**BAC 2210-40**

**UNITED STATES SENTENCING COMMISSION**

**Sentencing Guidelines for United States Courts**

**AGENCY:** United States Sentencing Commission

**ACTION:** Notice and request for public comment and hearing.

**SUMMARY:** 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 proposed 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:** *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 3, 2025**. Written reply comments, which may only respond to issues raised during the original comment period, should be received by

the Commission not later than **February 18, 2025**. 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.

*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:** There are two methods for submitting public comment.

*Electronic Submission of Comments*. Comments may be submitted electronically via the Commission's Public Comment Submission Portal at https://comment.ussc.gov. Follow the online instructions for submitting comments.

*Submission of Comments by Mail*. Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Proposed Amendments.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4597.

**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 proposed amendment relating to §4B1.2 (Definitions of Terms Used in Section 4B1.1), including amendments to (A) §4B1.2 to eliminate the use of the categorical and modified categorical approaches by providing a definition for “crime of violence” that is based on a defendant’s conduct and a definition of “controlled substance offense” that lists specific federal drug statutes; (B) the commentary 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 (C) related issues for comment.

(2) A two-part proposed amendment to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), including (A) amendments to §2K2.1 to address its application to offenses involving machinegun conversion devices (MCDs), and related issues for comment; and (B) an amendment to §2K2.1(b)(4) to establish a *mens rea* requirement for the enhancements for stolen firearms and firearms with modified serial numbers, and a related issue for comment.

(3) A two-part proposed amendment addressing certain circuit conflicts involving §2B3.1 (Robbery) and §4A1.2 (Definitions and Instructions for Computing Criminal History), including (A) three options for amending §2B3.1(b)(4)(B) to address a circuit conflict concerning whether the "physically restrained" enhancement can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those listed in the "physically restrained" definition set forth in the Commentary to §1B1.1 (Application Instructions), and related issues for comment; and (B) an amendment to §4A1.2(a)(2) to address a circuit conflict concerning whether a traffic stop is an "intervening arrest" for purposes of determining whether multiple prior sentences should be "counted separately or treated as a single sentence" when assigning criminal history points ("single-sentence rule").

(4) A two-part proposed amendment to the *Guidelines Manual*, including (A) request for public comment on whether any changes should be made to the *Guidelines Manual* relating to the three-step process set forth in §1B1.1 (Application Instructions) and the use of departures and policy statements relating to specific personal characteristics; and (B) amendments that would restructure the *Guidelines Manual* to simplify both (1) the current three-step process utilized in determining a sentence that is "sufficient, but not greater than necessary," and (2) existing guidance in the *Guidelines Manual* regarding a court's consideration of the individual circumstances of the defendant as well as certain offense characteristics.

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

The text of the proposed amendments and related issues for comment are set forth below. Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission's website at www.ussc.gov. In addition, as required by 5 U.S.C. 553(b)(4), plain-language summaries of the proposed amendments are available at https://www.ussc.gov/guidelines/amendments/proposed-2025-amendments-federal-sentencing-guidelines-published-december-2024.

**AUTHORITY:** 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 2.2, 4.3, 4.4.

**Carlton W. Reeves,**

*Chair*.

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

### 1. CAREER OFFENDER

**Synopsis of Proposed Amendment:** In August 2024, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2025, "[s]implifying the guidelines and clarifying their role in sentencing," including "revising the 'categorical approach' for purposes of the career offender guideline." U.S. Sent'g Comm'n, "Notice of Final Priorities," 89 FR 66176 (Aug. 14, 2024).

The proposed amendment addresses recurrent criticism of the categorical approach and modified categorical approach, which courts have applied in the context of §4B1.1 (Career Offender). It would eliminate the categorical approach when determining whether an offense qualifies as a crime of violence by providing a definition for "crime of violence" that is based on a defendant's conduct and a definition of "controlled substance offense" that is limited to specific federal drug statutes. These changes are intended to correct some of the "odd" and "arbitrary" results that the categorical approach has produced relating to the "crime of violence" definition (*see*, *e.g.*, *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017); *United States v. McCollum*, 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring); *id*. (Wilkinson, J., dissenting)), and to provide a definition of "controlled substance offense" that is based on enumerated federal drug trafficking offenses.

*The Categorical Approach as Developed by Supreme Court Jurisprudence*

Several statutes and guidelines provide enhanced penalties for defendants convicted of offenses that meet the definition of a particular category of crimes. Courts typically determine whether a conviction fits within the definition of a particular category of crimes through the application of the "categorical approach" and "modified categorical approach," as set forth by Supreme Court jurisprudence. The categorical and modified categorical approaches require courts to look only to the elements of the offense, rather than the particular facts underlying the conviction, to determine whether the offense meets the definition of a particular category of crimes. In applying the modified categorical approach, courts may look to certain additional sources of information, now commonly referred to as the "*Shepard* documents," to determine the elements of the offense of conviction. *See* Taylor v. United States, 495 U.S. 575 (1990) (holding that, under the "categorical approach," courts must compare the elements of the offense as described in the statute of conviction to the elements of the applicable definition of a particular category of crimes to determine if such offense criminalizes the same or a narrower range of conduct than the definition captures in order to serve as a predicate offense); Shepard v. United States, 544 U.S. 13 (2005) (holding that courts may use a "modified categorical approach" in cases where the statute of conviction is "overbroad," that is, the statute contains multiple offenses with different offense elements).

