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 **February 19, 2019**. Written reply comments, which may only respond to issues raised during the original comment period, should be received by the Commission not later than **March 15, 2019**. Public comment regarding a proposed amendment received after the close of the comment period, and reply comment received on issues not raised during 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.

ADDRESSES: 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. 200002-8002, Attention: Public Affairs – Proposed Amendments.

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 USSC Rules of Practice and Procedure 2.2, 4.4. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. See id. 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 two-part proposed amendment to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)), including (A) three options for amending the policy statement and commentary in light of Koons v. United States, 138 S. Ct. 1783 (2018); and (B) two options for amending the commentary to resolve a circuit conflict concerning the application of §1B1.10(b)(2)(B), and a related issue for comment;

(2) a multi-part proposed amendment to §4B1.2 (Definitions of Terms Used in Section 4B1.1), including (A) amendments establishing that the categorical approach and modified categorical approach do not apply in determining whether a conviction is a "crime of violence" or a "controlled substance offense" by (i) providing that, in making that determination, a court shall consider any element or alternative means for meeting an element of the offense committed by the defendant, as well as the conduct that formed the basis of the offense of conviction, (ii) allowing courts to look at a wider range of sources from the judicial record, beyond the statute of conviction, in determining the conduct that formed the basis of the offense of conviction, and (iii) making similar revisions to §2L1.2 (Unlawfully Entering or Remaining in the United States), as well as conforming changes to the guidelines that use the terms "crime of violence" and "controlled substance offense" and define these terms by making specific

reference to §4B1.2, and related issues for comment; (B) three options to address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a "crime of violence" under §4B1.2, as amended in 2016, because these offenses do not meet either the generic definition of "robbery" or the new guidelines definition of "extortion," and related issues for comment; (C) three options to address certain issues regarding the commentary provision stating that the terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring to commit, and attempting to commit a "crime of violence" and a "controlled substance offense," and related issues for comment; and (D) revisions to the definition of "controlled substance offense" in §4B1.2(b) to include: (i) offenses involving an offer to sell a controlled substance, and (ii) offenses described in 46 U.S.C. § 70503(a) and § 70506(b), and a related issue for comment;

(3) a multi-part proposed amendment addressing recently enacted legislation and miscellaneous guideline issues, including (A) amendments to Appendix A (Statutory Index) and the Commentary to §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product) in response to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (Aug. 18, 2017), a technical correction to the Commentary to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury), and a related issue for comment; (B) amendments to Appendix A, §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle), as well as the commentaries to §2A2.4 (Obstructing or Impeding Officers) and §2X5.2 (Class A Misdemeanors

(Not Covered by Another Specific Offense Guideline)), in response to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (Oct. 8, 2018), and a related issue for comment; (C) amendments to Appendix A, §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), in response to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (Apr. 11, 2018), and related issues for comment; (D) an amendment to subsection (d) of §3D1.2 (Grouping of Closely Related Counts) to provide that offenses covered by §2G1.3 are not grouped under that subsection; and (E) an amendment to the Commentary to §5F1.7 (Shock Incarceration Program (Policy Statement)) to reflect the fact that the Bureau of Prisons no longer operates a shock incarceration program; and

(4) a proposed amendment to make various technical changes to the Guidelines Manual, including (A) technical changes to reflect the editorial reclassification of certain provisions previously contained in the Appendix to Title 50, to new chapters 49 to 57 of Title 50 and to other titles of the Code; (B) technical changes throughout the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), to, among other things, reorganize in alphabetical order the controlled substances contained in the tables therein to make them more user-friendly; (C) technical changes to the commentaries to §2A4.2 (Demanding or Receiving

Ransom Money), §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and to Appendix A, to provide references to the specific applicable provisions of 18 U.S.C. § 876; and (D) clerical changes to the background commentaries to §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)), §3D1.1 (Procedure for Determining Offense Level on Multiple Counts), and §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment).

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 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 2.2, 4.3, 4.4.

William H. Pryor Jr.,

Acting Chair

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

1. §1B1.10

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

Part A of the proposed amendment is the result of the Commission's consideration of miscellaneous issues, including possible amendments to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) in light of Koons v. United States, 138 S. Ct. 1783 (2018). See U.S. Sentencing Comm'n, "Notice of Final Priorities," 83 FR 43956 (Aug. 28, 2018). Part A would revise §1B1.10 in light of Koons.

Part B of the proposed amendment would resolve a circuit conflict concerning the application of §1B1.10, pursuant to the Commission's authority under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991). See U.S. Sentencing Comm'n, "Notice of Final Priorities," 83 FR 43956 (Aug. 28, 2018) (identifying resolution of circuit conflicts as a priority). An issue for comment is also provided.

(A) Possible Amendments in Light of Koons v. United States

Synopsis of Proposed Amendment: Pursuant to 18 U.S.C. § 3582(c), a court may modify a term of imprisonment if the defendant was initially sentenced based on a sentencing range that was subsequently lowered by a guideline amendment that the Commission has made retroactive. Section 3582(c)(2) provides:

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2).

A provision of the Sentencing Reform Act, 28 U.S.C. § 994(u), in turn, directs the Commission to determine when and to what extent such modifications are appropriate. Section 994(a)(2)(C) of Title 28 also directs the Commission to promulgate "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation . . . including the appropriate use of . . . the sentence modification provisions set forth in section . . .

3582(c) of title 18."

The policy statement at §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) implements the Commission's authority and responsibilities under these statutory provisions. Section 1B1.10(a) sets forth the eligibility requirements for a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and the policy statement. Specifically, a defendant is eligible for a sentence reduction under the policy statement only if an amendment listed in §1B1.10(d) "lower[ed] the defendant's applicable guideline range." The "applicable guideline range" is the range "that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance." USSG §1B1.10, comment. (n.1(A)).

Section 1B1.10(b)(1) instructs that in determining whether, and to what extent, a reduction is warranted, the court shall determine the "amended guideline range" that would have applied if the amendments listed in §1B1.10(d) had been in effect when the defendant was sentenced. In making that determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were in effect at the original sentencing, "leav[ing] all other guideline application decisions unaffected." Subsection (b)(2)(A) further instructs that the court cannot reduce the defendant's term of imprisonment below the bottom of the amended guideline range. However, subsection (b)(2)(B) provides an exception to this limitation: if the term of imprisonment originally imposed was less than the term provided by the

then applicable guideline range "pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under [§1B1.10(b)(1)] may be appropriate."

Section 1B1.10(c) provides a special rule for determining the amended guideline range if the defendant was subject to a statutory mandatory minimum penalty when originally sentenced but was relieved of that mandatory minimum because the defendant provided substantial assistance to the government. Under the special rule, the amended guideline range "shall be determined without regard to the operation of" §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction), the guidelines providing that a statutory mandatory minimum penalty trumps the otherwise applicable guideline range.

Recently, the Supreme Court decided Koons v. United States, 138 S. Ct. 1783 (June 4, 2018), which held that certain defendants are statutorily ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2). Specifically, Koons held that defendants whose initial guideline ranges fell entirely below a statutory mandatory minimum penalty, but who were originally sentenced below that penalty pursuant to a government motion for substantial assistance ("below defendants"), are ineligible for sentence reductions under section 3582(c)(2). See Koons, 138 S. Ct. at 1786–87. The Court reasoned that these below defendants' original sentences were not "based on" their guideline ranges but were instead "based on" their statutory minimum penalties and the substantial assistance they provided to the government. Id. (quoting 18 U.S.C. § 3582(c)(2)). As a result, below defendants do not satisfy the threshold requirement in

section 3582(c)(2) that they be "initially sentenced 'based on a sentencing range' that was later lowered by the [Commission]." Id.

Koons rested on the defendants' statutory ineligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) and did not analyze the policy statement at §1B1.10 or the correct application of the guidelines in sentence reduction proceedings. In addition, Koons did not address whether two other categories of defendants whose cases involve mandatory minimum sentences are eligible for relief: (1) those with guideline ranges that straddle the mandatory minimum penalty ("straddle defendants") and (2) those with guideline ranges completely above the mandatory minimum penalty ("above defendants").

Part A of the proposed amendment would revise §1B1.10 in light of the Supreme Court decision in Koons.

First, Part A would revise subsection (a) and its corresponding commentary to clarify that a defendant is eligible for a reduction under the policy statement only if the defendant was "sentenced based on a guideline range." Subsection (a)(1) would be revised to closely track section 3582(c)'s requirement that the defendant must be "sentenced based on a guideline range." The proposed amendment would revise subsection (a)(2) to affirmatively state the requirements for eligibility rather than exclusions from eligibility. It would also add as a requirement for eligibility that the defendant was "sentenced based on a guideline range."

Second, Part A would revise subsection (b)(1) to clarify that the eligibility requirement in renumbered subsection (a)(2)(c) — that the amendment has the effect of lowering the defendant's applicable guideline range — is determined by comparing the defendant's applicable guideline range at original sentencing to the amended guideline range, as calculated in the manner described in subsection (b)(1).

Finally, Part A provides three options for revising subsection (c), each of which would result in a different sentencing outcome for the defendants who remain eligible for a sentence reduction following Koons.

Option 1 would make no change to subsection (c). As a result, for statutorily eligible defendants (straddle and above defendants) who received relief from a statutory mandatory minimum penalty because they provided substantial assistance, the amended guideline range would continue to be determined without regard to the operation of §§5G1.1 and 5G1.2. This option would permit courts to give statutorily eligible defendants the largest possible sentence reductions for their substantial assistance. It would, however, treat straddle and above defendants more favorably than below defendants, who are statutorily ineligible for any reduction. It would also treat straddle and above defendants more favorably than similarly situated defendants who are being sentenced for the first time, because §§5G1.1 and 5G1.2 would apply to defendants facing initial sentencing.

Option 2 would provide that the amended guideline range is determined after operation of §§5G1.1 and 5G1.2. As a result, straddle defendants would not receive any reduction and above defendants would receive smaller reductions than they do under current subsection (c). This option would treat straddle and above defendants the same as below defendants. It would also treat all three categories of defendants the same as similarly situated defendants facing initial sentencing.

Option 3 would provide that the amended guideline range is restricted by §§5G1.1 and 5G1.2 only if it was so restricted at the time the defendant was originally sentenced. As a result, straddle defendants would not receive any reduction. Above defendants would be eligible for the largest possible reduction, as they are under current subsection (c). This option would, however, treat above defendants more favorably than straddle and below defendants, and more favorably than similarly situated defendants facing initial sentencing.

Part A of the proposed amendment also makes conforming changes to the commentary.

