UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

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

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

DATES: (1) Written Public Comment.—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding

retroactive application of any of the proposed amendments, should be received by the Commission not later than **October 10, 2017**. Written reply comments, which may only respond to issues raised in the original comment period, should be received by the Commission not later than **November 6, 2017.** Public comment regarding a proposed amendment received after the close of the comment period, and reply comment received on issues not raised in the original comment period, may not be considered.

(2) Public Hearing.—The Commission may hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding any public hearing that may be scheduled, including requirements for testifying and providing written testimony, as well as the date, time, location, and scope of the hearing, will be provided by the Commission on its website at www.ussc.gov.

ADDRESS: All written comment should be sent to the Commission by electronic mail or regular mail. The email address for public comment is Public_Comment@ussc.gov. The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502-4500, pubaffairs@ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an

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

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. See Rules 2.2 and 4.4 of the Commission's Rules of Practice and Procedure. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. See Rule 2.2; 28 U.S.C. § 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline, policy statement, or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In summary, the proposed amendments and issues for comment set forth in this notice are as follows:

(1) a multi-part proposed amendment to respond to the Bipartisan Budget Act of 2015, Pub. L. 114–74 (Nov. 2, 2015), including (A) revisions to Appendix A (Statutory Index), and a related issue for comment; and (B) amending §2B1.1 (Theft, Property Destruction, and Fraud) to address new increased penalties for certain persons who commit fraud offenses under certain Social Security programs, and related issues for comment;

(2) a multi-part proposed amendment relating to the findings and recommendations contained in the May 2016 Report of the Commission's Tribal Issues Advisory Group, including (A) amending the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to set forth a non-exhaustive list of factors for the court to consider in determining whether, and to what extent, an upward departure based on a tribal court conviction is appropriate, and related issues for comment; and (B) amending the Commentary to §1B1.1 (Application Instructions) to provide a definition of "court protection order," and a related issue for comment;

(3) a multi-part proposed amendment to Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence), including (A) setting forth options for a new Chapter Four guideline, at §4C1.1 (First Offenders), and amending §5C1.1 (Imposition of a Term

of Imprisonment) to provide lower guideline ranges for "first offenders" generally and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table, and related issues for comment; and (B) revising Chapter Five to (i) amend the Sentencing Table in Chapter Five, Part A to expand Zone B by consolidating Zones B and C and (ii) amend the Commentary to §5F1.2 (Home Detention) to revise language requiring electronic monitoring, and related issues for comment.

(4) a proposed amendment to the Commentary to §3E1.1 (Acceptance of Responsibility) setting forth options to revise how a defendant's challenge to relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline, and a related issue for comment;

(5) a multi-part proposed amendment to the Guidelines Manual to respond to recently enacted legislation and miscellaneous guideline issues, including (A) amending §2B5.3 (Criminal Infringement of Copyright or Trademark) to respond to changes made by the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016); (B) amending §2A3.5 (Failure to Register as a Sex Offender), §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), and Appendix A (Statutory Index) to respond to changes made by the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act, Pub. L. 114–119 (Feb. 8, 2016); (C) revisions to Appendix A (Statutory Index) to respond to a new offense established by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114–182 (June 22, 2016); (D) a technical

amendment to §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor); and (E) amending §5D1.3 (Conditions of Supervised Release) to respond to changes made by the Justice for All Reauthorization Act of 2016, Pub. L. 114–324 (Dec. 16, 2016).

(6) a proposed amendment to make technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to replace "marihuana equivalency" as the conversion factor in the Drug Equivalency Tables for determining penalties for certain controlled substances;

(7) a proposed amendment to make various technical changes to the Guidelines Manual, including (A) an explanatory note in Chapter One, Part A, Subpart 1(4)(b) (Departures) and clarifying changes to the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud); (B) technical changes to §4A1.2 (Definitions and Instructions for Computing Criminal History) and to the Commentary of other guidelines to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)); and (C) clerical changes to §2D1.11 (Unlawful Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), §5D1.3 (Conditions of Supervised Release), Appendix A (Statutory Index), and to the Commentary of other guidelines.

In addition, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), any proposed amendment published in this notice should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The background commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

The text of the proposed amendments and related issues for comment are set forth below. Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission's website at www.ussc.gov.

AUTHORITY: 28 U.S.C. § 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 4.3, 4.4.

William H. Pryor, Jr.,

Acting Chair

PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. Bipartisan Budget Act

Synopsis of Proposed Amendment: This proposed amendment responds to the Bipartisan Budget Act of 2015, Pub. L. 114–74 (Nov. 2, 2015), which, among other things, amended three existing criminal statutes concerned with fraudulent claims under certain Social Security programs.

The three criminal statutes amended by the Bipartisan Budget Act of 2015 are sections 208 (Penalties [for fraud involving the Federal Old-Age and Survivors Insurance Trust Fund]), 811 (Penalties for fraud [involving special benefits for certain World War II veterans]), and 1632 (Penalties for fraud [involving supplemental security income for the aged, blind, and disabled]) of the Social Security Act (42 U.S.C. §§ 408, 1011, and 1383a, respectively).

(A) Conspiracy to Commit Social Security Fraud

The Bipartisan Budget Act of 2015 added new subdivisions prohibiting conspiracy to commit fraud for substantive offenses already contained in the three statutes (42 U.S.C. §§ 408, 1011, and 1383a). For each of the three statutes, the new subdivision provides that whoever "conspires to commit any offense described in any of [the] paragraphs" enumerated shall be imprisoned for not

more than five years, the same statutory maximum penalty applicable to the substantive offense.

The three amended statutes are currently referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud). The proposed amendment would amend Appendix A so that sections 408, 1011, and 1383a of Title 42 are referenced not only to §2B1.1 but also to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)).

An issue for comment is provided.

(B) Increased Penalties for Certain Individuals Violating Positions of Trust

The Bipartisan Budget Act of 2015 also amended sections 408, 1011, and 1383a of Title 42 to add increased penalties for certain persons who commit fraud offenses under the relevant Social Security programs. The Act included a provision in all three statutes identifying such a person as:

> a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination . . . .

A person who meets this requirement and is convicted of a fraud offense under one of the three amended statutes may be imprisoned for not more than ten years, double the otherwise applicable five-year penalty for other offenders. The new increased penalties apply to all of the fraudulent conduct in subsection (a) of the three statutes.

The proposed amendment would amend §2B1.1 to address cases in which the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies. It provides an enhancement of [4][2] levels and a minimum offense level of [14][12] for such cases. It also adds Commentary specifying whether an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) applies — bracketing two possibilities: if the enhancement applies, the adjustment does not apply; and if the enhancement applies, the adjustment is not precluded from applying.

Issues for comment are also provided.

(A) Conspiracy to Commit Social Security Fraud

Proposed Amendment:

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. § 408 by inserting ", 2X1.1" at the end; in the line referenced to 42 U.S.C. § 1011 by inserting ", 2X1.1" at the end; and in the line referenced to 42 U.S.C. § 1383a(a) by inserting ", 2X1.1" at the end.

Issue for Comment:

1. Part A of the proposed amendment would reference the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)). The Commission invites comment on whether the guidelines covered by the proposed amendment adequately account for these offenses. If not, what revisions to the guidelines would be appropriate to account for these offenses? Should the Commission reference these new offenses to other guidelines instead of, or in addition to, the guidelines covered by the proposed amendment?

(B) Increased Penalties for Certain Individuals Violating Positions of Trust

Proposed Amendment:

Section 2B1.1(b) is amended by redesignating paragraphs (13) through (19) as paragraphs (14) through (20), respectively, and by inserting the following new paragraph (13):

"(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by [4][2] levels. If the resulting offense level is less than [14][12], increase to level [14][12].".

The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 11 through 20 as Notes 12 through 21, respectively, and by inserting the following new Note 11:

"11. Interaction of Subsection (b)(13) and §3B1.3.—[If subsection (b)(13) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).][Application of subsection (b)(13) does not preclude a defendant from consideration for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).]".