*Application of the Categorical Approach in the Guidelines*

Supreme Court jurisprudence on this subject pertains to statutory provisions (*e.g.*, 18 U.S.C. § 924(e)), but courts have applied the categorical and modified categorical approaches to guideline provisions. For example, courts have used these approaches 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.

Commission data indicates that of the 64,124 individuals sentenced in fiscal year 2023, 1,351 individuals (2.1%) were sentenced under the career offender guideline. While representing a relatively small portion of the federal caseload each year, the categorical approach continues to result in substantial litigation.

*General Criticism of the Categorical Approach as Developed by Supreme Court Jurisprudence*

The Commission has received significant comment over the years regarding the complexity and limitations of the categorical approach, as developed by Supreme Court jurisprudence. Courts have criticized the categorical approach as a "legal fiction," in which an offense that a defendant commits violently is deemed to be a non-violent offense because other defendants at other times could have been convicted of violating the same statute without violence, often leading to "odd" and "arbitrary" results (*e.g.*, United States v. Davis, 875 F.3d 592, 595 (11th Cir. 2017); United States v.

McCollum, 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring); *id*. (Wilkinson, J., dissenting)).

*Feedback from Stakeholders*

The Commission has also received input at roundtable discussions with several stakeholders with diverse perspective and expertise within the criminal justice system. Many stakeholders suggested that the Commission should eliminate the categorical approach to capture violent offenses that are currently excluded while also narrowing the scope of the "controlled substance offense" definition, particularly its reach over predicate offenses. Many stakeholders also recommend that the definition of "controlled substance offense" should only cover federal drug offenses and exclude prior state drug offenses for purposes of the career offender guideline.

Many stakeholders have remarked that the Commission should limit the number of qualifying prior offenses overall for purposes the career offender guideline. Some stakeholders suggested that the Commission should condition which convictions qualify as predicate offenses by establishing a minimum sentence length threshold.

*Proposed Changes to §4B1.2*

The proposed amendment would amend §4B1.2 (Definitions of Terms Used in Section 4B1.1) in several ways.

First, the proposed amendment would move the definition of "controlled substance offense" from subsection (b) to subsection (a). It would also revise the definition of "controlled substance offense" to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. The proposed amendment lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo with respect to federal drug trafficking statutes. The federal drug trafficking statutes that do not appear in brackets are specifically referenced in the career offender directive at 28 U.S.C. § 994(h). The proposed amendment would also move to subsection (a) the provision currently located in Commentary to §4B1.2 stating that a violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense."

Second, the proposed amendment would place all provisions related to "crime of violence" in subsection (b). It would define the term "crime of violence" based on the defendant's own offense conduct which, consistent with subsection (a)(1)(A) of §1B1.3 (Relevant Conduct), is the conduct that the defendant committed, aided or abetted, counseled, commanded, induced, procured, or willfully caused during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. It provides a list of types of qualifying conduct that includes a "force clause" at §4B1.2(b)(1)(A) (which closely tracks the language of current §4B1.2(a)(1) but would incorporate a parenthetical insert defining the

term “physical force” as “force capable of causing physical pain or injury to another person”) and provisions relating to conduct that would constitute certain specific offenses that currently qualify as a “crime of violence,” such as forcible sex offenses, robbery, arson, and extortion. The proposed amendment would also include a provision at subsection (b)(2) that would allow certain inchoate offenses to still qualify as “crimes of violence.” In addition, the proposed amendment would require the government to make a prima facie showing that an offense is a “crime of violence” by using only a specific list of sources of information from the record.

Third, the proposed amendment sets forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a “crime of violence” or “controlled substance offense.” **Option 1** would limit qualifying prior convictions to only convictions that are counted separately under §4A1.1(a) [or (b)]. **Option 2** would limit qualifying prior convictions to only convictions that resulted in a sentence imposed of [five years][three years][one year] or more that are counted separately under §4A1.1(a) [or (b)]. Option 2 brackets the possibility of including a provision that provides that a conviction shall not qualify as a prior felony conviction under §4B1.2 if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than [three years] [two years][six months] in prison. **Option 3** would limit qualifying prior convictions to only convictions that resulted in a sentence for which the defendant served [five years][three years][one year] or more in prison and that are counted separately under §4A1.1(a) [or (b)]. All three options include two suboptions. Suboption A in each option would set the minimum sentence length requirement for

purposes of both “crime of violence” and “controlled substance offense.” Suboption B in each option would set the minimum sentence length requirement for purposes of “crime of violence” only.

*Changes to Other Guidelines*

The current definitions of “crime of violence” and “controlled substance” at §4B1.2 are incorporated by reference in several other guidelines in the *Guidelines Manual*. The proposed amendment would maintain the status quo by amending the Commentary to these guidelines to incorporate the relevant part or parts of §4B1.2. The proposed amendment would make such changes 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 or Ammunition), §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), §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)), and §7B1.1 (Classification of Violations (Policy Statement)).

Issues for comment are also provided.