Proposed Amendment:

Section 1B1.10 is amended—

in subsection (a)(1) by striking "is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered" and inserting "was sentenced to a

term of imprisonment based on a guideline range that has subsequently been lowered";

in subsection (a)(2) by striking the following:

"Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (d) is applicable to the defendant; or

(B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.",

and inserting the following:

"Eligibility.—A defendant is eligible for a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c) and this policy statement only if—

(A) the defendant was sentenced based on a guideline range;

(B) an amendment listed in subsection (d) is applicable to the defendant; and

(C) that amendment has the effect of lowering the defendant's applicable guideline range.";

[Option 1 (which also includes changes to commentary):

and in subsection (b)(1), by striking "In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted," and inserting "To determine whether the defendant is eligible under subsection (a)(2)(C) and the extent of any permissible reduction in the defendant's term of imprisonment,", and by striking "leave all other guideline application decisions unaffected" and inserting "leave all other guideline application decisions unaffected, except as provided in subsection (c) below".**]**

[Option 2 (which also includes changes to commentary):

in subsection (b)(1), by striking "In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted," and inserting "To determine whether the defendant is eligible under subsection (a)(2)(C) and the extent of any permissible reduction in the defendant's term of imprisonment,", and by striking "leave all other guideline application decisions unaffected" and inserting "leave all other guideline application decisions unaffected, except as provided in subsection (c) below";

and in subsection (c) by striking "without regard to the operation of §5G1.1 (Sentencing on a

Single Count of Conviction)" and inserting "after operation of §5G1.1 (Sentencing on a Single Count of Conviction)".**]**

[Option 3 (which also includes changes to commentary):

in subsection (b)(1) by striking "In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted," and inserting "To determine whether the defendant is eligible under subsection (a)(2)(C) and the extent of any permissible reduction in the defendant's term of imprisonment,";

and in subsection (c) by striking "the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction)" and inserting "the court shall not apply §5G1.1 (Sentencing on a Single Count of Conviction) or §5G1.2 (Sentencing on Multiple Counts of Conviction) to replace or restrict the amended guideline range unless §5G1.1 or §5G1.2 operated to restrict the guideline range at the time the defendant was sentenced".**]**

The Commentary to §1B1.10 captioned "Application Notes" is amended—

in Note 1 in paragraph (A) by striking the following:

"Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).",

and inserting the following:

"Eligibility.—Under 18 U.S.C. § 3582(c)(2), a defendant may obtain a reduction in his term of imprisonment only if the defendant was originally sentenced 'based on a sentencing range that has subsequently lowered by the Sentencing Commission.' Subsection (a)(2)(A) therefore provides that a defendant is eligible for a reduction under the statute and this policy statement only if 'the defendant was sentenced based on a guideline range.' For purposes of 18 U.S.C. § 3582(c)(2), a defendant was sentenced 'based on a guideline range' only if that range played a relevant part in the framework that the sentencing court used in imposing the sentence. See Hughes v. United States, 138 S. Ct. 1765 (2018). Accordingly, a defendant is not sentenced

'based on a guideline range' if, pursuant to §5G1.1(b), the guideline range that would otherwise have applied was superseded, and the statutorily required minimum sentence became the defendant's guideline sentence. See Koons v. United States, 138 S. Ct. 1783 (2018). If a defendant is ineligible for a reduction under subsection (a)(2)(A), the court shall not apply any other provisions of this policy statement and may not order a reduction in the defendant's term of imprisonment.

Subsection (a)(2)(C) further provides that a defendant is eligible for a reduction in his term of imprisonment only if an amendment listed in subsection (d) has the effect of lowering the defendant's applicable guideline range. The 'applicable guideline range' is the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance. Accordingly, a defendant is not eligible for a reduction if an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment). To determine whether a defendant is eligible for a reduction under subsection (a)(2)(C), and the permissible amount of the reduction, if any, the court must first determine the defendant's amended guideline range, as provided in subsection (b)(1).";

[Option 1 and Option 2 would also include the following changes to Notes 2 and 3:

in Note 2 by striking "All other guideline application decisions remain unaffected" and inserting "All other guideline application decisions remain unaffected, except as provided in subsection (c)";

in Note 3 by striking "limit the extent to which the court may reduce the defendant's term of imprisonment" and inserting "limit the extent to which the court may reduce an otherwise eligible defendant's term of imprisonment";**]**

[Option 1 continued:

and in Note 4(B)—

by striking "Ordinarily, §5G1.1 would operate to restrict the amended guideline range to precisely 120 months" and inserting "Ordinarily, §5G1.1 would operate to replace the amended guideline range with a guideline sentence of precisely 120 months";

and by striking "the amended guideline range is considered to be 87 to 108 months (i.e., unrestricted by operation of §5G1.1 and the statutory minimum of 120 months)" and inserting "the amended guideline range is considered to be 87 to 108 months (i.e., not replaced by operation of §5G1.1 with the statutory minimum of 120 months)".**]**

[Option 2 continued:

and in Note 4 by striking the following:

"Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. See §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. See §5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (i.e., unrestricted by operation of §5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less

than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.",

and inserting the following:

"Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined after operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. For purposes of this policy statement, the

amended guideline range is considered to be 120 to 135 months (i.e., restricted by operation of §5G1.1(c)(2) to reflect the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 90 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 120 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. See §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. For purposes of this policy statement, §5G1.1 would replace the amended guideline range as calculated on the Sentencing Table with a guideline sentence of precisely 120 months, to reflect the mandatory minimum term of imprisonment. See §5G1.1(b).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. However, subsection (b)(2)(B) precludes this defendant from receiving any further reduction, because the point from which any comparable reduction would be determined has not changed; the minimum of the original guideline range (120 months) and the amended guideline range (120 months) are the same, so any comparable reduction that may be appropriate under subsection (b)(2)(B) would be equivalent to the reduction Defendant B already received in the original sentence of 90 months.".**]**

[Option 3 continued:

and in Note 4 by striking the following:

"Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of

120 to 135 months. See §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. See §5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (i.e., unrestricted by operation of §5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.",

and inserting the following:

"Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the

defendant's substantial assistance to authorities, then for purposes of this policy statement the court shall not apply §5G1.1 (Sentencing on a Single Count of Conviction) or §5G1.2 (Sentencing on Multiple Counts of Conviction) to replace or restrict the amended guideline range unless §5G1.1 or §5G1.2 operated to restrict the guideline range at the time the defendant was sentenced. For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The original range of 135 to 168 months was entirely above the mandatory minimum, so §5G1.1 did not operate to replace or restrict that range. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months. The court does not apply §5G1.1 to the amended guideline range because §5G1.1 was not applied when the defendant was originally sentenced.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent

below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. See §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Section 5G1.1 would operate to replace the amended guideline range as calculated on the Sentencing Table with a guideline sentence of precisely 120 months, to reflect the mandatory minimum term of imprisonment. See §5G1.1(b). The court should apply §5G1.1 to the amended guideline range because §5G1.1 was applied when the defendant was originally sentenced.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. However, subsection (b)(2)(B) precludes this defendant from receiving any further reduction, because the point from

which any comparable reduction would be determined has not changed; the minimum of the original guideline range (120 months) and the minimum of the amended range (120 months) are the same, so any comparable reduction that may be appropriate under subsection (b)(2)(B) would be equivalent to the reduction Defendant B already received in the original sentence of 90 months.".**]**

(B) Resolution of Circuit Conflict

Synopsis of Proposed Amendment: In addition to the issues raised by Koons v. United States, 138 S. Ct. 1783 (2018), a circuit conflict has emerged regarding the application of §1B1.10(b)(2)(B). Section 1B1.10(b)(2)(A) instructs that, in acting on a motion under 18 U.S.C. § 3582(c)(2), a court cannot reduce a defendant's term of imprisonment to a term that is less than the amended guideline minimum, as calculated under §1B1.10(b)(1). However, §1B1.10(b)(2)(B) provides an exception to this limitation: if the term of imprisonment originally imposed was less than the applicable guideline range at the time of sentencing "pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under [§1B1.10(b)(1)] may be appropriate."

Circuit courts have disagreed about whether §1B1.10(b)(2)(B) allows a court to reduce a sentence below the amended guideline range to reflect departures other than substantial assistance that the defendant received at his original sentencing or whether any sentence

reduction may reflect only the departure amount attributable to substantial assistance. The Sixth and Eleventh Circuits have held that a court may reduce a sentence below the amended guideline range by an amount attributable only to the substantial assistance departure. See United States v. Taylor, 815 F.3d 248 (6th Cir. 2016); United States v. Marroquin-Medina, 817 F.3d 1285 (11th Cir. 2016); see also United States v. Wright, 562 F. App'x 885 (11th Cir. 2014). The Seventh and Ninth Circuits have held that, if a defendant received a substantial assistance departure, a court may reduce the defendant's sentence further below the amended guideline minimum to reflect other departures or variances the defendant received, in addition to the substantial assistance departure. See United States v. Phelps, 823 F.3d 1084 (7th Cir. 2016); United States v. D.M., 869 F.3d 1133 (9th Cir. 2017).

Part B of the proposed amendment would revise Application Note 3 of the Commentary to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) to resolve this circuit conflict. Part B provides two options for resolving the conflict.

Option 1 would adopt the approach of the Sixth and Eleventh Circuits. It would revise Application Note 3 to state that in a case in which the exception provided by subsection (b)(2)(B) applies and the defendant received both a substantial assistance departure and at least one other departure or variance, a reduction "comparably less" than the defendant's amended guideline range may take into account only the substantial assistance departure.

Option 2 would adopt the approach of the Seventh and Ninth Circuits. It would revise

Application Note 3 to state that in a case in which the exception provided by subsection (b)(2)(B) applies and the defendant received both a substantial assistance departure and at least one other departure or variance, a reduction "comparably less" than the amended guideline range may take into account all the departures and variances that the defendant received.

An issue for comment is also provided.

Proposed Amendment:

The Commentary to §1B1.10 captioned "Application Notes" is amended in Note 3 by striking the following:

"Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the

guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).",

and inserting the following:

"Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim.

P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In a case in which the exception provided by subsection (b)(2)(B) applies, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range.