Issues for Comment:

1. The Bipartisan Budget Act of 2015 amended sections 408, 1011, and 1383a of Title 42 to include a provision in all three statutes increasing the statutory maximum term of imprisonment from five years to ten years for certain persons who commit fraud offenses under subsection (a) of the three statutes. The Act identifies such a person as:

> a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination . . . .

The Commission seeks comment on how, if at all, the guidelines should be amended to address cases in which the offense of conviction is 42 U.S.C. § 408, § 1011, or § 1383a, and the statutory maximum term of ten years' imprisonment applies because the defendant was a person described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a). Are these cases adequately addressed by existing provisions in the guidelines, such as the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill)? If so, as an alternative to the proposed amendment, should the Commission amend §2B1.1 only to provide an application note that expressly provides that, for a defendant subject to the ten years' statutory maximum in such cases, an adjustment under §3B1.3 ordinarily would apply? If not, how should the Commission amend the guidelines to address these cases?

2. The proposed amendment would amend §2B1.1 to provide an enhancement and a minimum offense level for cases in which the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies because the defendant was a person described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a). However, there may be cases in which a defendant, who meets the criteria set forth for the new statutory maximum term of ten years' imprisonment, is convicted under a general fraud statute (e.g., 18 U.S.C. § 1341) for an offense involving conduct described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a).

The Commission seeks comment on whether the Commission should instead amend §2B1.1 to provide a general specific offense characteristic for such cases. For example,

should the Commission provide an enhancement for cases in which the offense involved conduct described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the defendant is a person "who receives a fee or other income for services performed in connection with any determination with respect to benefits [covered by those statutory provisions] (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination"? If so, how many levels would be appropriate for such an enhancement? How should such an enhancement interact with the existing enhancements at §2B1.1 and the Chapter Three adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill)?

2. Tribal Issues

Synopsis of Proposed Amendment: This proposed amendment is the result of the Commission's study of the May 2016 Report of the Commission's Tribal Issues Advisory Group. See U.S. Sentencing Comm'n, "Notice of Final Priorities," 82 FR 39949 (Aug. 22, 2017). See also Report of the Tribal Issues Advisory Group (May 16, 2016), at http://www.ussc.gov/research/research-publications/report-tribal-issues-advisory-group.

In 2015, the Commission established the Tribal Issues Advisory Group (TIAG) as an ad hoc advisory group to the Commission. Among other things, the Commission tasked the TIAG with studying the following issues—

(A) the operation of the federal sentencing guidelines as they relate to American Indian defendants and victims and to offenses committed in Indian Country, and any viable methods for revising the guidelines to (i) improve their operation or (ii) address particular concerns of tribal communities and courts;

(B) whether there are disparities in the application of the federal sentencing guidelines to American Indian defendants, and, if so, how to address them;

(C) the impact of the federal sentencing guidelines on offenses committed in Indian Country in comparison with analogous offenses prosecuted in state courts and tribal courts;

(D) the use of tribal court convictions in the computation of criminal history scores, risk assessment, and for other purposes;

(E) how the federal sentencing guidelines should account for protection orders issued by tribal courts; and

(F) any other issues relating to American Indian defendants and victims, or to offenses committed in Indian Country, that the TIAG considers appropriate. See Tribal Issues Advisory Group Charter § 1(b)(3).

The Commission also directed the TIAG to present a final report with its findings and recommendations, including any recommendations that the TIAG considered appropriate on potential amendments to the guidelines and policy statements. See id. § 6(a). On May 16, 2016, the TIAG presented to the Commission its final report. Among the recommendations suggested in the

Report, the TIAG recommends revisions to the Guidelines Manual relating to the use of tribal court convictions in the computation of criminal history points and how the guidelines should account for protection orders issued by tribal courts.

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

(A) Tribal Court Convictions

Pursuant to Chapter Four, Part A (Criminal History), sentences resulting from tribal court convictions are not counted for purposes of calculating criminal history points, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). See USSG §4A1.2(i). The policy statement at §4A1.3 allows for upward departures if reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history. Among the grounds for departure, the policy statement includes "[p]rior sentences not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses)." USSG §4A1.3(a)(2)(A).

As noted in the TIAG's report, in recent years there have been important changes in tribal criminal jurisdiction. In 2010, Congress enacted the Tribal Law and Order Act of 2010 (TLOA), Pub. L. 111–211, to address high rates of violent crime in Indian Country by improving criminal justice funding and infrastructure in tribal government, and expanding the sentencing authority of tribal

court systems. In 2013, the Violence Against Women Reauthorization Act of 2013 (VAWA Reauthorization), Pub. L. 113–4, was enacted to expand the criminal jurisdiction of tribes to prosecute, sentence, and convict Indians and non-Indians who assault Indian spouses or dating partners or violate a protection order in Indian Country. It also established new assault offenses and enhanced existing assault offenses. Both statutes increased criminal jurisdiction for tribal courts, but also required more robust court procedures and provided more procedural protections for defendants.

The TIAG notes in its report that "[w]hile some tribes have exercised expanded jurisdiction under TLOA and the VAWA Reauthorization, most have not done so. Given the lack of tribal resources, and the absence of significant additional funding under TLOA and the VAWA Reauthorization to date, it is not certain that more tribes will be able to do so any time soon." TIAG Report, at 10–11. Members of the TIAG describe their experience with tribal courts as "widely varied," expressing among their findings certain concerns about funding, perceptions of judicial bias or political influence, due process protections, and access to tribal court records. Id. at 11–12.

The TIAG report highlights that "[t]ribal courts occupy a unique and valuable place in the criminal justice system," while also recognizing that "[t]ribal courts range in style." Id. at 13. According to the TIAG, the differences in style and the concerns expressed above "make it often difficult for a federal court to determine how to weigh tribal court convictions in rendering a sentencing decision." Id. at 11. It also asserts that "taking a single approach to the consideration of tribal court convictions would be very difficult and could potentially lead to a disparate result among Indian

defendants in federal courts." Id. at 12. Thus, the TIAG concludes that tribal convictions should not be counted for purposes of determining criminal history points pursuant to Chapter Four, Part A, and that "the current use of USSG §4A1.3 to depart upward in individual cases continues to allow the best formulation of 'sufficient but not greater than necessary' sentences for defendants, while not increasing sentencing disparities or introducing due process concerns." Id. Nevertheless, the TIAG recommends that the Commission amend §4A1.3 to provide guidance and a more structured analytical framework for courts to consider when determining whether a departure is appropriate based on a defendant's record of tribal court convictions. The guidance recommended by the TIAG "collectively . . . reflect[s] important considerations for courts to balance the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences in light of disparate tribal court practices and circumstances, and the goal of accurately assessing the severity of any individual defendant's criminal history." Id. at 13.

The proposed amendment would amend the Commentary to §4A1.3 to set forth a non-exhaustive list of factors for the court to consider in determining whether, and to what extent, an upward departure based on a tribal court conviction is appropriate.

Issues for comment are also provided.

(B) Court Protection Orders

Under the Guidelines Manual, the violation of a court protection order is a specific offense

characteristic in three Chapter Two offense guidelines. See USSG §§2A2.2 (Aggravated Assault), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2A6.2 (Stalking or Domestic Violence). The Commission has heard concerns that the term "court protection order" has not been defined in the guidelines and should be clarified.

The TIAG notes in its report the importance of defining "court protection order" in the guidelines, because—

> [a] clear definition of that term will ensure that orders used for sentencing enhancements are the result of court proceedings assuring appropriate due process protections, that there is consistent identification and treatment of such orders, and that such orders issued by tribal courts receive treatment consistent with that of other issuing jurisdictions. TIAG Report, at 14.

The TIAG recommends that the Commission adopt a definition of "court protection order" that incorporates the statutory provisions at 18 U.S.C. §§ 2265 and 2266. Section 2266(5) provides that the term "protection order" includes:

> (A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or

criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and

(B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking. 18 U.S.C. § 2266(5).

Section 2265(b) provides that

A protection order issued by a State, tribal, or territorial court is consistent with this subsection if—

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be

heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights. 18 U.S.C. § 2265(b).