**Proposed Amendment:**

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

"(a) *Crime of Violence*.—The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) *Controlled Substance Offense*.—The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit

substance) with intent to manufacture, import, export, distribute, or dispense; or

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

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

(d) *Inchoate Offenses Included.*—The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(e) *Additional Definitions*.—

(1) *Forcible Sex Offense*.—'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(2) *Extortion*.—'Extortion' is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

(3) *Robbery*.—'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase 'actual

or threatened force' refers to force that is sufficient to overcome a victim's resistance.

(4) *Prior Felony Conviction*.—'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

*Commentary*

*Application Notes*:

1. *Further Considerations Regarding 'Crime of Violence' and 'Controlled Substance Offense'*.—For purposes of this guideline—

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

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

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

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

A violation of 18 U.S.C. § 924(c) or § 929(a) is a 'crime of violence' or a 'controlled substance offense' if the offense of conviction established that the underlying offense was a 'crime of violence' or a 'controlled substance offense'. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense,

the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

2. *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.

3. *Applicability of §4A1.2*.—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.

4. *Upward Departure for Burglary Involving Violence*.—There may be cases in which a burglary involves violence, but does not qualify as a 'crime of violence' as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a 'crime of violence.' In such a case, an upward departure may be appropriate.";

and inserting the following:

“(a) *Controlled Substance Offense*.—

(1) *Definition*.—The term ‘controlled substance offense’ means an offense under 21 U.S.C. § 841, § 952(a), § 955, or § 959, or 46 U.S.C. § 70503(a) or § 70506(b), **[**or 21 U.S.C. § 843(a)(6), § 843(b), § 846 (if the object of the conspiracy or attempt was to commit an offense covered by this provision), § 856, § 860, § 960, or § 963 (if the object of the conspiracy or attempt was to commit an offense covered by this provision)**]**.

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

(b) *Crime of Violence*.—

(1) *Definition*.—The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, in which the defendant engaged in any of the following conduct:

(A) The use, attempted use, or threatened use of physical force (*i.e.*, force capable of causing physical pain or injury to another person) against the person of another.

(B) A sexual act with a person where the person does not consent or gives consent that is not legally valid (such as involuntary, incompetent, or coerced consent). However, conduct constituting sexual abuse of a minor and statutory rape is included only if the defendant engaged in conduct that constitutes (i) an offense described in 18 U.S.C. § 2241(c), or (ii) an offense under state law that would have been an offense under 18 U.S.C. § 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(C) The unlawful taking or obtaining of personal property from a person, or in the presence of a person, against the person's will by means of actual or threatened force (*i.e.*, force that is sufficient to overcome a victim's resistance), or violence, or fear of injury against: (i) the person, the property of such person, or property in the custody or possession of such person; (ii) a relative or family member of the person, or the property of such relative or family member; or (iii) anyone in the company of the person at the time of the taking or obtaining, or their property.

(D) The obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury.

(E) The willful or malicious setting of fire to or burning of property.

(F) The use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive materials as defined in 18 U.S.C. § 841(c).

(2) *Covered Inchoate Offenses*.—An offense is a 'crime of violence' if the defendant engaged in any of the conduct described in subsection (b)(1) regardless of whether the offense of conviction was for a substantive offense, aiding and abetting the commission of an offense, attempting to commit an offense, or conspiring to commit an offense.

(3) *Determination of Whether an Offense Is a 'Crime of Violence'*.—In determining whether an offense is a 'crime of violence,' the focus of inquiry is on the conduct that the defendant committed, aided or abetted, counseled, commanded, induced, procured, or willfully caused during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. *See* subsection (a)(1)(A) of §1B1.3 (Relevant Conduct).

(4) *Sources of Information*.—In making a prima facie showing that the offense is a 'crime of violence,' the government may only use the following sources of information from the record:

(A) The charging document.

(B) The jury instructions and accompanying verdict form.

(C) 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.

**[**(D) The judge's formal rulings of law or findings of fact.

(E) The judgment of conviction.

(F) Any explicit factual finding by the trial judge to which the defendant assented.**]**

(G) Any comparable judicial record of the sources described in paragraphs (A) through (F).

**[Option 1 for Subsection (c) (Limiting Prior Convictions to Sentences Receiving Points under §4A1.1(a)[or (b)]):**

**[*Suboption 1A (Limitation applicable to both "crime of violence" and "controlled substance offense")*:**

(c) *Two Prior Felony Convictions*.—The term 'two prior felony convictions' means: (1) the defendant committed the instant offense of conviction

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

**[*Suboption 1B (Limitation applicable only to "crime of violence")*:**

(c) *Two Prior Felony Convictions*.—The term 'two prior felony convictions' means the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. For purposes of determining whether the defendant sustained at least two felony convictions of either a crime of violence or a controlled substance

offense, use only: (1) any such felony conviction of a 'controlled substance offense' that is counted separately under §4A1.1(a), (b), or (c); or (2) any such felony conviction of a 'crime of violence' that is counted separately under §4A1.1(a) **[**or (b)**]**.**]]**

**[Option 2 for Subsection (c) (Limiting Prior Convictions Through a Sentence-Imposed Approach):**

**[*Suboption 2A (Limitation applicable to both "crime of violence" and "controlled substance offense")*:**

(c) *Two Prior Felony Convictions*.—The term 'two prior felony convictions' means: (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense); and (2) each of at least two of the aforementioned felony convictions (A) is counted separately under §4A1.1(a) **[**or (b)**]**, and (B) resulted in a sentence imposed of **[**five years**][**three years**][**one year**]** or more. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. For

purposes of this provision, 'sentence imposed' has the meaning given the term 'sentence of imprisonment' in §4A1.2(b) and Application Note 2 of the Commentary to §4A1.2. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