[Option 1:

If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to one or more departures or variances in addition to a substantial assistance departure, the reduction under subsection (b)(2)(B) may take into account only the substantial assistance departure. Thus, if the term of imprisonment imposed in the example above was 56 months (representing a downward departure of 20 percent below the minimum of the guideline range applicable to the defendant at the time of sentencing), and that departure was solely pursuant to a government motion to reflect the defendant's substantial assistance, then a reduction of approximately 20 percent below the minimum of the amended guideline range, to a term of imprisonment of 41 months, would be a comparable reduction and may be appropriate. If, however, the 56-month term of imprisonment reflected both a departure of 10 percent below the minimum of the applicable guideline range pursuant to a substantial-assistance motion and a variance of an additional 10 percent below the

applicable range because of the history and characteristics of the defendant, then only a reduction of approximately 10 percent (representing solely the departure for substantial assistance), to a term of imprisonment of 46 months, would be a comparable reduction and may be appropriate.**]**

[Option 2:

If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to one or more departures or variances in addition to a substantial assistance departure, the reduction under subsection (b)(2)(B) may take into account all the departures and variances that the defendant received. Thus, if the term of imprisonment imposed in the example above was 56 months (representing downward departures or variances totaling 20 percent below the minimum term of the guideline range applicable to the defendant at the time of sentencing), and at least part of that below-guideline sentence was pursuant to a government motion to reflect the defendant's substantial assistance, then a reduction of approximately 20 percent below the minimum of the amended guideline range, to a term of imprisonment of 41 months, would be a comparable reduction and may be appropriate.**]**".

Issue for Comment:

1. Option 2 of Part B of the proposed amendment would revise Application Note 3 of the Commentary to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended

Guideline Range (Policy Statement)) to state that where the exception provided by §1B1.10(b)(2)(B) applies and the defendant received both a substantial assistance departure and at least one other departure or variance, a reduction "comparably less" than the defendant's amended guideline range may take into account not only the substantial assistance departure but also any other departure or variance that the defendant received. If the Commission adopts this approach, should the Commission limit the departures and variances that may be considered? For example, should the Commission provide that a comparable reduction may take into account only departures and not variances? Should the Commission provide that a comparable reduction may take into account only certain, specified types of departures or variances? If so, which ones? Or should the Commission provide that a comparable reduction generally may take into account departures and variances other than substantial assistance, but one or more particular types of departures or variances may not be considered? If so, which ones?

2. Career Offender

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of possible amendments to §4B1.2 (Definitions of Terms Used in Section 4B1.1) to (A) allow courts to consider the actual conduct of the defendant, rather than only the elements of the offense (i.e., "categorical approach"), in determining whether an offense is a crime of violence or a controlled substance offense; and (B) address various application issues, including the meaning of "robbery" and "extortion," and the treatment of inchoate offenses and offenses

involving an offer to sell a controlled substance. See U.S. Sentencing Comm'n, "Notice of Final Priorities," 83 FR 43956 (Aug. 28, 2018). The proposed amendment contains four parts (Parts A through D). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A of the proposed amendment would amend §4B1.2 to establish that the categorical approach and modified categorical approach do not apply in determining whether a conviction is a "crime of violence" or a "controlled substance offense." Specifically, it would provide that, in making that determination, a court shall consider any element or alternative means for meeting an element of the offense committed by the defendant, as well as the conduct that formed the basis of the offense of conviction. In addition, Part A would allow courts to look at a wider range of sources from the judicial record, beyond the statute of conviction, in determining the conduct that formed the basis of the offense of conviction. Part A would also make similar revisions to §2L1.2 (Unlawfully Entering or Remaining in the United States), as well as conforming changes to the guidelines that use the terms "crime of violence" and "controlled substance offense" and define these terms by making specific reference to §4B1.2. Issues for comment are also provided.

Part B of the proposed amendment would address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a "crime of violence" under §4B1.2, as amended in 2016, because these offenses do not meet either the generic definition of "robbery" or the new guidelines definition of "extortion." Three options are presented. Issues for comment are also

provided.

Part C of the proposed amendment would amend §4B1.2 to address certain issues regarding the commentary provision stating that the terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring to commit, and attempting to commit a "crime of violence" and a "controlled substance offense." Three options are presented. Issues for comment are also provided.

Part D of the proposed amendment would amend the definition of "controlled substance offense" in §4B1.2(b) to include offenses involving an offer to sell a controlled substance and offenses described in 46 U.S.C. § 70503(a) and § 70506(b). An issue for comment is also provided.

(A) Categorical Approach

Synopsis of Proposed Amendment: A number of statutes and guidelines provide enhanced penalties for defendants convicted of offenses that fit within a particular category of crimes. Courts typically determine whether a conviction fits within a particular category of crimes through the application of the "categorical approach" set forth by the Supreme Court. The Supreme Court cases adopting and applying the categorical approach have involved statutory provisions (e.g., 18 U.S.C. § 924(e)) rather than guidelines. However, courts have applied the categorical approach to guideline provisions, even though the guidelines do not expressly require

such an analysis. Specifically, courts have used the categorical approach to determine if a conviction is a "crime of violence" or a "controlled substance offense" for purposes of applying the career offender guideline at §4B1.1 (Career Offender). This form of analysis limits the range of information a sentencing court may consider in making such determination to the statute under which the defendant sustained the conviction (and, in certain cases, judicial documents surrounding that conviction).

In Taylor v. United States, 495 U.S. 575 (1990), the Supreme Court held that to determine whether a prior conviction qualifies as an enumerated "violent felony" under the Armed Career Criminal Act (ACCA), courts must use "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." Taylor, 495 U.S. at 600. If the statutory definition of the prior offense corresponds in substance to the generic version of the enumerated offense, or is narrower than that generic offense, the prior conviction can serve as a predicate offense. Id. at 599. If the statutory definition of the prior offense is broader than the generic offense, the prior conviction generally cannot count as a predicate offense. Id. In making such a determination, a sentencing court generally may "look only to the fact of conviction and the statutory definition of the prior offense." Id. at 602. However, this approach "may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements" of the generic offense. Id. Thus, a prior conviction fits within the particular category of crimes "if either its statutory definition substantially corresponds to [the generic definition of the crime], or the charging paper and jury instructions actually required the jury to

find all the elements of [the generic crime] in order to convict the defendant." Id.

In Shepard v. United States, 544 U.S. 13 (2005), the Supreme Court reaffirmed the use of this modified version of the categorical approach in the "narrow range of cases" recognized in Taylor in which the statute of conviction defines an offense that is broader than the elements of the generic offense. Shepard, 544 U.S. at 17–18. In such a case, the Court held, the sentencing court may look to a limited list of documents to determine the class of offense. In cases resolved by a guilty plea, such as in Shepard, the court may look to "the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." Id. at 26. This analysis is called the "modified categorical approach." Under this approach, the court may consider only those sources of information approved by Taylor and Shepard — the charging document, the jury instructions or judge's formal rulings of law and findings of fact, any plea agreement or plea statement, or "some comparable judicial record of this information."

More recent cases make clear that a court may use the modified categorical approach described in Shepard only when the statute that the defendant was convicted of violating is "divisible." The Supreme Court held in Descamps v. United States, 570 U.S. 254 (2013), that a statute is "divisible" only when it contains multiple crimes defined by multiple alternative elements. If the statute is not divisible (i.e., it describes a single crime defined by a single set of elements, even if it may also list alternative means of satisfying one or more elements), then the modified

categorical approach is not permitted. When a statute is divisible, and the modified categorical approach is applied, only the documents approved in Taylor and Shepard may be used to determine which of the alternative specified ways of committing the offense formed the basis of conviction. The modified categorical approach acts in such cases not as an exception to the categorical approach, but as a tool of that approach, while retaining its central feature: "a focus on the elements, rather than the facts of a crime." Id. at 263. Consequently, courts cannot use the documents to investigate the underlying conduct of the prior offense.

In Mathis v. United States, 136 S. Ct. 2243 (2016), the Supreme Court elaborated further on the elements-means distinction, holding that a sentencing court may look only to the elements of the statute of conviction, even if the statute specifies alternative ways of committing the offense. The Court instructed that the first task for sentencing courts faced with alternatively phrased statutes is to "determine whether its listed items are elements or means." Id. at 2256. If the listed items are elements of the offense, the modified categorical approach is available for courts to determine under what section of the statute the defendant was convicted. However, if the listed items are means of satisfying one of the offense elements, the court cannot apply the modified categorical approach to determine which of the statutory alternatives was at issue in prosecuting the prior conviction. Id.

The Commission has received significant comment over the years regarding the categorical approach, most of which has been negative. Courts and stakeholders have criticized the categorical approach as being an overly complex, time consuming, resource-intensive analysis

that often leads to litigation and uncertainty. Commenters have also indicated that the categorical approach creates serious and unjust inconsistencies that make the guidelines more cumbersome, complex, and less effective at addressing dangerous repeat offenders. As a result, commenters argue, some federal and state offenses that would otherwise qualify as a "crime of violence" or a "controlled substance offense" no longer qualify as such in several federal circuits.

Part A of the proposed amendment would amend §4B1.2 (Definitions of Terms Used in Section 4B1.1) to provide that the categorical approach and modified categorical approach do not apply in determining whether a conviction is a "crime of violence" or a "controlled substance offense." Specifically, Part A would provide that, in making that determination, a court shall consider any element or alternative means for meeting an element of the offense committed by the defendant, as well as the conduct that formed the basis of the offense of conviction.

In addition, Part A would allow courts to look at a wider range of sources from the judicial record, beyond the statute of conviction, in determining the conduct that formed the basis of the offense of conviction. Specifically, it would permit courts to look to the types of sources identified in Taylor and Shepard: (1) the charging document; (2) the jury instructions, in a case tried to a jury; the judge's formal rulings of law or findings of fact, in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the plea was confirmed by the defendant; (3) any explicit factual finding by the trial judge to which the defendant assented; and (4) any comparable judicial record of the information described above.

Part A of the proposed amendment would also make corresponding changes to the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States), which contains definitions for the terms "crime of violence" and "drug trafficking offense" that closely track the definitions of "crime of violence" and "controlled substance offense," respectively, in §4B1.2. It would add a new application note that mirrors the new provisions proposed for §4B1.2.

Finally, Part A of the proposed amendment makes conforming changes to the guidelines that use the terms "crime of violence" and "controlled substance offense" and define these terms by making specific reference to §4B1.2. Accordingly, the proposed amendment would amend the commentaries to §§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms and Ammunitions), 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), 4A1.2 (Definitions and Instructions for Computing Criminal History), 4B1.4 (Armed Career Criminal), and 7B1.1 (Classification of Violations (Policy Statement)).

Issues for comment are also provided.

Proposed Amendment:

Section 4B1.2 is amended—

in subsection (a)(1) by striking "has as an element" and inserting "has an element or alternative means for meeting an element";

in subsection (a)(2) by striking "is murder," and inserting "constituted murder,";

and in subsection (b) by striking "that prohibits" and inserting "that has as an element or alternative means for meeting an element".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 2 by striking the following:

"Offense of Conviction as Focus of Inquiry.—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.",

and inserting the following:

"Procedure for Determining Whether an Offense is a 'Crime of Violence' or a 'Controlled Substance Offense'.—The 'categorical approach' and 'modified categorical approach' adopted by the Supreme Court in the context of certain statutory provisions (e.g., 18 U.S.C. § 924(e)) do not apply in the determination of whether a conviction is a 'crime of violence' or a 'controlled substance offense,' as set forth below. See Background Commentary.