The proposed amendment would amend the Commentary to §1B1.1 (Application Instructions) to provide a definition of court protection order derived from 18 U.S.C. § 2266(5), with a provision that it must be consistent with 18 U.S.C. § 2265(b).

An issue for comment is also provided.

(A) Tribal Court Convictions

Proposed Amendment:

Section 4A1.3(a)(2) is amended by striking "subsection (a)" and inserting "subsection (a)(1)"; and by striking "tribal offenses" and inserting "tribal convictions".

The Commentary to §4A1.3 captioned "Application Notes" is amended in Note 2 by inserting at the end the following new paragraph (C):

"(C) Upward Departures Based on Tribal Court Convictions.—In determining whether, or to

what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Pub. L. 111–211 (July 29, 2010), and the Violence Against Women Reauthorization Act of 2013, Pub. L. 113–4 (March 7, 2013).

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

(iv) The conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

[(v) At the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual.]".

Issues for Comment:

1. Part A of the proposed amendment would provide a list of relevant factors that courts may consider, in addition to the factors set forth in §4A1.3(a), in determining whether an upward departure based on a tribal court conviction may be warranted. The Commission seeks comment on whether the factors provided in the proposed amendment are appropriate. Should any factors be deleted or changed? Should the Commission provide additional or different guidance? If so, what guidance should the Commission provide?

   In particular, the Commission seeks comment on how these factors should interact with each other and with the factors already contained in §4A1.3(a). Should the Commission provide greater emphasis on one or more factors set forth in the proposed amendment? For example, how much weight should be given to factors that address due process concerns (subdivisions (i) and (ii)) in relation to the other factors provided in the proposed amendment, such as those factors relevant to preventing unwarranted double counting (subdivisions (iii) and (iv))? Should the Commission provide that in order to consider whether an upward departure based on a tribal court conviction is appropriate, and before taking into account any other factor, the court must first determine as a threshold factor that the defendant received due process protections consistent with those provided to criminal defendants under the United States Constitution?

Finally, Part A of the proposed amendment brackets the possibility of including as a factor that courts may consider in deciding whether to depart based on a tribal court conviction if, "at the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual." The Commission invites broad comment on this factor and its interaction with the other factors set forth in the proposed amendment. Is this factor relevant to the court's determination of whether to depart? What are the advantages and disadvantages of including such a factor? How much weight should be given to this factor in relation to the other factors provided in the proposed amendment? What criteria should be used in determining when a tribal government has "formally expressed a desire" that convictions from its courts should count? How would tribal governments notify and make available such statements?

2. Pursuant to subsection (i) of §4A1.2 (Definitions and Instructions for Computing Criminal History), sentences resulting from tribal court convictions are not counted for purposes of calculating criminal history points, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). As stated above, the policy statement at §4A1.3 allows for upward departures if reliable information indicates that the defendant's criminal history category substantially underrepresents the seriousness of the defendant's criminal history.

The Commission invites comment on whether the Commission should consider changing

how the guidelines account for sentences resulting from tribal court convictions for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History). Should the Commission consider amending §4A1.2(i) and, if so, how? For example, should the guidelines treat sentences resulting from tribal court convictions same as other sentences imposed for federal, state, and local offenses that may be used to compute criminal history points? Should the guidelines treat sentences resulting from tribal court convictions more akin to military sentences and distinguish between certain types of tribal courts? Is there a different approach the Commission should follow in addressing the use of tribal court convictions in the computation of criminal history scores?

(B) Court Protection Orders

Proposed Amendment:

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1 by redesignating paragraphs (D) through (L) as paragraphs (E) through (M), respectively; and by inserting the following new paragraph (D):

"(D) 'court protection order' means 'protection order' as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).".

Issue for Comment:

1. Part B of the proposed amendment would include in the Commentary to §1B1.1 (Application Instructions) a definition of court protection order derived from 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b). Is this definition appropriate? If not, what definition, if any, should the Commission provide?

3. First Offenders / Alternatives to Incarceration

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

(A) First Offenders

Part A of the proposed amendment is primarily informed by the Commission's multi-year study of recidivism, including the circumstances that correlate with increased or reduced recidivism. See U.S. Sentencing Comm'n, "Notice of Final Priorities," 82 FR 39949 (Aug. 22, 2017). It is also informed by the Commission's continued study of alternatives to incarceration. Id.

Under the Guidelines Manual, offenders with minimal or no criminal history are classified into Criminal History Category I. "First offenders," offenders with no criminal history, are addressed

in the guidelines only by reference to Criminal History Category I. However, Criminal History Category I includes not only "first" offenders but also offenders with varying criminal histories, such as offenders with no criminal history points and those with one criminal history point. Accordingly, the following offenders are classified in the same category: (1) first time offenders with no prior convictions; (2) offenders who have prior convictions that are not counted because they were not within the time limits set forth in §4A1.2(d) and (e); (3) offenders who have prior convictions that are not used in computing the criminal history category for reasons other than their "staleness" (e.g., sentences resulting from foreign or tribal court convictions, minor misdemeanor convictions or infractions); and (4) offenders with a prior conviction that received only one criminal history point.

Part A sets forth a new Chapter Four guideline, at §4C1.1 (First Offenders), that would provide lower guideline ranges for "first offenders" generally and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table (compared to otherwise similar offenders in Criminal History Category I). Recidivism data analyzed by the Commission indicate that "first offenders" generally pose the lowest risk of recidivism. See, e.g., U.S. Sentencing Comm'n, "Recidivism Among Federal Offenders: A Comprehensive Overview," at 18 (2016), available at http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview. In addition, 28 U.S.C. § 994(j) directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense. The new Chapter Four guideline, in conjunction with the revision to §5C1.1 (Imposition of a Term

of Imprisonment) described below, would further implement the congressional directive at section 994(j).

Part A of the proposed amendment provides two options for defining a "first offender" who would be eligible for a decrease in offense level under the new guideline. **Option 1** defines a defendant as a "first offender" if the defendant did not receive any criminal history points from Chapter Four, Part A. **Option 2** defines a defendant as a "first offender" if the defendant has no prior convictions of any kind.

Part A also provides two options for the decrease in offense level that would apply to a first offender. **Option 1** provides a decrease of [1] level from the offense level determined under Chapters Two and Three. **Option 2** provides a decrease of [2] levels if the final offense level determined under Chapters Two and Three is less than level [16], or a decrease of [1] level if the offense level determined under Chapters Two and Three is level [16] or greater.

Part A also amends §5C1.1 (Imposition of a Term of Imprisonment) to add a new subsection (g) that provides that if (1) the defendant is determined to be a first offender under §4C1.1 (First Offender), (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], and (3) the guideline range applicable to that defendant is in Zone A or Zone B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options.

Finally, Part A of the proposed amendment also provides issues for comment.

(B) Consolidation of Zones B and C in the Sentencing Table

Part B of the proposed amendment is a result of the Commission's continued study of alternatives to incarceration. See U.S. Sentencing Comm'n, "Notice of Final Priorities," 82 FR 39949 (Aug. 22, 2017).

The Guidelines Manual defines and allocates sentencing options in Chapter Five (Determining the Sentence). This chapter sets forth "zones" in the Sentencing Table based on the minimum months of imprisonment in each cell. The Sentencing Table sorts all sentencing ranges into four zones, labeled A through D. Each zone allows for different sentencing options, as follows:

> Zone A.—All sentence ranges within Zone A, regardless of the underlying offense level or criminal history category, are zero to six months. A sentencing court has the discretion to impose a sentence that is a fine-only, probation-only, probation with a confinement condition (home detention, community confinement, or intermittent confinement), a split sentence (term of imprisonment with term of supervised release with condition of confinement), or imprisonment. Zone A allows for probation without any conditions of confinement.

Zone B.—Sentence ranges in Zone B are from one to 15 months of imprisonment. Zone B allows for a probation term to be substituted for imprisonment, contingent upon the probation term including conditions of confinement. Zone B allows for non-prison sentences, which technically result in sentencing ranges larger than six months, because the minimum term of imprisonment is one month and the maximum terms begin at seven months. To avoid sentencing ranges exceeding six months, the guidelines require that probationary sentences in Zone B include conditions of confinement. Zone B also allows for a term of imprisonment (of at least one month) followed by a term of supervised release with a condition of confinement (i.e., a "split sentence") or a term of imprisonment only.