**[**A conviction shall not qualify as a prior felony conviction under this provision if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than **[**three years**]** **[**two years**][**six months**]** in prison.**]]**

**[*Suboption 2B (Limitation applicable only to "crime of violence")*:**

(c) *Two Prior Felony Convictions*.—The term 'two prior felony convictions' means the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. For purposes of determining whether the defendant sustained at least two

felony convictions of either a crime of violence or a controlled substance offense, use only: (1) any such felony conviction of a 'controlled substance offense' that is counted separately under §4A1.1(a), (b), or (c); or (2) any such felony conviction of a 'crime of violence' that (A) is counted separately under §4A1.1(a) **[**or (b)**]**, and (B) resulted in a sentence imposed of **[**five years**][**three years**][**one year**]** or more. For purposes of this provision, 'sentence imposed' has the meaning given the term 'sentence of imprisonment' in §4A1.2(b) and Application Note 2 of the Commentary to §4A1.2. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

**[**A conviction of a crime of violence shall not qualify as a prior felony conviction under this provision if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than **[**three years**]** **[**two years**][**six months**]** in prison.**]]]**

**[Option 3 for Subsection (c) (Limiting Prior Convictions Through a Time-Served Approach):**

**[*Suboption 3A (Limitation applicable to both "crime of violence" and "controlled substance offense")*:**

(c) *Two Prior Felony Convictions*.—The term 'two prior felony convictions' means: (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense); and (2) each of at least two of the aforementioned felony convictions (A) is counted separately under §4A1.1(a) **[**or (b)**]**, and (B) resulted in a sentence for which the defendant served **[**five years**][**three years**][**one year**]** or more in prison. The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.**]**

**[*Suboption 3B (Limitation applicable only to "crime of violence")*:**

(c) *Two Prior Felony Convictions*.—The term 'two prior felony convictions' means the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense). The date that a defendant

sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. For purposes of determining whether the defendant sustained at least two felony convictions of either a crime of violence or a controlled substance offense, use only: (1) any such felony conviction of a 'controlled substance offense' that is counted separately under §4A1.1(a), (b), or (c); or (2) any such felony conviction of a 'crime of violence' that (A) is counted separately under §4A1.1(a) **[**or (b)**]**, and (B) resulted in a sentence for which the defendant served **[**five years**][**three years**][**one year**]** or more in prison.**]]**

(d) *Prior Felony Conviction*.—'Prior felony conviction' means a prior adult conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

*Commentary*

*Application Note:*

1. *Conduct Constituting Robbery and Extortion Offenses*.—The Commission anticipates that subsection (b)(1)(A) will be sufficient to include as crimes of violence conduct that would constitute most robbery and extortion offenses that involve violence. Subsections (b)(1)(C) and (b)(1)(D) are included to provide clarity and ease of application.

*Background:* Section 4B1.2 defines the terms 'crime of violence,' 'controlled substance offense,' and 'two prior felony convictions.' Prior to **[**amendment year**]**, to determine if an offense met the definition of 'crime of violence' or 'controlled substance offense' in §4B1.2, courts 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*, 579 U.S. 500 (2016). These Supreme Court cases, however, involved statutory provisions (*e.g.*, 18 U.S.C. § 924(e)) rather than guideline provisions.

In **[**amendment year**]**, the Commission amended §4B1.2 to eliminate the use of the categorical approach and modified categorical approach established by Supreme Court jurisprudence for purposes of determining whether an offense is a

‘crime of violence’ or a ‘controlled substance offense’ in §4B1.2. *See* USSG App. C, Amendment **[**___**]** (effective **[**Date**]**). Section 4B1.2 provides a list of the federal drug statutes that qualify as a ‘controlled substance offense.’ The approach set out in the guideline for determining whether an offense of conviction is a ‘crime of violence’ allows a court to consider the conduct of the defendant underlying the offense of conviction. The approach set forth by this guideline requires the court to consider the defendant’s own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused. The government must make a prima facie showing that an offense of conviction is a ‘crime of violence’ only by using the limited list of sources of information, commonly referred to as the ‘*Shepard* documents,’ that Supreme Court jurisprudence has determined is permissible to determine whether a conviction fits within the definition of a particular category of crimes.”.

The Commentary to §2K1.3 captioned “Application Notes” is amended in Note 2 by striking the following:

“For purposes of this guideline:

‘Controlled substance offense’ has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Crime of violence' has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

'Felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).";

and inserting the following:

"*Definitions for Purposes of Subsections (a)(1) and (a)(2).*—

(A) *Crime of Violence.*—

(i) *Definition*.—'Crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) has as an element the use, attempted use, or

threatened use of physical force against the person of another; or (II) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(ii) *Additional Considerations*.—

(I) The term 'crime of violence' includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) 'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (aa) an offense described in 18 U.S.C. § 2241(c) or (bb) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(III) ‘Extortion’ is obtaining something of value from another by the wrongful use of (aa) force, (bb) fear of physical injury, or (cc) threat of physical injury.

(IV) ‘Robbery’ is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase ‘actual or threatened force’ refers to force that is sufficient to overcome a victim’s resistance.