(A) Conduct-Based Inquiry.—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. In determining whether the defendant was convicted of a 'crime of violence' or a 'controlled substance offense,' the court shall consider the conduct that formed the basis of the conviction, i.e., only the conduct that met one or more elements of the offense of conviction or that was an alternative means of meeting any such element.

(B) Sources to be Considered.—In determining the conduct that formed the basis of the conviction, the court shall look only to the statute of conviction and the following sources—

(i) The charging document.

(ii) The jury instructions, in a case tried to a jury; the judge's formal rulings of law or findings of fact, in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.

(iii) Any explicit factual finding by the trial judge to which the defendant assented.

(iv) Any comparable judicial record of the information described in subparagraphs (i) through (iii).

(C) Definitions of Enumerated Offenses.—In determining whether the conduct that formed the basis of the conviction constitutes one of the enumerated offenses in subsection (a)(2), use the definition of the enumerated offense provided in Application Note 1. If no definition is provided, use the contemporary, generic definition of the enumerated offense.".

The Commentary to §4B1.2 is amended by adding at the end the following:

"Background: Section 4B1.2 provides the definitions for the terms 'crime of violence,' 'controlled substance offense,' and 'two prior felony convictions' used in §4B1.1 (Career Offender). To determine if a conviction meets the definitions of 'crime of violence' and 'controlled substance offense' in §4B1.2, courts have typically used the categorical approach and

the modified categorical approach, as set forth in Supreme Court jurisprudence. See, e.g., Taylor v. United States, 495 U.S. 575 (1990); Shepard v. United States, 544 U.S. 13 (2005); Descamps v. United States, 570 U.S. 254 (2013); Mathis v. United States, 136 S. Ct. 2243 (2016). These Supreme Court cases, however, involved statutory provisions (e.g., 18 U.S.C. § 924(e)) rather than guideline provisions. Even though courts have applied the categorical approach and the modified categorical approach to guideline provisions, neither 28 U.S.C. § 994(h) nor the guidelines require such a limited analysis for determining whether an offense is a 'crime of violence' or a 'controlled substance offense' for purposes of §4B1.1. Section 4B1.2 and Application Note 2 make clear that the categorical approach and modified categorical approach do not apply when a court determines whether a defendant's conviction qualifies as a 'crime of violence' or a 'controlled substance offense' under the career offender guideline. In addition, the court is permitted to consider a wider range of sources from the judicial record in determining whether a prior conviction qualifies as a 'crime of violence' or a 'controlled substance offense.'".

The Commentary to §2L1.2 captioned "Application Notes" is amended—

in Note 2—

in the paragraph that begins "'Crime of violence' means" by striking "any of the following offenses under federal, state, or local law:" and inserting "an offense under federal, state, or local law that constituted", and by striking ", or any other offense under federal, state, or local law that

has as an element" and inserting "; or any other offense under federal, state, or local law that has as an element or alternative means for meeting an element";

and in the paragraph that begins "'Drug trafficking offense' means" by striking "an offense under federal, state, or local law that prohibits" and inserting "an offense under federal, state, or local law that has as an element or alternative means for meeting an element";

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

and by inserting the following new Note 6:

"6. Procedure for Determining Whether a Prior Conviction is a 'Crime of Violence' or a 'Drug Trafficking Offense'.—The 'categorical approach' and 'modified categorical approach' adopted by the Supreme Court in the context of certain statutory provisions (e.g., 18 U.S.C. § 924(e)) do not apply in the determination of whether a conviction is a 'crime of violence' or a 'drug trafficking offense,' as set forth below. See Background Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

(A) Conduct-Based Inquiry.—In determining whether the defendant was convicted of a 'crime of violence' or a 'drug trafficking offense' for the purposes of subsections (b)(2)(E) and (b)(3)(E), the court shall take into account the conduct that formed the basis of the conviction, i.e., only the conduct that met one or more

elements of the offense of conviction or that was an alternative means of meeting any such element.

(B) Sources to be Considered.—In determining the conduct that formed the basis of the conviction, the court shall look only to the statute of conviction and the following sources—

(i) The charging document.

(ii) The jury instructions, in a case tried to a jury; the judge's formal rulings of law or findings of fact, in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.

(iii) Any explicit factual finding by the trial judge to which the defendant assented.

(iv) Any comparable judicial record of the information described in subparagraphs (i) through (iii).

(C) Definitions of Enumerated Offenses.—In determining whether the conduct that

formed the basis of the conviction constituted one of the enumerated offenses in the definition of 'crime of violence,' use the definition of the enumerated offense provided. If no definition is provided, use the contemporary, generic definition of the enumerated offense.".

The Commentary to §2K1.3 captioned "Application Notes" is amended in Note 2—

in the paragraph that begins "'Controlled substance offense' has the meaning" by striking "has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1)" and inserting "means a 'controlled substance offense' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)";

and in the paragraph that begins "'Crime of violence' has the meaning" by striking "has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2" and inserting "means a 'crime of violence' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)".

The Commentary to §2K2.1 captioned "Application Notes" is amended—

in Note 1—

in the paragraph that begins "'Controlled substance offense' has the meaning" by striking "has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1)" and inserting "means a 'controlled substance offense' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)";

and in the paragraph that begins "'Crime of violence' has the meaning" by striking "has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2" and inserting "means a 'crime of violence' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)";

and in Note 13(B) by striking "have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1)" and inserting "mean a 'crime of violence' and a 'controlled substance offense' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)".

The Commentary to §2S1.1 captioned "Application Notes" is amended in Note 1, in the paragraph that begins "'Crime of violence' has the meaning", by striking "has the meaning given that term in subsection (a)(1) of §4B1.2 (Definitions of Terms Used in Section 4B1.1)" and inserting "means a 'crime of violence' as defined in subsection (a)(1) of §4B1.2 (Definitions of Terms Used in Section 4B1.1), regardless of whether such offense resulted in a conviction".

The Commentary to §4A1.1 captioned "Application Notes" is amended in Note 5 by striking "has the meaning given that term in §4B1.2(a)" and inserting "means a 'crime of violence' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)".

Section 4A1.2(p) is amended by striking "the definition of 'crime of violence' is that set forth in §4B1.2(a)" and inserting "'crime of violence' means a 'crime of violence' as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1)".

Section 4B1.4 is amended—

in subsection (b)(3)(A) by striking "in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b)" and inserting "in connection with either a crime of violence, as defined in §4B1.2(a) (regardless of whether such offense resulted in a conviction), or a controlled substance offense, as defined in §4B1.2(b) (regardless of whether such offense resulted in a conviction)";

and in subsection (c)(2) by striking "in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b)" and inserting "in connection with either a crime of violence, as defined in §4B1.2(a) (regardless of whether such offense resulted in a conviction), or a controlled substance offense, as defined in §4B1.2(b) (regardless of whether such offense resulted in a conviction)".

The Commentary to §5K2.17 captioned "Application Notes" is amended in Note 1 by striking "are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1)" and inserting "mean a 'crime of violence' and a 'controlled substance offense' as defined in subsections (a) and (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1), regardless of whether such offense resulted in a conviction".

The Commentary to §7B1.1 captioned "Application Notes" is amended—

in Note 2 by striking "is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). See §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2" and inserting "means a 'crime of violence' as defined in subsection (a) of §4B1.2 (Definitions of Terms Used in Section 4B1.1), regardless of whether such conduct resulted in a conviction";

and in Note 3 by striking "is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1). See §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2" and inserting "means a 'controlled substance offense' as defined in subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1), regardless of whether such conduct resulted in a conviction".

Issues for Comment:

1. Part A of the proposed amendment would amend §4B1.2 (Definitions of Terms Used in

Section 4B1.1) to provide that the "categorical approach" and "modified categorical approach," as set forth in Supreme Court jurisprudence for certain statutory provisions, do not apply in determining whether a conviction is a "crime of violence" or a "controlled substance offense" for purposes of the guidelines. As indicated above, courts have applied the categorical approach and the modified categorical approach to guideline provisions, even though the guidelines do not expressly require such an analysis. The Commission invites comment on whether Part A of the proposed amendment is consistent with the Commission's authority under 28 U.S.C. § 994(a)–(f), (h).

2. Part A of the proposed amendment would allow courts to look to the documents expressly approved in Taylor v. United States, 495 U.S. 575 (1990), and Shepard v. United States, 544 U.S. 13 (2005), in determining the conduct that formed the basis of the offense of conviction.

The Commission seeks comment on whether additional or different guidance should be provided. If so, what additional or different guidance should the Commission provide? For example, should the Commission provide a specific set of factors to assess the reliability of a source of information, such as whether the document came out of the adversarial process, was accepted by both parties, or was made by an impartial third party? If so, what factors should the Commission provide? Should the Commission list specific sources or types of sources that courts may consider, in addition to the sources expressly approved in Taylor and Shepard (i.e., the Shepard documents)? If so, what

documents or types of information should be included in this list? Are there any documents or types of information that should be expressly excluded? If so, what documents or types of information should be excluded? Should the Commission broaden the range of sources courts may look at, in addition to the Shepard documents, by providing that courts may also consider any uncontradicted, internally consistent parts of the judicial record from the prior conviction?

3. Currently, §4B1.2 provides definitions for only two of the enumerated offenses contained in the "crime of violence" definition (i.e., "forcible sex offense" and "extortion"). For the other enumerated offenses, the proposed amendment provides that courts should use the contemporary, generic definition of the enumerated offense. Should the Commission instead set forth specific definitions for all enumerated offenses covered by the guideline? If so, what definitions would be appropriate for purposes of the career offender guideline? For example, should the Commission provide definitions derived from broad contemporary, generic definitions of the enumerated offenses? What offenses should be covered by any potential definition of the enumerated offenses? What offenses should be excluded from any potential definition?

(B) Meaning of "Robbery"

Synopsis of Proposed Amendment: In 2016, the Commission amended §4B1.2 (Definitions of Terms Used in Section 4B1.1) to, among other things, delete the "residual clause" and revise the

"enumerated offenses clause" by moving enumerated offenses that were previously listed in the commentary to the guideline itself. See USSG, App. C, Amendment 798 (effective Aug. 1, 2016). The "enumerated offenses clause" identifies specific offenses that qualify as crimes of violence. Although the guideline relies on existing case law for purposes of defining most enumerated offenses, the amendment added to the Commentary to §4B1.2 definitions for two of the enumerated offenses: "forcible sex offense" and "extortion."