Zone C.—Sentences in Zone C range from 10 to 18 months of imprisonment. Zone C allows for split sentences, which must include a term of imprisonment equivalent to at least half of the minimum of the applicable guideline range. The remaining half of the term requires supervised release with a condition of community confinement or home detention. Alternatively, the court has the option of imposing a term of imprisonment only.

Zone D.—The final zone, Zone D, allows for imprisonment only, ranging from 15 months to life.

Part B of the proposed amendment expands Zone B by consolidating Zones B and C. The expanded Zone B would include sentence ranges from one to 18 months and allow for the sentencing options described above. Although the proposed amendment would in fact delete

Zone C by its consolidation with Zone B, Zone D would not be redesignated. Finally, Part B makes conforming changes to §§5B1.1 (Imposition of a Term of Probation) and 5C1.1 (Imposition of a Term of Imprisonment).

Part B also amends the Commentary to §5F1.2 (Home Detention) to remove the language instructing that (1) electronic monitoring "ordinarily should be used in connection with" home detention; (2) alternative means of surveillance may be used "so long as they are effective as electronic monitoring;" and (3) "surveillance necessary for effective use of home detention ordinarily requires" electronic monitoring.

Issues for comment are also provided.

(A) First Offenders

Proposed Amendment:

Chapter Four is amended by inserting at the end the following new Part C:

" PART C — FIRST OFFENDER

§4C1.1. First Offender

[Definition of "First Offender"

[Option 1:

(a) A defendant is a first offender if the defendant did not receive any criminal history points from Chapter Four, Part A.**]**

[Option 2:

(a) A defendant is a first offender if the defendant has no prior convictions of any kind.**]]**

[Decrease in Offense Level for First Offenders

[Option 1:

(b) If the defendant is determined to be a first offender under subsection (a), decrease the offense level determined under Chapters Two and Three by [1] level.**]**

[Option 2:

(b) If the defendant is determined to be a first offender under subsection (a),

decrease the offense level as follows:

(1) if the offense level determined under Chapters Two and Three is less than level [16], decrease by [2] levels; or

(2) if the offense level determined under Chapters Two and Three is level [16] or greater, decrease by [1] level.**]]**

Commentary

Application Note:

1. Cases Involving Mandatory Minimum Penalties.—If the case involves a statutorily required minimum sentence of at least five years and the defendant meets the criteria set forth in subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), the offense level determined under this section shall be not less than level 17. See §5C1.2(b).".

Section 5C1.1 is amended by inserting at the end the following new subsection (g):

" (g) In cases in which (1) the defendant is determined to be a first offender under §4C1.1 (First Offender), (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or

possess a firearm or other dangerous weapon in connection with the offense], and (3) the guideline range applicable to that defendant is in Zone A or B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options set forth in this guideline.".

The Commentary to §5C1.1 captioned "Application Notes" is amended by inserting at the end the following new Note 10:

"10. Application of Subsection (g).—

(A) Sentence of Probation Prohibited.—The court may not impose a sentence of probation pursuant to this provision if prohibited by statute. See §5B1.1 (Imposition of a Term of Probation).

[(B) Definition of 'Crime of Violence'.—For purposes of subsection (g), 'crime of violence' has the meaning given that term in §4B1.2 (Definitions of Terms Used in Section 4B1.1).

(C) Sentence of Imprisonment for First Offenders.—A sentence of imprisonment may be appropriate in cases in which the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon in connection with the

offense].”.

Issues for Comment:

1. Part A of the proposed amendment provides two options for how to define “first offender” for purposes of applying the new §4C1.1 (First Offender). Option 1 defines a defendant as a “first offender” if the defendant did not receive any criminal history points from Chapter Four, Part A. Option 2 defines a defendant as a “first offender” if the defendant has no prior convictions of any kind. The Commission seeks comment on the proposed definition. Should the Commission adopt a broader definition than either Option 1 or Option 2? Should the Commission adopt a narrower definition than either option? Should the Commission adopt a definition that is narrower than Option 1 but broader than Option 2? For example, should the Commission define “first offender” as a defendant who did not receive any criminal history points from Chapter Four, Part A and has no prior felony convictions? Should the Commission instead define “first offender” as a defendant who either has no prior convictions of any kind or has only prior convictions that are not counted under §4A1.2 for a reason other than being too remote in time? Should the Commission provide additional or different guidance for determining whether a defendant is, or is not, a first offender?

2. Part A of the proposed amendment provides two options for the decrease in offense level that would apply to a first offender. One of the options, Option 1, would provide that if the defendant is determined to be a first offender (as defined in the new guideline) a decrease of [1] level from the offense level determined under Chapters Two and Three would apply.

Should the Commission limit the applicability of the adjustment to defendants with an offense level determined under Chapters Two and Three that is less than a certain number of levels? For example, should the Commission provide that if the offense level determined under Chapters Two and Three is less than level [16], the offense level shall be decreased by [1] level? What other limitations or requirements, if any, should the Commission provide for such an adjustment?

3. Part A of the proposed amendment would amend §5C1.1 (Imposition of a Term of Imprisonment) to provide that if the defendant is determined to be a first offender under the new §4C1.1 (First Offender), [the defendant's instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], and the guideline range applicable to that defendant is in Zone A or Zone B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options. Should the Commission further limit the application of such a rebuttable "presumption" and exclude certain categories of non-violent offenses? If so, what offenses should be excluded from the presumption of a non-incarceration sentence? For example, should the Commission exclude public corruption, tax, and other white-collar offenses?

4. If the Commission were to promulgate Part A of the proposed amendment, what conforming changes, if any, should the Commission make to other provisions of the

Guidelines Manual?

(B) Consolidation of Zones B and C in the Sentencing Table

Proposed Amendment:

Chapter Five, Part A is amended in the Sentencing Table by striking "Zone C"; by redesignating Zone B to contain all guideline ranges having a minimum of at least one month but not more than twelve months; and by inserting below "Zone B" the following: "[Zone C Deleted]".

The Commentary to the Sentencing Table is amended by inserting at the end the following:

"Background: The Sentencing Table previously provided four 'zones,' labeled A through D, based on the minimum months of imprisonment in each cell. The Commission expanded Zone B by consolidating former Zones B and C. Zone B in the Sentencing Table now contains all guideline ranges having a minimum term of imprisonment of at least one but not more than twelve months. Although Zone C was deleted by its consolidation with Zone B, the Commission decided not to redesignate Zone D as Zone C, to avoid unnecessary confusion that may result from different meanings of 'Zone C' and 'Zone D' through different editions of the Guidelines Manual.".

The Commentary to §5B1.1 captioned "Application Notes" is amended in Note 1(B), in the heading, by striking "nine months" and inserting "twelve months"; and in Note 2 by striking

"Zone C or D" and inserting "Zone D", and by striking "ten months" and inserting "fifteen months".

Section 5C1.1 is amended—

in subsection (c) by striking "subsection (e)" both places such term appears and inserting "subsection (d)";

by striking subsection (d) as follows:

"(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by—

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.";

and by redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

The Commentary to §5C1.1 captioned "Application Notes" is amended—

in Note 3 by striking "nine months" and inserting "twelve months";

by striking Note 4 as follows:

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

(A) It may impose a sentence of imprisonment.

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

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

by striking Note 6 as follows:

"6. There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.

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

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

by redesignating Notes 5, 7, 8, and 9 as Notes 4, 5, 6, and 7, respectively;

in Note 4 (as so redesignated) by striking "Subsection (e)" and inserting "Subsection (d)";

in Note 5 (as so redesignated) by striking “subsections (c) and (d)” and inserting “subsection (c)”;

and in Note 7 (as so redesignated) by striking “Subsection (f)” and inserting “Subsection (e)”, and by striking “subsection (e)” and inserting “subsection (d)”.