(V) A violation of 18 U.S.C. § 924(c) or § 929(a) is a ‘crime of violence’ if the offense of conviction established that the underlying offense was a ‘crime of violence. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under

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

(VI) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(B) *Controlled Substance Offense*.—

(i) *Definition*.—'Controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or (II) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(ii) *Additional Considerations*.—

(I) The term 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

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

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

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

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

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

(VII) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(C) *Felony Conviction*.—'Felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the

defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).".

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

in Note 1 by striking the following:

" 'Controlled substance offense' has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Crime of violence' has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.";

by redesignating Notes 3 through 14 as Notes 4 through 15, respectively;

by inserting after Note 2 the following new Note 3:

"3. *'Crime of Violence' and 'Controlled Substance Offense'.*—

(A) *Crime of Violence.*—

(i) *Definition*.—'Crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (II) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(ii) *Additional Considerations*.—

(I) The term 'crime of violence' includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) 'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape

was (aa) an offense described in 18 U.S.C. § 2241(c) or (bb) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(III) 'Extortion' is obtaining something of value from another by the wrongful use of (aa) force, (bb) fear of physical injury, or (cc) threat of physical injury.

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

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

(VI) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(B) *Controlled Substance Offense*.—

(i) *Definition*.—‘Controlled substance offense’ means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit

substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or (II) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(ii) *Additional Considerations*.—

(I) The term 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

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

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

(IV) Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a 'controlled substance offense' if the offense of conviction

established that the underlying offense (the offense facilitated) was a 'controlled substance offense.'

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

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

(VII) In determining whether an offense is a controlled substance offense, the offense of conviction

(*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.";

in Note 12 (as so redesignated) by striking "*see* Application Note 7" and inserting "*see* Application Note 8";

and in Note 14 (as so redesignated) by striking the following:

" 'Crime of violence' and 'controlled substance offense' have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1).".

The Commentary to §2S1.1 captioned "Application Notes" is amended—

in Note 1 by striking the following:

" 'Crime of violence' has the meaning given that term in subsection (a)(1) of §4B1.2 (Definitions of Terms Used in Section 4B1.1).";

by redesignating Notes 4, 5, and 6 as Notes 5, 6, and 7;

and by inserting after Note 3 the following new Note 4:

"4. *'Crime of Violence' under Subsection (b)(1).—*

(A) *Definition*.—For purposes of subsection (b)(1), 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(B) *Additional Considerations*.—

(i) The term 'crime of violence' includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

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

(iii) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.”.

The Commentary to §4A1.1 captioned “Application Notes” is amended in Note 4 by striking “ ‘crime of violence’ has the meaning given that term in §4B1.2(a). *See* §4A1.2(p)” and inserting “ ‘crime of violence’ has the meaning given that term in §4A1.2(p)”.

Section 4A1.2(p) is amended by striking the following:

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

and inserting the following:

“(1) *Definition*.—For purposes §4A1.1(d), ‘crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (A) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (B) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful

possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(2) *Additional Considerations*.—

(A) The term 'crime of violence' includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(B) 'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (i) an offense described in 18 U.S.C. § 2241(c) or (ii) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(C) 'Extortion' is obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury.

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

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

(F) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.".

Section 4B1.4(b)(3) is amended by striking "either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b)" and inserting "either a crime of violence or a controlled substance offense".

Section 4B1.4(c)(2) is amended by striking "either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b)" and inserting "either a crime of violence or a controlled substance offense".

The Commentary to §4B1.4 captioned "Application Notes" is amended by inserting at the end the following new Note 3:

"3. *'Crime of Violence' and 'Controlled Substance Offense'*.—

(A) *Crime of Violence*.—

(i) *Definition*.—'Crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (II) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C.

§ 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(ii) *Additional Considerations*.—

(I) The term ‘crime of violence’ includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) ‘Forcible sex offense’ includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (aa) an offense described in 18 U.S.C. § 2241(c) or (bb) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(III) ‘Extortion’ is obtaining something of value from another by the wrongful use of (aa) force, (bb) fear of physical injury, or (cc) threat of physical injury.

(IV) ‘Robbery’ is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase ‘actual or threatened force’ refers to force that is sufficient to overcome a victim’s resistance.

(V) A violation of 18 U.S.C. § 924(c) or § 929(a) is a ‘crime of violence’ if the offense of conviction established that the underlying offense was a ‘crime of violence.’ (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions

will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(VI) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(B) *Controlled Substance Offense*.—

(i) Definition.—'Controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or (II) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(ii) *Additional Considerations*.—

(I) The term ‘controlled substance offense’ include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

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

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

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

(V) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C.

§ 843(b)) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a 'controlled substance offense.'

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

(VII) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.".

The Commentary to §5K2.17 captioned "Application Notes" is amended—

in the caption by striking “Note” and inserting “Notes”;

by striking Note 1 as follows:

“1. ‘Crime of violence’ and ‘controlled substance offense’ are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1).”;

and by inserting the following new Notes 1 and 2:

“1. *Crime of Violence*.—

(A) *Definition*.—‘Crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(B) *Additional Considerations*.—

(i) The term ‘crime of violence’ includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(ii) ‘Forcible sex offense’ includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (I) an offense described in 18 U.S.C. § 2241(c) or (II) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) ‘Extortion’ is obtaining something of value from another by the wrongful use of (I) force, (II) fear of physical injury, or (III) threat of physical injury.