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

In its annual letter to the Commission, the Department of Justice expressed concern that courts have held that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a "crime of violence" under the guideline as amended in 2016 because the statute of conviction does not fit either the generic definition of "robbery" or the new guideline definition of "extortion."

See Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf. The Hobbs Act defines the term "robbery" as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . . . " 18 U.S.C. §1951(b)(1) (emphasis added). At least two circuits — the Ninth and Tenth Circuits — have found ambiguity as to whether the guideline definition of extortion includes injury to property, and (under the rule of lenity) both circuits have interpreted the new definition as excluding prior convictions where the statute encompasses injury to property offenses, such as Hobbs Act robbery. See, e.g., United States v. O'Connor, 874 F.3d 1147 (10th Cir. 2017) (Hobbs Act robbery); United States v. Edling, 895 F.3d 1153 (9th Cir. 2018) (Nevada robbery).

Part B of the proposed amendment would amend §4B1.2 to address this issue. Three options are provided.

Option 1 would amend the enumerated offenses clause at §4B1.2(a)(2) to add a parenthetical annotation that robbery, as listed, is "robbery (as described in 18 U.S.C. § 1951(b)(1))." Section 1951(b)(1) provides the Hobbs Act definition of "robbery."

Option 2 would amend the Commentary to §4B1.2 to add a definition of "robbery" for purposes of the career offender guideline. The definition would mirror the "robbery" definition at

18 U.S.C. § 1951(b)(1). Specifically, it would provide that "robbery" is "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." Option 2 also brackets a provision defining the phrase "actual or threatened force," for purposes of the "robbery" definition, as "minimal force that is sufficient to compel a person to part with personal property."

Option 3, similar to Option 2, would amend the Commentary to §4B1.2 to add a definition of "robbery" that mirrors the "robbery" definition at 18 U.S.C. § 1951(b)(1). However, Option 3 brackets a different alternative for defining the phrase "actual or threatened force." It would provide that such phrase refers to "force that is sufficient to overcome a person's physical resistance or physical power of resistance."

In addition, Part B of the proposed amendment includes conforming changes to the definition of "crime of violence" in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States). The changes are presented in accordance with the options described above.

Issues for comment are also provided.

Proposed Amendment:

[Option 1:

Section 4B1.2(a)(2) is amended by striking "robbery" and inserting "robbery (as described in 18 U.S.C. § 1951(b)(1))".**]**

[Option 2:

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'Forcible sex offense' includes" the following new paragraph:

"'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. **[**The phrase "actual or threatened force" refers to minimal force that is sufficient to compel a person to part with personal property.**]**".**]**

[Option 3:

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 by inserting

after the paragraph that begins "'Forcible sex offense' includes" the following new paragraph:

"'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. **[**The phrase "actual or threatened force" refers to force that is sufficient to overcome a person's physical resistance or physical power of resistance.**]**".**]**

The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 2, in the paragraph that begins "'Crime of violence' means"—

[Option 1:

by striking "robbery" and inserting "robbery (as described in 18 U.S.C. § 1951(b)(1))".**]**

[Option 2:

by inserting after "territorial jurisdiction of the United States." the following: "'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or

property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. **[**The phrase "actual or threatened force" refers to minimal force that is sufficient to compel a person to part with personal property.**]**".**]**

[Option 3:

by inserting after "territorial jurisdiction of the United States." the following: "'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. **[**The phrase "actual or threatened force" refers to force that is sufficient to overcome a person's physical resistance or physical power of resistance.**]**".**]**

Issues for Comment:

1. Options 1, 2, and 3 in Part B of the proposed amendment would have "robbery," as listed in subsection (a)(2) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) and §2L1.2 (Unlawfully Entering or Remaining in the United States), either reference or mirror the Hobbs Act definition of "robbery" at 18 U.S.C. § 1951(b)(1). The Commission seeks comment generally on whether the proposed definition of "robbery" is appropriate. Are there robbery offenses that are covered by the proposed definition but should not be? Are

there robbery offenses that are not covered by the proposed definition but should be?

2. The Hobbs Act definition of "robbery" at 18 U.S.C. § 1951(b)(1) includes the phrase "actual or threated force" as part of the elements of the offense. The Commission seeks comment on how the phrase "actual or threatened force" has been defined by case law for purposes of the Hobbs Act definition of "robbery" at 18 U.S.C. § 1951(b)(1). What level of force have courts determined is required for purposes of Hobbs Act robbery cases? Have courts interpreted the level of force required in such cases to be "violent force," as defined in Johnson v. United States, 559 U.S. 133, 140 (2010)? Have courts determined that Hobbs Act robbery could encompass conduct that falls below the level of "violent force"? If so, what level of force have courts specified?

Options 2 and 3 of the proposed amendment bracket two alternatives for defining the phrase "actual or threatened force," for purposes of the proposed "robbery" definition. Option 2 would provide that the phrase "actual or threatened force" refers to "minimal force that is sufficient to compel a person to part with personal property." Option 3 would provide that such phrase refers to "force that is sufficient to overcome a person's physical resistance or physical power of resistance." The Commission seeks comment on whether either of these two alternatives is appropriate for purposes of the proposed "robbery" definition. Are there robbery offenses that would be covered by defining "actual or threatened force" in any such way but should not be? Are there robbery offenses that would not be covered but should be? If none of the bracketed alternatives is appropriate

for purposes of the proposed "robbery" definition, how should the Commission define the phrase "actual or threatened force"? What level of force should the Commission specify as part of the proposed "robbery" definition?

(C) Inchoate Offenses

Synopsis of Proposed Amendment: The career offender guideline includes convictions for inchoate offenses and offenses arising from accomplice liability, such as aiding and abetting, conspiring to commit, and attempting to commit a "crime of violence" and a "controlled substance offense." See USSG §4B1.2, comment. (n.1). In the original 1987 Guidelines Manual, these offenses were included only in the definition of "controlled substance offense." See USSG §4B1.2, comment. (n.2) (effective Nov. 1, 1987). In 1989, the Commission amended the guideline to provide that both definitions – "crime of violence" and "controlled substance offense" – include the offenses of aiding and abetting, conspiracy, and attempt to commit such crimes. See USSG App. C, Amendment 268 (effective Nov. 1, 1989).

In its annual letter to the Commission, the Department of Justice has suggested that application issues have arisen regarding whether certain conspiracy offenses qualify under the career offender guideline as a "crime of violence" or a "controlled substance offense." See Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf. In making this determination, some courts have employed a two-

step analysis, first comparing the substantive offense to its generic definition, and then separately comparing the inchoate offense involving that substantive offense to the generic definition of the specific inchoate offense. In comparing conspiracy to commit an offense to the generic definition of "conspiracy," some courts have concluded that because the generic definition of conspiracy requires an overt act, federal and state conspiracy statutes that do not require an overt act categorically do not qualify as a "crime of violence" or a "controlled substance offense." See, e.g., United States v. McCollum, 885 F.3d 300, 303 (4th Cir. 2018).

In addition, another issue has been brought to the Commission's attention. Case law has long held that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Stinson v. United States, 508 U.S. 36, 38 (1993); see also USSG §1B1.7. Most circuits have held that the definitions of "crime of violence" and "controlled substance offense" at §4B1.2 include the offenses of aiding and abetting, conspiracy to commit, and attempt to commit such crimes, in accordance with the commentary to the guideline. See, e.g., United States v. Nieves-Borrero, 856 F.3d 5 (1st Cir. 2017); United States v. Jackson, 60 F.3d 128 (2d Cir. 1995); United States v. Dozier, 848 F.3d 180 (4th Cir. 2017); United States v. Guerra, 962 F.2d 484 (5th Cir. 1992); United States v. Evans, 699 F.3d 858 (6th Cir. 2012); United States v. Tate, 822 F.3d 370 (7th Cir. 2016); United States v. Mendoza-Figueroa, 65 F.3d 691 (8th Cir. 1995); United States v. Sarbia, 367 F.3d 1079 (9th Cir. 2004); United States v. McKibbon, 878 F.3d 967 (10th Cir. 2017); United States v. Lange, 862 F.3d 1290 (11th Cir. 2017). However, a recent decision from the D.C. Circuit concluded otherwise for

purposes of the "controlled substance offense" definition. See United States v. Winstead, 890 F.3d 1082, 1091 (D.C. Cir. May 25, 2018) ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses.").

Part C of the proposed amendment would address these issues by amending §4B1.2 (Definitions of Terms Used in Section 4B1.1) and its commentary. As indicated above, the commentary that accompanies the guidelines is authoritative and failure to follow the commentary would constitute an incorrect application of the guidelines, subjecting the sentence imposed to possible reversal on appeal. See 18 U.S.C. § 3742. However, the Commission proposes to move the inchoate offenses provision from the Commentary to §4B1.2 to the guideline itself as a new subsection (c) to alleviate any confusion and uncertainty resulting from the D.C. Circuit's decision.

In addition to moving the inchoate offenses provision from the Commentary to the guideline, Part C of the proposed amendment would revise the provision to provide that the terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a "crime of violence" or a "controlled substance offense." Three options are provided to address the other issues brought by the Department of Justice in different ways.

Option 1 would address the conspiracy issue in a comprehensive manner that would be

applicable to all other inchoate offenses and offenses arising from accomplice liability. It would eliminate the need for the two-step analysis discussed above by adding the following to the new subsection (c): "To determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability."

Option 2, similar to Option 1, would eliminate the need for the two-step analysis generally by providing that to determine whether an inchoate offense or an offense arising from accomplice liability qualifies as a "crime of violence" or "controlled substance offense," the court shall only determine whether the underlying substantive offense is a "crime of violence" or a "controlled substance offense," and shall not consider the elements of the inchoate offense or offense arising from accomplice liability. However, Option 2 sets forth two suboptions to address conspiracy offenses. Suboption 2A would provide that an offense of conspiring to commit a "crime of violence" or a "controlled substance offense" qualifies as a "crime of violence" or a "controlled substance offense" only if the underlying substantive offense is a "crime of violence" or a "controlled substance offense" and an overt act must be proved as an element of the conspiracy offense. Suboption 2B treats "crime of violence" and "controlled substance offense" differently with respect to conspiracy offenses. It would eliminate the need for the two-step analysis for an offense of conspiring to commit a "crime of violence," but it would provide that an offense of conspiring to commit a "controlled substance offense" qualifies as a "controlled substance

offense" only if the underlying substantive offense is a "controlled substance offense" and an overt act must be proved as an element of the conspiracy offense.

Option 3 would take a narrower approach, addressing only the conspiracy issue, and not adding language to subsection (c) eliminating the two-step analysis described above. Option 3 would amend the commentary to add an application note relating to offenses of conspiring to commit a "crime of violence" or a "controlled substance offense." It sets forth two suboptions.