The Commentary to §5F1.2 captioned “Application Notes” is amended in Note 1 by striking “Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention” and inserting “Electronic monitoring is an appropriate means of surveillance for home detention”; and by striking “may be used so long as they are as effective as electronic monitoring” and inserting “may be used if appropriate”.

The Commentary to §5F1.2 captioned “Background” is amended by striking “The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring” and inserting “The Commission has concluded that electronic monitoring is an appropriate means of surveillance for home detention”; and by striking “the court should be confident that an alternative form of surveillance will be equally effective” and inserting “the court should be confident that an alternative form of surveillance is appropriate considering the facts and circumstances of the defendant’s case”.

Issues for Comment:

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

2. The proposed amendment would consolidate Zones B and C to create an expanded Zone B. Such an adjustment would provide probation with conditions of confinement as a sentencing option for current Zone C defendants, an option that was not available to such defendants before. The Commission seeks comment on whether the Commission should provide additional guidance to address these new Zone B defendants. If so, what guidance should the Commission provide?

4. Acceptance of Responsibility

Synopsis of Proposed Amendment: This proposed amendment is the result of the Commission's consideration of miscellaneous guideline application issues, including whether a defendant's denial of relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of §3E1.1. See U.S. Sentencing Comm'n, "Notice of Final Priorities," 82 FR 39949 (Aug. 22, 2017).

Section 3E1.1 (Acceptance of Responsibility) provides for a 2-level reduction for a defendant who clearly demonstrates acceptance of responsibility. Application Note 1(A) of §3E1.1 provides as one of the appropriate considerations in determining whether a defendant "clearly demonstrate[d] acceptance of responsibility" the following:

> truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner

inconsistent with acceptance of responsibility;

In addition, Application Note 3 provides further guidance on evidence that might demonstrate acceptance of responsibility, as follows:

> Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

The Commission has heard concerns that the Commentary to §3E1.1 (particularly the provisions cited above) encourages courts to deny a reduction in sentence when a defendant pleads guilty and accepts responsibility for the offense of conviction, but unsuccessfully challenges the presentence report's assessments of relevant conduct. These commenters suggest this has a chilling effect because defendants are concerned such objections may jeopardize their eligibility for a reduction for acceptance of responsibility.

The proposed amendment amends the Commentary to §3E1.1 to revise how a defendant's challenge to relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline. Specifically, the proposed amendment would revise Application Note 1(A) by substituting a new sentence for the sentence that states "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." The proposed amendment includes two options for the substitute.

Option 1 would provide that "a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction."

Option 2 would provide that "a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact."

An issue for comment is also provided.

Proposed Amendment:

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 1(A) by striking "However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility", and

inserting the following:

[Option 1:

"In addition, a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction".**]**

[Option 2:

"In addition, a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact".**]**

Issue for Comment:

1. The Commission seeks comment on whether the Commission should amend the Commentary to §3E1.1 (Acceptance of Responsibility) to change or clarify how a defendant's challenge to relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of §3E1.1. If so, what changes should the Commission make to §3E1.1?

   One of the options included in the proposed amendment, Option 1, would provide that "a defendant may make a non-frivolous challenge to relevant conduct without affecting his

ability to obtain a reduction" under §3E1.1(a). If the Commission were to adopt Option 1, what additional guidance, if any, should the Commission provide on the meaning of "non-frivolous"? The second option included in the proposed amendment, Option 2, would provide that "a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact." If the Commission were to adopt Option 2, should the Commission provide additional guidance on when a challenge "lacks an arguable basis either in law or in fact"? For example, should the Commission state explicitly that the fact that a challenge is unsuccessful does not by itself establish that the challenge lacked an arguable basis either in law or in fact? If the Commission were to adopt either Option 1 or Option 2, should the challenges covered by the amendment include informal challenges to relevant conduct during the sentencing process, whether or not the issues challenged are determinative to the applicable guideline range? Should the Commission broaden the proposed provision to address other sentencing considerations, such as departures or variances? Should the Commission, instead of adopting either option in the proposed amendment, remove from §3E1.1 all references to relevant conduct for which the defendant is accountable under §1B1.3, and reference only the elements of the offense of conviction?

5. Miscellaneous

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

The proposed amendment contains five parts (Parts A through E). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive. They are as follows—

Part A responds to the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016), by amending §2B5.3 (Criminal Infringement of Copyright or Trademark).

Part B responds to the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act, Pub. L. 114–119 (Feb. 8, 2016), by amending §2A3.5 (Failure to Register as a Sex Offender), §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), and Appendix A (Statutory Index).

Part C responds to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114–182 (June 22, 2016), by amending Appendix A (Statutory Index).

Part D amends §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) to clarify how the use of a computer enhancement at subsection (b)(3) interacts with its correlating commentary.

Part E responds to the Justice for All Reauthorization Act of 2016, Pub. L. 114–324 (Dec. 16, 2016), by amending §5D1.3 (Conditions of Supervised Release).

(A) Transnational Drug Trafficking Act of 2015

Synopsis of Proposed Amendment: Part A of the proposed amendment responds to the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016). The primary purpose of the Act is to enable the Department of Justice to target extraterritorial drug trafficking activity. Among other things, the Act clarified the mens rea requirement for offenses related to trafficking in counterfeit drugs, without changing the statutory penalties associated with such offenses. The Act amended 18 U.S.C. § 2230 (Trafficking in Counterfeit Goods or Services), which prohibits trafficking in a range of goods and services, including counterfeit drugs. The amended statute is currently referenced in Appendix A (Statutory Index) of the Guidelines Manual to §2B5.3 (Criminal Infringement of Copyright or Trademark).

In particular, the Act made changes relating to counterfeit drugs. First, the Act amended the penalty provision at section 2320, replacing the term "counterfeit drug" with the phrase "drug that uses a counterfeit mark on or in connection with the drug." Second, the Act revised section 2320(f)(6) to define only the term "drug" instead of "counterfeit drug." The amended provision defines "drug" as "a drug, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321)." The Act did not amend the definition of "counterfeit mark" contained in

section 2230(f)(1), which provides that—

> the term "counterfeit mark" means–
>
> (A) a spurious mark–
>
> (i) that is used in connection with trafficking in any goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature;
>
> (ii) that is identical with, or substantially indistinguishable from, a mark registered on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered;
>
> (iii) that is applied to or used in connection with the goods or services for which the mark is registered with the United States Patent and Trademark Office, or is applied to or consists of a label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature that is designed, marketed, or otherwise intended to be used on or in connection with the goods or services for which the mark is registered in the United States Patent and Trademark Office; and
>
> (iv) the use of which is likely to cause confusion, to cause mistake,

or to deceive; or

(B) a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of the Lanham Act are made available by reason of section 220506 of title 36 . . . .

Part A of the proposed amendment amends §2B5.3(b)(5) to replace the term "counterfeit drug" with "drug that uses a counterfeit mark on or in connection with the drug." The proposed amendment would also amend the Commentary to §2B5.3 to delete the "counterfeit drug" definition and provide that "drug" and "counterfeit mark" have the meaning given those terms in 18 U.S.C. § 2320(f).

Proposed Amendment:

Section 2B5.3(b)(5) is amended by striking "counterfeit drug" and inserting "drug that uses a counterfeit mark on or in connection with the drug".

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 1 by striking the third undesignated paragraph as follows:

"'Counterfeit drug' has the meaning given that term in 18 U.S.C. § 2320(f)(6).",

and by inserting after the paragraph that begins "'Counterfeit military good or service' has the

meaning" the following new paragraph:

"'Drug' and 'counterfeit mark' have the meaning given those terms in 18 U.S.C. § 2320(f).".

(B) International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders

Synopsis of Proposed Amendment: Part B of the proposed amendment responds to the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act ("International Megan's Law"), Pub. L. 114–119 (Feb. 8, 2016). The Act added a new notification requirement to 42 U.S.C. § 16914 (Information required in [sex offender] registration). Section 16914 states that sex offenders who are required to register under the Sex Offender Registration and Notification Act (SORNA) must provide certain information for inclusion in the sex offender registry. Those provisions include the offender's name, Social Security number, address of all residences, name and address where the offender is an employee, the name and address where the offender is a student, license plate number and description of any vehicle. The International Megan's Law added as an additional requirement that the sex offender must provide "information relating to intended travel of the sex offender outside of the United States, including any anticipated dates and places of departure, arrival or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General."