(iv) ‘Robbery’ is the unlawful taking or obtaining of personal property from the person or in the presence of another,

against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance.

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

(vi) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

2. *Controlled Substance Offense*.—

(A) *Definition*.—'Controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (i) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or (ii) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(B) *Additional Considerations*.—

(i) The term 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

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

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

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

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

(vi) A violation of 18 U.S.C. § 924(c) or § 929(a) is a 'controlled substance offense' if the offense of conviction established that the underlying offense was a 'controlled substance offense.' (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences

for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

(vii) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.”.

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

in Note 2 by striking the following:

“ ‘Crime of violence’ 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 the following:

“*Crime of Violence*.—

(A) *Definition*.—‘Crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (i) has as an element the use, attempted use, or threatened use of physical

force against the person of another; or (ii) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(B) *Additional Considerations*.—

(i) The term 'crime of violence' includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(ii) 'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (I) an offense described in 18 U.S.C. § 2241(c) or (II) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) 'Extortion' is obtaining something of value from another by the wrongful use of (I) force, (II) fear of physical injury, or (III) threat of physical injury.

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

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

(vi) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.";

and in Note 3 by striking the following:

" 'Controlled substance offense' 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 the following:

"*Controlled Substance Offense*.—

(A) *Definition*.—'Controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (i) prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or (ii) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(B) *Additional Considerations*.—

(i) The term ‘controlled substance offense’ include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

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

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

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

(v) Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a ‘controlled substance offense’ if the offense of conviction established that the

underlying offense (the offense committed, caused, or facilitated) was a ‘controlled substance offense.’

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

(vii) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.”.

**Issues for Comment:**

1. As explained above, courts use the “categorical approach” and the “modified categorical approach,” as set forth in Supreme Court jurisprudence, to determine whether a conviction is a “crime of violence” or a “controlled substance offense” for purposes of §4B1.2 (Definitions of Terms Used in Section 4B1.1). These

Supreme Court cases, however, involved statutory provisions (*e.g.*, 18 U.S.C. § 924(e)) rather than guideline provisions.

The Commission seeks comment on whether determinations under the career offender guideline should use a different approach, such as the approach provided above, that permits the court to consider the defendant's conduct underlying the offense of conviction for purposes of the "crime of violence" definition. What are the advantages and disadvantages of the "categorical approach" as opposed to the approach set forth in the proposed amendment above?

2. The proposed amendment provides that courts may consider the full scope of the defendant's conduct under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct) (*i.e.*, "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense") for purposes of the "crime of violence" definition. Should the focus of the inquiry be limited to the conduct that formed the basis of the conviction? If not, should the Commission limit the consideration of the defendant's conduct in some other way? If so, how should the Commission set forth such limitation? Should the Commission limit the consideration of the defendant's conduct only to such acts and omissions that occurred "during the commission of the offense of conviction" and exclude conduct "in preparation for that offense, or in the course of

attempting to avoid detection or responsibility for that offense" or make any other changes?

3. The proposed amendment would revise the definition of "controlled substance offense" in §4B1.2 to exclude state drug offenses by listing specific federal statutes relating to drug offenses. The proposed amendment lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo. The federal drug trafficking statutes that do not appear in brackets are specifically referenced in the career offender directive at 28 U.S.C. § 994(h). Are there federal drug offenses that are covered by the proposed amendment but should not be? Are there federal drug offenses that are not covered by the proposed amendment but should be?

   The Commission also seeks comment on whether, instead of excluding state drug offenses, it should limit the definition of "controlled substance offense" in some other way. For example, should the Commission keep the current definition of "controlled substance offense" and limit qualifying prior convictions to only convictions that received a certain number of criminal history points or a certain length of sentence imposed or served? If so, how should the Commission set that limit and why?

4. The definition of "crime of violence" set forth in the proposed amendment above includes a "force clause" proposed at §4B1.2(b)(1)(A). The provision closely

tracks the language of current §4B1.2(a)(1) but would incorporate a parenthetical insert defining the term "physical force" as "force capable of causing physical pain or injury to another person." The Commission seeks comment on whether this definition is appropriate.

The definition of "crime of violence" also includes provisions relating to conduct that would constitute certain specific offenses that currently qualify as a "crime of violence," such forcible sex offenses, robbery, arson, and extortion. The Commission seeks comment on whether the force clause set forth in proposed §4B1.2(b)(1)(A) would be sufficient to cover the other types of conduct specifically listed in the "crime of violence" definition. Specifically, the Commission seeks comment on whether the force clause would cover conduct constituting robbery and extortion offenses.

5. The definition of "crime of violence" includes a provision relating to forcible sexual acts at proposed §4B1.2(b)(1)(B). The Commission seeks comment generally on whether the scope of this provision for purposes of the "crime of violence" definition is appropriate.

6. The "crime of violence" definition includes a provision that would cover conduct constituting an arson offense at proposed §4B1.2(b)(1)(E). The Commission seeks comment generally on whether the proposed provision is appropriate.

7. The Commission seeks comment on whether the definition of "crime of violence" should still address the offenses of attempting to commit a substantive offense and conspiracy to commit a substantive offense. Should the Commission provide additional requirements or guidance to address these types of offenses?