Suboption 3A treats offenses of conspiring to commit a "crime of violence" or a "controlled substance offense" the same way but brackets two possible alternatives for the overt-act issue. It provides that an offense of conspiring to commit a "crime of violence" or a "controlled substance offense" qualifies as a "crime of violence" or a "controlled substance offense," [regardless of whether][only if] an overt act must be proved as an element of the conspiracy offense.

Suboption 3B treats "crime of violence" and "controlled substance offense" differently with respect to conspiracy offenses. It provides that an offense of conspiring to commit a "crime of violence" qualifies as a "crime of violence," regardless of whether an overt act must be proved as an element of the conspiracy offense; however, an offense of conspiring to commit a "controlled substance offense" qualifies as a "controlled substance offense" only if an overt act must be proved as an element of the conspiracy offense.

Issues for comment are also provided.

Proposed Amendment:

Section 4B1.2 is amended by redesignating subsection (c) as subsection (d), and inserting the following new subsection (c):

[Option 1 (which also includes changes to the commentary):

"(c) The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, **[**soliciting to commit,**]** or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.' To determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.".**]**

[Option 2 (which also includes changes to the commentary):

[Suboption 2A:

"(c) The terms 'crime of violence' and 'controlled substance offense' include the offenses of

aiding and abetting, attempting to commit, **[**soliciting to commit,**]** or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.' To determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' except for an offense of conspiring to commit a 'crime of violence' or 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.

An offense of conspiring to commit a 'crime of violence' or a 'controlled substance offense,' however, qualifies as a 'crime of violence' or a 'controlled substance offense' only if the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense' and an overt act must be proved as an element of the conspiracy offense.".**]**

[Suboption 2B:

"(c) The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, **[**soliciting to commit,**]** or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.'

To determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' except for an offense of conspiring to commit a 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.

An offense of conspiring to commit a 'controlled substance offense,' however, qualifies as a 'controlled substance offense' only if the underlying substantive offense is a 'controlled substance offense' and an overt act must be proved as an element of the conspiracy offense.".**]]**

[Option 3 (which also includes changes to the commentary):

"(c) The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, **[**soliciting to commit,**]** or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.'".**]**

[Options 1, 2, and 3 (continued):

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 1 by striking the following "'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."; and in the paragraph that begins "A violation of 18 U.S.C.§ 924 (c) or § 929(a)" by striking "was a 'crime of violence' or a 'controlled substance offense'." and inserting "was a 'crime of violence' or a 'controlled substance offense.'".**]**

[Option 3 (continued):

The Commentary to §4B1.2 captioned "Application Notes" is further amended by redesignating Notes 3 and 4 as Notes 4 and 5, respectively, and inserting the following new Note 3:

[Suboption 3A:

"3. Application of Subsection (c).—For purposes of subsection (c), an offense of conspiring to commit a 'crime of violence' or a 'controlled substance offense' qualifies as a 'crime of violence' or a 'controlled substance offense,' **[**regardless of whether**][**only if**]** an overt act must be proved as an element of the conspiracy offense.".**]**

[Suboption 3B:

"3. Application of Subsection (c).—For purposes of subsection (c), an offense of conspiring to commit a 'crime of violence' qualifies as a 'crime of violence,' regardless of whether an overt act must be proved as an element of the conspiracy offense. An offense of conspiring to commit a 'controlled substance offense,' however, qualifies as a 'controlled substance offense' only if an overt act must be proved as an element of the conspiracy offense.".**]]**

Issues for Comment:

1. As indicated above, in determining whether an inchoate offense is a "crime of violence" or a "controlled substance offense," some courts have employed a two-step analysis. First, courts compare the substantive offense to its generic definition to determine whether it is "crime of violence" or a "controlled substance offense." Then, these courts make a second and separate analysis comparing the inchoate offense involving that substantive offense to the generic definition of the specific inchoate offense. To promote clarity and consistency in the application of the career offender guideline, Option 1 of Part C of the proposed amendment would amend §4B1.2 (Definitions of Terms Used in Section 4B1.1) to clarify that the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit a "crime of violence" or a "controlled substance offense," or any other inchoate offense or offense arising from accomplice

liability involving a "crime of violence" or a "controlled substance offense" are a "crime of violence" or a "controlled substance offense" if the substantive offense is a "crime of violence" or a "controlled substance offense."

The Commission seeks comment on whether the guidelines should be amended to make this clarification. Should the guidelines adopt a different approach for these types of offenses? If so, what should that different approach be? For example, should the Commission require the courts to use a two-step analysis in determining whether an inchoate offense is a "crime of violence" or a "controlled substance offense"? Should the Commission require courts to use a two-step analysis for an inchoate offense involving a "controlled substance offense" but provide that an inchoate offense involving a "crime of violence" is always a "crime of violence" if the substantive offense is a "crime of violence"?

2. The Commission seeks comment on how the guidelines definitions of "crime of violence" and "controlled substance offense" should address the offenses of aiding and abetting, attempting to commit, soliciting to commit, or conspiring to commit a "crime of violence" or a "controlled substance offense," or any other inchoate offense or offense arising from accomplice liability involving a "crime of violence" or a "controlled substance offense." Specifically, should the Commission promulgate any of the options provided above? Should the Commission provide additional requirements or guidance to address these types of offenses? What additional requirements or guidance, if any, should

the Commission provide?

(D) Definition of "Controlled Substance Offense"

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

In its annual letter to the Commission, the Department of Justice has raised a concern that courts have held that state drug statutes that include an offense involving an "offer to sell" a controlled substance do not qualify as a "controlled substance offense" under §4B1.2(b) because such statutes encompass conduct that is broader than §4B1.2(b)'s definition of a "controlled substance offense." See Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf. The Commission previously addressed a similar issue regarding the definition of a "drug trafficking offense" in the illegal reentry guideline at §2L1.2 (Unlawfully Entering or Remaining in the United States). In 2008, the Commission amended the Commentary to §2L1.2 to clarify that an offer to sell a controlled substance is a "drug trafficking offense" for purposes of that guideline, by adding "offer to sell" to the conduct listed in the definition of "drug trafficking offense." See USSG App. C, Amendment 722 (effective Nov. 1,

2008). In 2016, the Commission comprehensively revised §2L1.2. Among the changes made, the Commission amended the definition of "crime of violence" in the Commentary to §2L1.2 to conform it to the definition in §4B1.2, but the Commission did not make changes to the "drug trafficking offense" definition in the Commentary to §2L1.2.

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

> An individual may not knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board–
>
> (1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or
>
> (2) any vessel if the individual is a citizen of the United States or a resident alien of the United States.

46 U.S.C. § 70503(a) (2012). Section 70506(b) provided that a person attempting or conspiring

to violate section 70503 was subject to the same penalties as provided for violating section 70503.

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

> While on board a covered vessel, an individual may not knowingly or intentionally-
>
> (1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;
>
> (2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)); or
>
> (3) conceal, or attempt or conspire to conceal, more than $100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

46 U.S.C. § 70503(a). Section 70506(b) remained unchanged. The Act added two new offenses to section 70503(a), in subparagraphs (2) and (3). Accordingly, "chapter 705 of title 46," as referenced in 28 U.S.C. § 994(h), was also amended. However, these two new offenses may not

be covered by the current definition of "controlled substance offense" in §4B1.2.

Part D of the proposed amendment would amend the definition of "controlled substance offense" in §4B1.2(b) to address these issues. First, it would amend the definition to include offenses involving an offer to sell a controlled substance, which would align it with the current definition of "drug trafficking offense" in the Commentary to §2L1.2. Second, it would revise the "controlled substance offense" definition to also include "an offense described in 46 U.S.C. § 70503(a) or § 70506(b)."

An issue for comment is also provided.

Proposed Amendment:

Section 4B1.2(b) is amended by striking the following:

"The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.",

and inserting the following:

"The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or

(2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).".

Issue for Comment:

1. Part D of the proposed amendment would amend the definition of "controlled substance offense" in subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) to include offenses involving an offer to sell a controlled substance. The Commission seeks comment on the extent to which such offenses should be included as "controlled substance offenses" for purposes of the career offender guideline. Are there other drug offenses that are not included under this definition, but should be? For example, should the Commission expressly include as part of the definition offenses involving the transportation of controlled substances?

If the Commission were to amend the definition of "controlled substance offense" in §4B1.2(b) to include other drug offenses, in addition to offenses involving an offer to sell a controlled substance, should the Commission revise the definition of "controlled substance offense" at §2L1.2 (Unlawfully Entering or Remaining in the United States) to conform it to the revised definition set forth in §4B1.2(b)?

3. Miscellaneous

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues. See U.S. Sentencing Comm'n, "Notice of Final Priorities," 83 FR 43956 (Aug. 28, 2018) (identifying as priorities "[i]mplementation of any legislation warranting Commission action" and "[c]onsideration of other miscellaneous issues[]").

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

Part A responds to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (Aug. 18, 2017), by amending Appendix A (Statutory Index) and the Commentary to §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product). It also makes a technical correction to the Commentary to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily

Injury). An issue for comment is also provided.

Part B responds to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (Oct. 8, 2018), by amending Appendix A and §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle), as well as the commentaries to §2A2.4 (Obstructing or Impeding Officers) and §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). An issue for comment is also provided.

Part C responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (Apr. 11, 2018), by amending Appendix A, §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). Issues for comment are also provided.

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

offenses covered by §2G1.3, like offenses covered by §2G1.1, are not grouped under subsection (d).

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

(A) FDA Reauthorization Act of 2017

Synopsis of Proposed Amendment: Part A of the proposed amendment responds to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (Aug. 18, 2017).

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

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

21 U.S.C. § 333(b)(8). Section 331(i)(3) prohibits any action which causes a drug to be a

counterfeit drug, or the sale or dispensing, or the holding for sale or dispensing, of a counterfeit drug.

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

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

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 21 U.S.C. § 458 the following new line reference:

"21 U.S.C. §333(b)(8) 2N2.1".

The Commentary to §2N2.1 captioned "Statutory Provisions" is amended by striking "333(a)(1), (a)(2), (b)" and inserting "333(a)(1), (a)(2), (b)(1)-(6), (b)(8)".

The Commentary to §2N1.1 captioned "Statutory Provisions" is amended by striking "18 U.S.C. § 1365(a), (e)" and inserting "18 U.S.C. § 1365(a), (e); 21 U.S.C. § 333(b)(7). For additional statutory provision(s), see Appendix A (Statutory Index)".