The International Megan's Law also added a new criminal offense at 18 U.S.C. § 2250(b) (Failure to register). The new subsection (b) provides that whoever is required to register under SORNA who knowingly fails to provide the above described information required by SORNA relating to intended travel in foreign commerce and who engages or attempts to engage in the intended travel, is subject to a 10-year statutory maximum penalty. Section 2250 offenses are referenced in Appendix A (Statutory Index) to §2A3.5 (Failure to Register as a Sex Offender).

Part B of the proposed amendment amends Appendix A (Statutory Index) so the new offenses at 18 U.S.C. § 2250(b) are referenced to §2A3.5. The proposed amendment also brackets the possibility of adding a new application note to the Commentary to §2A3.5 providing that for purposes of §2A3.5(b), a defendant shall be deemed to be in a "failure to register status" during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).

Finally, Part B makes clerical changes to §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to reflect the redesignation of 18 U.S.C.§ 2250(c) by the International Megan's Law.

Proposed Amendment:

The Commentary to §2A3.5 captioned "Statutory Provision" is amended by striking "§ 2250(a)" and inserting "§ 2250(a), (b)".

[The Commentary to §2A3.5 captioned "Application Notes" is amended by redesignating Note 2 as Note 3, and by inserting the following new Note 2:

"2. Application of Subsection (b)(1).—For purposes of subsection (b)(1), a defendant shall be deemed to be in a 'failure to register status' during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).".]

Section 2A3.6(a) is amended by striking "§ 2250(c)" and inserting "§ 2250(d)".

The Commentary to §2A3.6 captioned "Statutory Provisions" is amended by striking "2250(c)" and inserting "2250(d)".

The Commentary to §2A3.6 captioned "Application Notes" is amended—

in Note 1 by striking "Section 2250(c)" and inserting "Section 2250(d)", and by inserting after "18 U.S.C. § 2250(a)" the following: "or (b)";

in Note 3 by striking "§ 2250(c)" and inserting "§ 2250(d)";

and in Note 4 by striking "§ 2250(c)" and inserting "§ 2250(d)".

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 2250(a) by striking "§ 2250(a)" and inserting "§ 2250(a), (b)"; and in the line referenced to 18 U.S.C. § 2250(c) by striking "§ 2250(c)" and inserting "§ 2250(d)".

(C) Frank R. Lautenberg Chemical Safety for the 21st Century Act

Synopsis of Proposed Amendment: Part C of the proposed amendment responds to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114–182 (June 22, 2016). The Act, among other things, amended section 16 of the Toxic Substances Control Act (15 U.S.C. § 2615) to add a new subsection that provides that any person who knowingly and willfully violates certain provisions of the Toxic Substances Control Act and who knows at the time of the violation that the violation places an individual in imminent danger of death or bodily injury shall be subject to a fine up to $250,000, imprisonment of up to 15 years, or both.

Part C of the proposed amendment amends Appendix A (Statutory Index) so that the new provision, 15 U.S.C. § 2615(b)(2), is referenced to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), while maintaining the reference to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for 15 U.S.C. § 2615(b)(1).

Proposed Amendment:

Appendix A (Statutory Index) is amended—

in the line referenced to 15 U.S.C. § 2615 by striking "§ 2615" and inserting "§ 2615(b)(1)";

and by inserting before the line referenced to 15 U.S.C. § 6821 the following new line reference:

"15 U.S.C. § 2615(b)(2) 2Q1.1".

(D) Use of a Computer Enhancement in §2G1.3

Synopsis of Proposed Amendment: Part D of the proposed amendment clarifies how the use of a computer enhancement at §2G1.3(b)(3) interacts with its corresponding commentary at Application Note 4. Section 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) applies to several offenses involving the transportation of a minor for illegal sexual activity. Subsection (b)(3) of §2G1.3 provides a 2-level enhancement if—

the offense involved the use of a computer or an interactive computer service to

> (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor.

Application Note 4 to §2G1.3 sets forth guidance on this enhancement providing as follows:

> Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

An application issue has arisen as to whether Application Note 4, by failing to distinguish between the two prongs of subsection (b)(3), prohibits application of the enhancement where a computer was used to solicit a third party to engage in prohibited sexual conduct with a minor.

Most courts to have addressed this issue have concluded that Application Note 4 is inconsistent with the language of §2G1.3(b)(3), and have permitted the application of the enhancement for use of a computer in third party solicitation cases. See, e.g., United States v. Cramer, 777 F.3d 597, 606 (2d Cir. 2015) ("We conclude that Application Note 4 is plainly inconsistent with subsection (b)(3)(B) . . . . The plain language of subsection (b)(3)(B) is clear, and there is no

indication that the drafters of the Guidelines intended to limit this plain language through Application Note 4."); United States v. McMillian, 777 F.3d 444, 449–50 (7th Cir. 2015) ("[The defendant] points out that Application Note 4 states that 'Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.[']. . . . But the note is wrong. The guideline section provides a 2-level enhancement whenever the defendant uses a computer to 'entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor' . . . . When an application note clashes with the guideline, the guideline prevails."); United States v. Hill, 783 F.3d 842, 846 (11th Cir. 2015) ("Because the application note is inconsistent with the plain language of U.S.S.G. § 2G1.3(b)(3)(B), the plain language of the guideline controls."); United States v. Pringler, 765 F.3d 445, 455 (5th Cir. 2014) ("[W]e hold that the commentary in application note 4 is 'inconsistent with' Guideline § 2G1.3(b)(3)(B), and we therefore follow the plain language of the Guideline alone.").

Part D of the proposed amendment would amend the Commentary to §2G1.3 to clarify that the guidance contained in Application Note 4 refers only to subsection (b)(3)(A) and does not control the application of the enhancement for use of a computer in third party solicitation cases (as provided in subsection (b)(3)(B)).

Proposed Amendment:

The Commentary to §2G1.3 captioned "Application Notes" is amended in Note 4 by striking

"(b)(3)" each place such term appears and inserting "(b)(3)(A)".

(E) Justice for All Reauthorization Act of 2016

Synopsis of Proposed Amendment: Part E of the proposed amendment responds to the Justice for All Reauthorization Act of 2016, Pub. L. 114–324 (Dec. 16, 2016). The Act made statutory changes to protect the rights of crime victims and to address the use of DNA and other forensic evidence. Among other things, the Act amended 18 U.S.C. § 3583, the statute addressing supervised release. Section 3583(d) requires a court, when imposing a sentence of supervised release, to impose certain specified conditions of supervised release. The Act amended section 3583(d) to require the court to include, as one of those conditions, "that the defendant make restitution in accordance with sections 3663 and 3663A [of Title 18, United States Code], or any other statute authorizing a sentence of restitution."

Part E of the proposed amendment amends the "mandatory" condition of supervised release set forth in subsection (a)(6)(A) of §5D1.3 (Conditions of Supervised Release). It conforms §5D1.3(a)(6)(A) to section 3583(d) as amended by the Justice for All Reauthorization Act.

Proposed Amendment:

Section 5D1.3(a)(6)(A) is amended by striking "18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664" and inserting "18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a

sentence of restitution".

6. Marihuana Equivalency

Synopsis of Proposed Amendment: This proposed amendment makes technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to replace the term "marihuana equivalency" which is used in the Drug Equivalency Tables when determining penalties for certain controlled substances.

The Commentary to §2D1.1 sets forth a series of Drug Equivalency Tables. These tables provide a conversion factor termed "marihuana equivalency" for certain controlled substances that is used to determine the offense level for cases in which the controlled substance involved in the offense is not specifically listed in the Drug Quantity Table, or where there is more than one controlled substance involved in the offense (whether or not listed in the Drug Quantity Table). See §2D1.1, comment. (n.8). The Drug Equivalency Tables are separated by drug type and schedule.