8. The proposed amendment would require the government to make a prima facie showing that an offense is a "crime of violence" only by using a specific list of sources of information from the record. The sources of information that do not appear within brackets in the proposed amendment are specifically identified in *Shepard v. United States*, 544 U.S. 13 (2005), for use in the modified categorical approach. The sources of information listed within brackets are comparable judicial documents identified in subsequent case law for the same purpose.

   The Commission seeks comment on whether it should limit the sources of information that the government needs to make a prima facie showing that an offense of conviction is a "crime of violence." Should the Commission list specific sources or types of sources that courts may consider in addition to the sources listed in the proposed amendment? 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 excluded?

9. The proposed amendment sets forth three options for setting a minimum sentence length requirement for a prior conviction to qualify as a "crime of violence" or

"controlled substance offense." The Commission seeks comment on whether including a minimum sentence length requirement for prior offenses to qualify as a "crime of violence" or "controlled substance offense" is consistent with the Commission's authority under 28 U.S.C. § 994(h). The Commission also seeks comment on each of these options and suboptions. Should the Commission differentiate between "crimes of violence" and "controlled substance offenses" in setting a minimum sentence length requirement?

10. As indicated above, several guidelines use the terms "crime of violence" and "controlled substance offense" and define these terms by making specific reference to §4B1.2. *See* Commentary 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 or Ammunition), §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), §5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)), and §7B1.1 (Classification of Violations (Policy Statement)).

    The proposed amendment would maintain the status quo by amending the Commentary to these guidelines to incorporate the relevant part or parts of

§4B1.2. The Commission seeks comment on whether this is the appropriate approach or, in the alternative, whether any or all of these guidelines should continue to define the terms "crime of violence" and "controlled substance offense" by making specific references to §4B1.2 if the Commission were to promulgate the proposed amendment making changes to the definitions contained in §4B1.2. Should the Commission consider moving these definitions from the commentary of these guidelines to the guidelines themselves?

## 2. FIREARMS OFFENSES

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

**Part A** of the proposed amendment addresses the application of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to machinegun conversion devices (MCDs), which are designed to convert weapons to fully automatic firearms. Issues for comment are also provided.

**Part B** of the proposed amendment establishes a *mens rea* requirement for the enhancements under §2K2.1(b)(4) for stolen firearms and firearms with modified serial numbers. An issue for comment is also provided.

**(A) Machinegun Conversion Devices (MCDs)**

**Synopsis of Proposed Amendment:** Section 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) employs, for different purposes, two distinct definitions of the term "firearm" drawn from separate statutory sources: 21 U.S.C. § 921(a)(3) ("Gun Control Act (GCA) definition of firearm") and 26 U.S.C. § 5845(a) ("National Firearms Act (NFA) definition of firearm"). One difference between the definitions is the inclusion of machinegun conversion devices (MCDs). Commonly referred to as "Glock switches" or "auto sears," MCDs are devices designed to convert weapons into fully automatic firearms. The NFA definition of firearm includes "machineguns," 26 U.S.C. § 5845(a), and the definition of "machinegun" includes "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun," 26 U.S.C. § 5845(b). Therefore, MCDs fall within the NFA definition of firearm. However, the GCA definition of firearm does not encompass MCDs. *See* 21 U.S.C. § 921(a)(3).

Section 2K2.1 uses the NFA definition of firearm for certain enhanced base offense levels. *See*, *e.g.,* USSG §2K2.1(a)(1), (3), (4), and (5). Therefore, those enhanced base

offense levels apply to offenses involving MCDs. However, the remainder of §2K2.1, including the specific offense characteristics and the cross reference, uses the GCA definition of firearm. USSG §2K2.1, comment. (n.1). Therefore, MCDs do not trigger §2K2.1's specific offense characteristics or the cross reference. For example, an individual convicted under 18 U.S.C. § 922(o) for possessing five MCDs would receive an enhanced base offense level because the offense involved a firearm described in 26 U.S.C. § 5845(a). *See* USSG §2K2.1(a)(5). However, this individual would not receive an enhancement under §2K2.1(b)(1) for the number of firearms involved in the offense because the MCDs are not firearms under the GCA definition. *See* USSG §2K2.1(b)(1).

Commenters have expressed concern that §2K2.1 insufficiently addresses offenses involving MCDs. Commenters have described a significant recent proliferation of MCDs and pointed out the increased danger to bystanders and law enforcement officials when a weapon is equipped with an MCD because those weapons can fire more quickly and are more difficult to control.

Part A of the proposed amendment would amend §2K2.1 to address these concerns.

The proposed amendment provides two options to amend §2K2.1.

**Option 1** would amend the definition of "firearm" applicable to §2K2.1 to include any firearm described in 18 U.S.C. § 921(a)(3) (*i.e.*, the GCA definition of firearm) or

26 U.S.C. § 5845(a) (*i.e.*, the NFA definition of firearm). It would move the definition from the Commentary to the guideline itself in newly created subsection (d).