Issue for Comment:

1. Part A of the proposed amendment references newly-enacted 21 U.S.C. § 333(b)(8) to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product). The Commission seeks comment on whether any additional changes to the guidelines are required to account for section 333(b)(8)'s offense conduct. Specifically, should the Commission amend §2N2.1 to provide a higher or lower base offense level if 21 U.S.C. § 333(b)(8) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to §2N2.1 in response to section 333(b)(8)? If so, what should that specific offense characteristic provide and why?

(B) FAA Reauthorization Act of 2018

Synopsis of Proposed Amendment: Part B of the Proposed Amendment responds to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (Oct. 8, 2018). That act created two new criminal offenses concerning the operation of unmanned aircraft, commonly known as "drones," and added a new provision to an existing criminal statute that also concerns drones.

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

The second new criminal offense, codified at 18 U.S.C. § 40A (Operation of unauthorized

unmanned aircraft over wildfires), generally prohibits any individual from operating an unmanned aircraft and knowingly or recklessly interfering with a wildfire suppression or with law enforcement or emergency response efforts related to a wildfire suppression. A violation of this offense is punishable by a fine, imprisonment for not more than two years, or both.

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

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

In addition, Part B would amend Appendix A to reference 18 U.S.C. § 40A to §2A2.4

(Obstructing or Impeding Officers). Part B would also make conforming changes to the Commentary to §2A2.4.

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

An issue for comment is also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. § 43" the following new line references:

"18 U.S.C. § 39B 2A5.2, 2X5.2

18 U.S.C. § 40A 2A2.4".

Section 2A5.2 is amended in the heading by striking "Vehicle" and inserting "Vehicle; Unsafe Operation of Unmanned Aircraft".

The Commentary to §2A5.2 captioned "Statutory Provisions" is amended by striking "18 U.S.C.

§ 1992(a)(1)" and inserting "18 U.S.C. §§ 39B, 1992(a)(1)".

The Commentary to §2X5.2 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 1365(f)" and inserting "18 U.S.C. §§ 39B, 1365(f)", and by striking "49 U.S.C. § 31310" and inserting "49 U.S.C. § 31310. For additional statutory provision(s), see Appendix A (Statutory Index)".

The Commentary to §2A2.4 captioned "Statutory Provisions" is amended by striking "18 U.S.C. §§ 111" and inserting "18 U.S.C. §§ 40A, 111".

Issue for Comment:

1. In response to the FAA Reauthorization Act of 2018, Pub. L. 115–254 (Oct. 8, 2018), Part B of the proposed amendment references newly-enacted 18 U.S.C. § 39B to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle) and §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). Part B also references newly-enacted 18 U.S.C. § 40A to §2A2.4 (Obstructing or Impeding Officers). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for the new criminal offenses created by the FAA Reauthorization Act.

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

Synopsis of Proposed Amendment: Part C of the proposed amendment responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (Apr. 11, 2018).

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

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

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

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

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

If the offense involved a minor, §2G1.3 would be the applicable guideline. For a defendant convicted under 18 U.S.C. § 2421A, subsection (a)(4) would apply, and the defendant's base offense level would be level 24. Part C would amend §2G1.3(b)(4) to renumber the existing

specific offense characteristic as §2G1.3(b)(4)(A) and to add a new §2G1.3(b)(4)(B), which provides for a [4]-level increase in the defendant's offense level if (i) subsection (a)(4) applies; and (ii) [the offense of conviction is][the offense involved conduct described in] 18 U.S.C. § 2421A(b)(2). Only the greater of §2G1.3(b)(4)(A) or §2G1.3(b)(4)(B) would apply.

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

Finally, Part C would make conforming changes to §§2G1.1 and 2G1.3 and their commentaries.

Issues for comment are also provided.

Proposed Amendment:

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. § 2422 the following new line reference:

"18 U.S.C. § 2421A 2G1.1, 2G1.3".

Section 2G1.1(b)(1)(B) is amended by striking "the offense involved fraud or coercion" and inserting "(i) the offense involved fraud or coercion, or (ii) **[**the offense of conviction is**][**the offense involved conduct described in**]** 18 U.S.C. § 2421(A)(b)(2)".

The Commentary to §2G1.1 captioned "Statutory Provisions" is amended by striking "2422(a) (only if the offense involved a victim other than a minor)" and inserting "2421A (only if the offense involved a victim other than a minor), 2422(a) (only if the offense involved a victim other than a minor). For additional statutory provision(s), see Appendix A (Statutory Index)".

Section 2G1.3(b) is amended in paragraph (4) by striking the following:

"If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.",

and inserting the following:

"(Apply the greater):

(A) If (i) the offense involved the commission of a sex act or sexual contact; or
(ii) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.

(B) If (i) subsection (a)(4) applies; and (ii) **[**the offense of conviction is**][**the offense involved conduct described in**]** 18 U.S.C. § 2421A(b)(2), increase by **[**4**]** levels.".

The Commentary to §2G1.3 captioned "Statutory Provisions" is amended by striking "2422 (only if the offense involved a minor), 2423, 2425" and inserting "2421A (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2423, 2425. For additional statutory provision(s), see Appendix A (Statutory Index)".

The Commentary to §2G1.3 captioned "Application Notes" is amended by redesignating Notes 5, 6, and 7 as Notes 6, 7, and 8, respectively, and inserting the following new Note 5:

"5. Application of Subsection (b)(3)(B) when the Offense of Conviction is 18 U.S.C. § 2421A.—If the offense of conviction is 18 U.S.C. § 2421A, do not apply subsection (b)(3)(B).".

Issues for Comment:

1. Part C of the proposed amendment would reference newly-enacted 18 U.S.C. § 2421A to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a

Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), and would make various revisions to those guidelines to account for the new statute's offense conduct. The Commission seeks comment on whether the proposed revisions are appropriate and on whether the Commission should make other changes to the guidelines to account for section 2421A's offense conduct.

In particular, Part C would rely on the specific offense characteristics and special instructions in §§2G1.1 and 2G1.3 to produce the appropriate offense levels for the aggravated offense at 18 U.S.C. § 2421A(b). Should the Commission account for the aggravated offense in a different way, for example, by providing a higher base offense level if a defendant is convicted of that offense? If so, should the Commission use one of the base offense levels currently provided for convictions under other offenses, such as level 28, provided by §2G1.3 for a conviction under 18 U.S.C. § 2422(b) or 2423(a), or level 34, provided by §§ 2G1.1 and 2G1.3 for a conviction under 18 U.S.C. § 1591(b)(1)?

2. Newly-enacted 18 U.S.C. § 2421A is codified in chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) of title 18 of the United States Code, which contains statutes that generally prohibit conduct intended to promote or facilitate prostitution. Various guidelines refer to chapter 117, including §4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and §5D1.2 (Term of Supervised Release). The Commission

seeks comment on whether it should amend those guidelines to account for 18 U.S.C. § 2421A.

Specifically, §4B1.5 provides for increases in the defendant's offense level if the offense of conviction is a "covered sex crime." Application Note 2 of the Commentary to §4B1.5 states that a "covered sex crime" generally includes offenses under chapter 117 but excludes from coverage the offenses of "transmitting information about a minor or filing a factual statement about an alien individual." Should the Commission also exclude 18 U.S.C. § 2421A from the definition of a "covered sex crime"? If so, why? If not, why not?

Section 5D1.2 includes a policy statement recommending that the court impose the statutory maximum term of supervised release if the instant offense of conviction is a "sex offense." Application Note 1 of the Commentary to §5D1.2 defines "sex offense" to mean, among other things, an offense, perpetrated against a minor, under chapter 117, "not including transmitting information about a minor or filing a factual statement about an alien individual." Should the Commission also exclude offenses under 18 U.S.C. § 2421A from the definition of "sex offense" in Application Note 1? If so, why? If not, why not?

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

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

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

Section 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) is included in the list of guidelines for which the covered offenses

are excluded from grouping under §3D1.2(d). Section 2G1.3 is, however, not included on that list, even though several offenses that are referenced to §2G1.3 when the offense involves a minor are referenced to §2G1.1 when the offense involves an individual other than a minor. In addition, several offenses that were referenced to §2G1.1 before §2G1.3 was promulgated are now referenced to §2G1.3. See USSG App. C, Amendment 664 (effective Nov. 1, 2004). Furthermore, Application Note 6 of the Commentary to §2G1.3 states that multiple counts under §2G1.3 are not to be grouped.

Section 2G1.3 is also not included on the list of guidelines for which the covered offenses are to be grouped under §3D1.2(d). Because §2G1.3 is included on neither list, §3D.1(d) provides that "grouping under [the] subsection may or may not be appropriate and a "case-by-case determination must be made based upon the facts of the case and the applicable guideline (including specific offense characteristics and other adjustments) used to determine the offense level."

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

Proposed Amendment:

Section 3D1.2(d) is amended by striking "§§2G1.1, 2G2.1" and inserting "§§2G1.1, 2G1.3, 2G2.1".

(E) Policy Statement on Shock Incarceration Programs

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

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

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

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

Proposed Amendment:

The Commentary to §5F1.7 captioned "Background" is amended by—

striking "six months" and inserting "6 months";

striking "as the Bureau deems appropriate. 18 U.S.C. § 4046.'" and inserting "as the Bureau deems appropriate.' 18 U.S.C. § 4046.";

and by striking the final paragraph as follows:

" The Bureau of Prisons has issued an operations memorandum (174-90 (5390), November 20, 1990) that outlines eligibility criteria and procedures for the implementation of this program (which the Bureau of Prisons has titled "intensive confinement program"). Under these procedures, the Bureau will not place a defendant in an intensive confinement program unless the sentencing court has approved, either at the time of sentencing or upon consultation after the Bureau has determined that the defendant is otherwise eligible. In return for the successful completion of the "intensive confinement" portion of the program, the defendant is

eligible to serve the remainder of his term of imprisonment in a graduated release program comprised of community corrections center and home confinement phases.",

and inserting the following:

" In 1990, the Bureau of Prisons ('BOP') issued an operations memorandum (174-90 (5390), November 20, 1990) that outlined eligibility criteria and procedures for the implementation of a shock incarceration program (which the Bureau of Prisons titled the "intensive confinement program"). In 2008, however, BOP terminated the program and removed the rules governing its operation. See 73 Fed. Reg. 39863 (July 11, 2008).".

4. Technical Amendment

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

Part A of the proposed amendment makes technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective December 1, 2015, the Office of Law Revision Counsel eliminated the Appendix to Title 50 of the United States Code and transferred the non-obsolete provisions to new chapters 49 to 57 of Title 50 and to other titles of the Code. To reflect the new section numbers of the reclassified provisions, Part A of the proposed amendment makes changes to §2M4.1 (Failure to Register and Evasion of Military

Service), §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism), and Appendix A (Statutory Index). Similarly, effective September 1, 2016, the Office of Law Revision Counsel also transferred certain provisions from Chapter 14 of Title 25 to four new chapters in Title 25 in order to improve the organization of the title. To reflect these changes, Part A of the proposed amendment makes further changes to Appendix A.