In a case involving a controlled substance that is not specifically referenced in the Drug Quantity Table, the base offense level is determined by using the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its marihuana equivalency, then finding the offense level in the Drug Quantity Table that corresponds to that quantity of marihuana. In a case involving more than one controlled substance, each of the drugs is converted

into its marihuana equivalency, the converted quantities are added, and the aggregate quantity is used to find the offense level in the Drug Quantity Table.

The Commission received comment expressing concern that the term "marihuana equivalency" is misleading and results in confusion for individuals not fully versed in the guidelines. In particular, some commenters suggested that the Commission should replace "marihuana equivalency" with another term.

The proposed amendment would amend §2D1.1 to replace "marihuana equivalency" as the conversion factor for determining penalties for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances, with a new value termed "converted drug weight." Specifically, the proposed amendment would add the new conversion factor to all provisions of the Drug Quantity Table at §2D1.1(c). In addition, the proposed amendment would change the title of the "Drug Equivalency Tables" to "Drug Conversion Tables," and revise the commentary to §2D1.1 to change all references to marihuana as a conversion factor and replace it with the new value.

All changes set forth in the proposed amendment are not intended as a substantive change in policy for §2D1.1.

Proposed Amendment:

Section 2D1.1(c)(1) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

" ● 90,000 KG or more of Converted Drug Weight.".

Section 2D1.1(c)(2) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

" ● At least 30,000 KG but less than 90,000 KG of Converted Drug Weight.".

Section 2D1.1(c)(3) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

" ● At least 10,000 KG but less than 30,000 KG of Converted Drug Weight.".

Section 2D1.1(c)(4) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

" ● At least 3,000 KG but less than 10,000 KG of Converted Drug Weight.".

Section 2D1.1(c)(5) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

" ● At least 1,000 KG but less than 3,000 KG of Converted Drug Weight.".

Section 2D1.1(c)(6) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

" ● At least 700 KG but less than 1,000 KG of Converted Drug Weight.".

Section 2D1.1(c)(7) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

" ● At least 400 KG but less than 700 KG of Converted Drug Weight.".

Section 2D1.1(c)(8) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

" ● At least 100 KG but less than 400 KG of Converted Drug Weight.".

Section 2D1.1(c)(9) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 80 KG but less than 100 KG of Converted Drug Weight.”.

Section 2D1.1(c)(10) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 60 KG but less than 80 KG of Converted Drug Weight.”.

Section 2D1.1(c)(11) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 40 KG but less than 60 KG of Converted Drug Weight.”.

Section 2D1.1(c)(12) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 20 KG but less than 40 KG of Converted Drug Weight.”.

Section 2D1.1(c)(13) is amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon, and by adding at the end the following:

“ ● At least 10 KG but less than 20 KG of Converted Drug Weight.”.

Section 2D1.1(c)(14) is amended by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon, and by adding at the end the following:

" ● At least 5 KG but less than 10 KG of Converted Drug Weight.".

Section 2D1.1(c)(15) is amended by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon, and by adding at the end the following:

" ● At least 2.5 KG but less than 5 KG of Converted Drug Weight.".

Section 2D1.1(c)(16) is amended by striking the period at the end of the line referenced to Schedule V substances and inserting a semicolon, and by adding at the end the following:

" ● At least 1 KG but less than 2.5 KG of Converted Drug Weight.".

Section 2D1.1(c)(17) is amended by striking the period at the end of the line referenced to Schedule V substances and inserting a semicolon, and by adding at the end the following:

" ● Less than 1 KG of Converted Drug Weight.".

The annotation to §2D1.1(c) captioned "Notes to Drug Quantity Table" is amended by inserting at the end the following new Note (J):

"(J) The term 'Converted Drug Weight,' for purposes of this guideline, refers to a nominal reference designation that is to be used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.".

The Commentary to §2D1.1 captioned "Application Notes" is amended—

in Note 6 by striking "marihuana equivalency" and inserting "converted drug weight" and by inserting after "the most closely related controlled substance referenced in this guideline." the following: "See Application Note 8.";

in the heading of Note 8 by striking "Drug Equivalency" and inserting "Drug Conversion";

in Note 8(A) by striking "Drug Equivalency Tables" both places such term appears and inserting "Drug Conversion Tables"; by striking "to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana" and inserting "to find the converted drug weight of the controlled substance involved in the offense"; by striking "Find the

equivalent quantity of marihuana" and inserting "Find the corresponding converted drug weight"; by striking "Use the offense level that corresponds to the equivalent quantity of marihuana" and inserting "Use the offense level that corresponds to the converted drug weight determined above"; by striking "an equivalent quantity of 5 kilograms of marihuana" and inserting "5 kilogram of converted drug weight"; and by striking "the equivalent quantity of marihuana would be 500 kilograms" and inserting "the converted drug weight would be 500 kilograms";

in Note 8(B) by striking "Drug Equivalency Tables" each place such term appears and inserting "Drug Conversion Tables"; by striking "convert each of the drugs to its marihuana equivalent" and inserting "convert each of the drugs to its converted drug weight"; by striking "For certain types of controlled substances, the marihuana equivalencies" and inserting "For certain types of controlled substances, the converted drug weights assigned"; by striking "e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of marihuana" and inserting "e.g., the combined converted weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of converted drug weight"; by striking "determine the marihuana equivalency for each schedule separately" and inserting "determine the converted drug weight for each schedule separately"; and by striking "Then add the marihuana equivalencies to determine the combined marihuana equivalency" and inserting "Then add the converted drug weights to determine the combined converted drug weight";

in Note 8(C)(i) by striking "of marihuana" each place such term appears and inserting "of converted drug weight"; and by striking "The total is therefore equivalent to 95 kilograms" and

inserting “The total therefore converts to 95 kilograms”;

in Note 8(C)(ii) by striking the following:

“The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 8 in the Drug Quantity Table.”,

and inserting the following:

“The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The amount of marihuana converts to 500 grams of converted drug weight. The diazepam, a Schedule IV drug, converts to 625 grams of converted drug weight. The total, 1.125 kilograms of converted drug weight, has an offense level of 8 in the Drug Quantity Table.”;

in Note 8(C)(iii) by striking “is equivalent” both places such term appears and inserting “converts”; by striking “of marihuana” each place such term appears and inserting “of converted drug weight”; and by striking “The total is therefore equivalent” and inserting “The total therefore converts”;

in Note 8(C)(iv) by striking “marihuana equivalency” each place such term appears and inserting “converted drug weight”; by striking “76 kilograms of marihuana” and inserting “76 kilograms”;

by striking “79.99 kilograms of marihuana” both places such term appears and inserting “79.99 kilograms of converted drug weight”; by striking “equivalent weight” each place such term appears and inserting “converted weight”; by striking “9.99 kilograms of marihuana” and inserting “9.99 kilograms”; and by striking “2.49 kilograms of marihuana” and inserting “2.49 kilograms”;

and in Note 8(D)—

in the heading, by striking “Drug Equivalency” and inserting “Drug Conversion”;

under the heading relating to Schedule I or II Opiates, by striking the heading as follows:

“Schedule I or II Opiates*”,

and inserting the following new heading:

“Schedule I or II Opiates* Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating Cocaine and Other Schedule I and II Stimulants (and their immediate precursors), by striking the heading as follows:

"Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*",

and inserting the following new heading:

"Cocaine and Other Schedule I and II Stimulants

(and their immediate precursors)* Converted Drug Weight";

and by striking "of marihuana" each place such term appears;

under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the heading as follows:

"LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*",

and inserting the following new heading:

"LSD, PCP, and Other Schedule I and II Hallucinogens

(and their immediate precursors)* Converted Drug Weight";

and by striking "of marihuana" each place such term appears;

under the heading relating to Schedule I Marihuana, by striking the heading as follows:

“Schedule I Marihuana”,

and inserting the following new heading:

“Schedule I Marihuana Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating to Flunitrazepam, by striking the heading as follows:

“Flunitrazepam**”,

and inserting the following new heading:

“Flunitrazepam** Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Schedule I or II Depressants (except gamma-hydroxybutyric acid), by striking the heading as follows:

“Schedule I or II Depressants (except gamma-hydroxybutyric acid)”,

and inserting the following new heading:

“Schedule I or II Depressants

(except gamma-hydroxybutyric acid) Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Gamma-hydroxybutyric Acid, by striking the heading as follows:

“Gamma-hydroxybutyric Acid”,

and inserting the following new heading:

“Gamma-hydroxybutyric Acid Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Schedule III Substances (except ketamine), by striking the heading as follows:

"Schedule III Substances (except ketamine)***",

and inserting the following new heading:

"Schedule III Substances (except ketamine)*** Converted Drug Weight";

by striking "1 gm of marihuana" and inserting "1 gm"; by striking "equivalent weight" and inserting "converted weight"; and by striking "79.99 kilograms of marihuana" and inserting "79.99 kilograms of converted drug weight";

under the heading relating to Ketamine, by striking the heading as follows:

"Ketamine",

and inserting the following new heading:

"Ketamine Converted Drug Weight";

and by striking "of marihuana";

under the heading relating to Schedule IV Substances (except flunitrazepam), by striking the heading as follows:

"Schedule IV Substances (except flunitrazepam)*****",

and inserting the following new heading:

"Schedule IV Substances (except flunitrazepam)***** Converted Drug Weight";

by striking "0.0625 gm of marihuana" and inserting "0.0625 gm"; by striking "equivalent weight" and inserting "converted weight"; and by striking "9.99 kilograms of marihuana" and inserting "9.99 kilograms of converted drug weight";

under the heading relating to Schedule V Substances, by striking the heading as follows:

"Schedule V Substances******",

and inserting the following new heading:

"Schedule V Substances****** Converted Drug Weight";

by striking "0.00625 gm of marihuana" and inserting "0.00625 gm"; by striking "equivalent weight" and inserting "converted weight"; and by striking "2.49 kilograms of marihuana" and inserting "2.49 kilograms of converted drug weight";

under the heading relating to List I Chemicals (relating to the manufacture of amphetamine or methamphetamine), by striking the heading as follows:

"List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)*******",

and inserting the following new heading:

"List I Chemicals (relating to the manufacture
of amphetamine or methamphetamine)******* Converted Drug Weight";

and by striking "of marihuana" each place such term appears;

under the heading relating to Date Rape Drugs (except flunitrazepam, GHB, or ketamine), by striking the heading as follows:

"Date Rape Drugs (except flunitrazepam, GHB, or ketamine)",

and inserting the following new heading:

"Date Rape Drugs (except flunitrazepam, GHB, or ketamine) Converted Drug Weight";

and by striking “marihuana” each place such term appears;

and in the text before the heading relating to Measurement Conversion Table, by striking “To facilitate conversions to drug equivalencies” and inserting “To facilitate conversions to converted drug weights”.

7. Technical Amendment

Synopsis of Amendment: This proposed amendment makes various technical changes to the Guidelines Manual.

Part A of the proposed amendment makes certain clarifying changes to two guidelines. First, the proposed amendment amends Chapter One, Part A, Subpart 1(4)(b) (Departures) to provide an explanatory note addressing the fact that §5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. Second, the proposed amendment makes minor clarifying changes to Application Note 2(A) to §2B1.1 (Theft, Property Destruction, and Fraud), to make clear that, for purposes of subsection (a)(1)(A), an offense is “referenced to this guideline” if §2B1.1 is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction.

Part B of the proposed amendment makes technical changes in §§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), 2R1.1 (Bid-Rigging,

Price-Fixing or Market-Allocation Agreements Among Competitors), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.4 (Armed Career Criminal), to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Part C of the proposed amendment makes clerical changes to—

(1) the Commentary to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)), to correct a typographical error by inserting a missing word in Application Note 4;

(2) subsection (d)(6) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), to correct a typographical error in the line referencing Pseudoephedrine;

(3) subsection (e)(2) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), to correct a punctuation mark under the heading relating to List I Chemicals;

(4) the Commentary to §2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) captioned "Statutory Provisions," to add a missing section symbol and a reference to Appendix A (Statutory Index);

(5) the Commentary to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) captioned "Statutory Provisions," to add a missing reference to 42 U.S.C. § 7413(c)(5) and a reference to Appendix A (Statutory Index);

(6) the Commentary to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) captioned "Statutory Provisions," to add a specific reference to 42 U.S.C. § 7413(c)(1)–(4);

(7) the Commentary to §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification) captioned "Statutory Provisions," to add a specific reference to 42 U.S.C. § 7413(c)(1)–(4);

(8) subsection (a)(4) to §5D1.3. (Conditions of Supervised Release), to change an inaccurate reference to "probation" to "supervised release"; and

(9) the lines referencing "18 U.S.C. § 371" and "18 U.S.C. § 1591" in Appendix A (Statutory Index), to rearrange the order of certain Chapter Two guidelines references to place them in proper numerical order.

(A) Clarifying Changes

Proposed Amendment:

Chapter One, Part A is amended—

in Subpart 1(4)(b) (Departures) by inserting an asterisk after "§5K2.19 (Post-Sentencing Rehabilitative Efforts)", and by inserting after the first paragraph the following new paragraph:

"*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (See USSG App. C, amendment 768.)";

and in the note at the end of Subpart 1(4)(d) (Probation and Split Sentences) by striking "Supplement to Appendix C" and inserting "USSG App. C".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2(A)(i) by striking "as determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of conviction" and inserting the following: "specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of §1B1.2 (Applicable Guidelines)".

(B) Title References to §4A1.3

Proposed Amendment:

The Commentary to §2Q1.3 captioned "Application Notes" is amended in Note 8 by striking "Adequacy of Criminal History Category" and inserting "Departures Based on Inadequacy of Criminal History Category (Policy Statement)".

The Commentary to §2R1.1 captioned "Application Notes" is amended in Note 7 by striking "Adequacy of Criminal History Category" and inserting "Departures Based on Inadequacy of Criminal History Category (Policy Statement)".

Section 4A1.2 is amended in subsections (h), (i), and (j) by striking "Adequacy of Criminal History Category" each place such term appears and inserting "Departures Based on Inadequacy of Criminal History Category (Policy Statement)".

The Commentary to §4A1.2 captioned "Application Notes" is amended in Notes 6 and 8 by striking "Adequacy of Criminal History Category" both places such term appears and inserting "Departures Based on Inadequacy of Criminal History Category (Policy Statement)".

The Commentary to §4B1.4 captioned "Background" is amended by striking "Adequacy of Criminal History Category" and inserting "Departures Based on Inadequacy of Criminal History

Category (Policy Statement)".

(C) Clerical Changes

Proposed Amendment:

The Commentary to §1B1.13 captioned "Application Notes" is amended in Note 4 by striking "factors set forth 18 U.S.C. § 3553(a)" and inserting "factors set forth in 18 U.S.C. § 3553(a)".

Section 2D1.11 is amended—

in subsection (d)(6) by striking "Pseuodoephedrine" and inserting "Pseudoephedrine";

and in subsection (e)(2), under the heading relating to List I Chemicals, by striking the period at the end and inserting a semicolon.

The Commentary to §2M2.1 captioned "Statutory Provisions" is amended by striking "§ 2153" and inserting "§§ 2153", and by inserting at the end the following: "For additional statutory provision(s), see Appendix A (Statutory Index).".

The Commentary to §2Q1.1 captioned "Statutory Provisions" is amended by striking "42 U.S.C. § 6928(e)" and inserting "42 U.S.C. §§ 6928(e), 7413(c)(5)", and by inserting at the end the

following: “For additional statutory provision(s), see Appendix A (Statutory Index).”.

The Commentary to §2Q1.2 captioned “Statutory Provisions” is amended by striking “7413” and inserting “7413(c)(1)–(4)”.

The Commentary to §2Q1.3 captioned “Statutory Provisions” is amended by striking “7413” and inserting “7413(c)(1)–(4)”.

Section 5D1.3(a)(4) is amended by striking “release on probation” and inserting “release on supervised release”.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. § 371 by rearranging the guidelines to place them in proper numerical order; and in the line referencing 18 U.S.C. § 1591 by rearranging the guidelines to place them in proper numerical order.