Part B of the proposed amendment makes certain technical changes to the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). First, Part B of the proposed amendment amends the Drug Conversion Tables at Application Note 8(D) and the Typical Weight Per Unit Table at Application Note 9, to reorganize the controlled substances contained therein in alphabetical order to make the tables more user-friendly. It also makes minor changes to the controlled substance references to promote consistency in the use of capitalization, commas, parentheticals, and slash symbols throughout the Drug Conversion Tables. For example, the proposed amendment would change the reference to "Phencyclidine (actual) /PCP (actual)" to "Phencyclidine (PCP) (actual)." Second, Part B of the proposed amendment makes clerical changes throughout the Commentary to correct some typographical errors. Finally, Part B of the proposed amendment amends the Background Commentary to add a specific reference to amendment 808, which replaced the term "marihuana equivalency" with the new term "converted drug weight" and changed the title of the "Drug Equivalency Tables" to "Drug Conversion Tables."

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

Part D of the proposed amendment makes clerical changes to—

(1) the Background Commentary to §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)), to update the citation of a Supreme Court case;

(2) the Background Commentary to §3D1.1 (Procedure for Determining Offense Level on Multiple Counts), to correct references to certain chapters of the Guidelines Manual; and

(3) the Background Commentary to §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment), to update the citation of a Supreme Court case.

Proposed Amendment:

(A) Reclassification of Sections of United States Code

The Commentary to §2M4.1 captioned "Statutory Provisions" is amended by striking "50 U.S.C. App. § 462" and inserting "50 U.S.C. § 3811".

The Commentary to §2M5.1 captioned "Statutory Provisions" is amended by striking "50 U.S.C. App. §§ 2401–2420" and inserting "50 U.S.C. §§ 4601–4623. For additional statutory provision(s), see Appendix A (Statutory Index)".

The Commentary to §2M5.1 captioned "Application Notes" is amended—

in Note 3 by striking "50 U.S.C. App. § 2410" and inserting "50 U.S.C. § 4610";

and in Note 4 by striking "50 U.S.C. App. 2405" and inserting "50 U.S.C. § 4605".

Appendix A (Statutory Index) is amended—

in the line referenced to 25 U.S.C. § 450d by striking "§ 450d" and inserting "§ 5306";

and by striking the lines referenced to 50 U.S.C. App. § 462, 50 U.S.C. App. § 527(e), and

50 U.S.C. App. § 2410, and inserting before the line referenced to 52 U.S.C. § 10307(c) the following new line references:

"50 U.S.C. § 3811	2M4.1
50 U.S.C. § 3937	2X5.2
50 U.S.C. § 4610	2M5.1".

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

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

in Note 8(A) by striking "the statute (21 U.S.C. § 841(b)(1)), as the primary basis" and inserting "the statute (21 U.S.C. § 841(b)(1)) as the primary basis", and by striking "fentanyl, LSD and marihuana" and inserting "fentanyl, LSD, and marihuana";

in Note 8(D)—

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

"1 gm of Heroin =	1 kg

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

1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg",

and inserting the following:

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

1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm
1 gm of Morphine =	500 gm
1 gm of Opium =	50 gm
1 gm of Oxycodone (actual) =	6,700 gm
1 gm of Oxymorphone =	5 kg
1 gm of Racemorphan =	800 gm”;

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

“1 gm of Cocaine =	200 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of Fenethylline =	40 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (Actual) =	20 kg
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (Actual) =	20 kg
1 gm of “Ice” =	20 kg
1 gm of Khat =	.01 gm
1 gm of 4-Methylaminorex (“Euphoria”) =	100 gm
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of Phenmetrazine =	80 gm

1 gm Phenylacetone/P_2P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm Phenylacetone/P_2P (in any other case) =	75 gm
1 gm Cocaine Base (“Crack”) =	3,571 gm
1 gm of Aminorex =	100 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of N-Benzylpiperazine =	100 gm”,

and inserting the following:

“1 gm of 4-Methylaminorex (“Euphoria”) =	100 gm
1 gm of Aminorex =	100 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (actual) =	20 kg
1 gm of Cocaine =	200 gm
1 gm of Cocaine Base (“Crack”) =	3,571 gm
1 gm of Fenethylline =	40 gm
1 gm of “Ice” =	20 kg
1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (actual) =	20 kg
1 gm of Methylphenidate (Ritalin) =	100 gm

1 gm of N-Benzylpiperazine =	100 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of Phenmetrazine =	80 gm
1 gm of Phenylacetone (P_2P) (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm of Phenylacetone (P_2P) (in any other case) =	75 gm”;

Under the heading relating to Synthetic Cathinones (except Schedule III, IV, and V Substances), by striking “a synthetic cathinone” and inserting “a Synthetic Cathinone”;

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

“1 gm of Bufotenine =	70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg
1 gm of Diethyltryptamine/DET =	80 gm
1 gm of Dimethyltryptamine/DM =	100 gm
1 gm of Mescaline =	10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm
1 gm of Mushrooms containing Psilocin and/or	

Psilocybin (Wet) =	0.1 gm
1 gm of Peyote (Dry) =	0.5 gm
1 gm of Peyote (Wet) =	0.05 gm
1 gm of Phencyclidine/PCP =	1 kg
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg
1 gm of Psilocin =	500 gm
1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA =	500 gm
1 gm of Paramethoxymethamphetamine/PMA =	500 gm
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg",

and inserting the following:

"1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) =	680 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =	2.5 kg

1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) =	500 gm
1 gm of Bufotenine =	70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide (LSD) =	100 kg
1 gm of Diethyltryptamine (DET) =	80 gm
1 gm of Dimethyltryptamine (DM) =	100 gm
1 gm of Mescaline =	10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (dry) =	1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (wet) =	0.1 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg
1 gm of Paramethoxymethamphetamine (PMA) =	500 gm
1 gm of Peyote (dry) =	0.5 gm
1 gm of Peyote (wet) =	0.05 gm
1 gm of Phencyclidine (PCP) =	1 kg
1 gm of Phencyclidine (PCP) (actual) =	10 kg
1 gm of Psilocin =	500 gm
1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine (PHP) =	1 kg

1 gm of Thiophene Analog of Phencyclidine (TCP) =	1 kg”;

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

“1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm
1 gm of Hashish Oil =	50 gm
1 gm of Cannabis Resin or Hashish =	5 gm
1 gm of Tetrahydrocannabinol, Organic =	167 gm
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm”,

and inserting the following:

“1 gm of Cannabis Resin or Hashish =	5 gm
1 gm of Hashish Oil =	50 gm
1 gm of Marihuana/Cannabis (granulated, powdered, etc.) =	1 gm
1 gm of Tetrahydrocannabinol (organic) =	167 gm
1 gm of Tetrahydrocannabinol (synthetic) =	167 gm”;

under the heading relating to Synthetic Cannabinoids (except Schedule III, IV, and V Substances), by striking “a synthetic cannabinoid” and inserting “a Synthetic Cannabinoid”, and by striking “‘Synthetic cannabinoid,’ for purposes of this guideline” and inserting “‘Synthetic Cannabinoid,’ for purposes of this guideline”;

under the heading relating to Schedule I or II Depressants (except gamma-hydroxybutyric acid), by striking "except gamma-hydroxybutyric acid" both places such term appears and inserting "except Gamma-hydroxybutyric Acid";

under the heading relating to Gamma-hydroxybutyric Acid, by striking "of gamma-hydroxybutyric acid" and inserting "of Gamma-hydroxybutyric Acid";

under the heading relating to Schedule III Substances (except ketamine), by striking "except ketamine" in the heading and inserting "except Ketamine";

under the heading relating to Ketamine, by striking "of ketamine" and inserting "of Ketamine";

under the heading relating to Schedule IV (except flunitrazepam), by striking "except flunitrazepam" in the heading and inserting "except Flunitrazepam";

under the heading relating to List I Chemicals (relating to the manufacture of amphetamine or methamphetamine), by striking "of amphetamine or methamphetamine" and inserting "of Amphetamine or Methamphetamine";

under the heading relating to Date Rape Drugs (except flunitrazepam, GHB, or ketamine), by striking "except flunitrazepam, GHB, or ketamine" and inserting "except Flunitrazepam, GHB,

or Ketamine", by striking "of 1,4-butanediol" and inserting "of 1,4-Butanediol", and by striking "of gamma butyrolactone" and inserting "of Gamma Butyrolactone";

in Note 9, under the heading relating to Hallucinogens, by striking the following:

"MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg",

and inserting the following:

"2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg
MDA	250 mg
MDMA	250 mg

Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg”;

and in Note 21, by striking “Section §5C1.2(b)” and inserting “Section 5C1.2(b)”.

The Commentary to §2D1.1 captioned “Background” is amended by striking “Public Law 103–237” and inserting “Public Law 104–237”, and by inserting after “to change the title of the Drug Equivalency Tables to the ‘Drug Conversion Tables.’” the following: “See USSG App. C, Amendment 808 (effective November 1, 2018).”.

(C) References to 18 U.S.C. § 876

The Commentary to §2A4.2 captioned “Statutory Provisions” is amended by striking “§§ 876,” and inserting “§§ 876(a),”.

The Commentary to §2A6.1 captioned “Statutory Provisions” is amended by striking “876,” and

inserting “876(c),”.

The Commentary to §2B3.2 captioned “Statutory Provisions” is amended by striking “§§ 875(b), 876,” and inserting “§§ 875(b), (d), 876(b), (d),”.

Appendix A (Statutory Index) is amended by striking the line referenced to 18 U.S.C. § 876 and inserting before the line referenced to 18 U.S.C. § 877 the following new line references:

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

(D) Clerical Changes

The Commentary to §1B1.11 captioned “Background” is amended by striking “133 S. Ct. 2072, 2078” and inserting “569 U.S. 530, 533”.

The Commentary to §3D1.1 captioned “Background” is amended by striking “Chapter 3, Part E

(Acceptance of Responsibility) and Chapter 4, Part B (Career Offenders and Criminal Livelihood)" and inserting "Chapter Three, Part E (Acceptance of Responsibility) and Chapter Four, Part B (Career Offenders and Criminal Livelihood)".

The Commentary to §5G1.3 captioned "Background" is amended by striking "122 S. Ct. 1463, 1468" and inserting "566 U.S. 231, 236", and by striking "132 S. Ct. at 1468" and inserting "566 U.S. at 236".