**Option 2** would expand the application of the following subsections, which now apply only to GCA firearms, so that those subsections would also apply to NFA firearms:

- Subsection (b)(1), which provides an enhancement based on the number of firearms involved in the offense;

- Subsection (b)(4), which provides an enhancement for offenses involving firearms that were stolen, had a modified serial number, or were not marked with a serial number;

- Subsection (b)(5), which provides an enhancement for certain offenses involving the transport, transfer, sale, or other disposition of a firearm to another person;

- Subsection (b)(6), which provides an enhancement for offenses involving transportation of a firearm outside the United States or the possession of a firearm in connection with another felony;

- Subsection (b)(7), which provides an enhancement for recordkeeping offenses that reflect an effort to conceal a substantive offense involving firearms or ammunition; and

- Subsection (c), which cross references other guidelines for cases in which the defendant used or possessed any firearm cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense.

Option 2, if applied to all of the listed subsections, would produce an equivalent result to Option 1, but Option 2 highlights the policy question as to whether expansion of the definition of "firearm" should apply to all relevant provisions.

Issues for comment are also provided.

**Proposed Amendment:**

**Option 1 ("Firearm" definition includes GCA firearms and NFA firearms):**

Section 2K1.1 is amended by inserting at the end the following new subsection (d):

"(d) Definition

(1) For purposes of this guideline, 'firearm' includes any firearm described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a).".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 1 by striking the following:

" '*Firearm*' has the meaning given that term in 18 U.S.C. § 921(a)(3).".

**Option 2 ("Firearm" definition depends on statutory references in specific subsections):**

Section 2K2.1 is amended—

in subsection (b)(1) by inserting after "three or more firearms" the following: "(as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a))";

in subsection (b)(3)(B), by striking "subdivision" and inserting "paragraph";

by striking subsection (b)(4) as follows:

"(4) If (A) any firearm was stolen, increase by 2 levels; or (B)(i) any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye; or (ii) the

defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, increase by 4 levels.",

and inserting the following new subsection (b)(4) as follows:

"(4) If any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) (A) was stolen, increase by 2 levels; (B) had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, increase by 4 levels; or (C) was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) and the defendant knew, was willfully blind to, or consciously avoided knowledge of such fact, increase by 4 levels.";

by striking subsections (b)(5), (b)(6), and (b)(7) as follows:

"(5) (Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by 2 levels;

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of inducing the conduct described in clause (i), increase by 2 levels; or

(C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence at the time of the offense; or (III) intended to use or dispose of the firearms unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received two or more firearms as a result of inducing the conduct described in clause (i), increase by 5 levels.

*Provided*, however, that subsection (b)(5)(C)(i)(I) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C).

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

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

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

and inserting the following new subsections (b)(5), (b)(6), and (b)(7):

“(5) (Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by 2 levels;

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C.

§ 5845(a)) or any ammunition as a result of inducing the conduct described in clause (i), increase by 2 levels; or

(C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence at the time of the offense; or (III) intended to use or dispose of the firearms unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received two or more firearms (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) as a result of inducing the conduct described in clause (i), increase by 5 levels.

*Provided*, however, that subsection (b)(5)(C)(i)(I) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such

individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C).

(6) If the defendant—

(A) possessed any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition in connection with another felony offense; or possessed or transferred any firearm (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

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

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms (as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)) or ammunition, increase to the offense level for the substantive offense.";

and in subsection (c)(1) by inserting after "any firearm" the following: "(as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a))"; and inserting after "transferred a firearm" the following: "(as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a))".

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

in Note 1, in the paragraph that begins " 'Firearm' has the meaning" by inserting after "18 U.S.C. § 921(a)(3)" the following: ", unless otherwise specified";

by striking Note 8 as follows:

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

(A) *Interaction with Subsection (a)(7).—*If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under

subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B)(i) or (ii).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B)(i). However, if the offense involved a stolen firearm or stolen ammunition, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(A) or (B)(ii).

(B) *Defendant's State of Mind.*—Subsection (b)(4)(A) or (B)(i) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. However, subsection (b)(4)(B)(ii) only applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.",

and inserting the following new Note 8:

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

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

into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B) or (C).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). However, if the offense involved a stolen firearm or stolen ammunition, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(A) or (C).

(B) *Defendant's State of Mind.*—Subsection (b)(4)(A) or (B) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. However, subsection (b)(4)(C) only applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.";

and in Note 9 by striking "record-keeping" and inserting "recordkeeping".

**Issues for Comment**

1. Part A of the proposed amendment seeks to respond to concerns that §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) insufficiently addresses the dangers presented by machinegun conversion devices (MCDs). The Commission seeks comment on whether the proposed amendment appropriately addresses those concerns. Should the Commission address those concerns in another way? If so, how?

2. Under Options 1 and 2 of Part A of the proposed amendment, an MCD would be treated as a firearm for purposes of §2K2.1. The Commission seeks comment on whether it is appropriate for MCDs to be given the same weight as other firearms. Should MCDs be treated differently from other firearms? If so, how?

3. Section 2K2.1(b)(1) and (b)(5)(C) provide enhancements based, in whole or in part, on the number of "firearms" involved in the offense. Under Options 1 and 2, an MCD would be considered a firearm. MCDs are designed to be affixed to another firearm. The Commission seeks comment on how MCDs should be factored when calculating the number of firearms for purposes of §2K2.1(b)(1) and (b)(5)(C). Should the calculation depend on whether the MCD was affixed to another firearm? If an MCD is affixed to a semi-automatic firearm, should the resulting weapon be counted as one firearm or two firearms?

4. Section 2K2.1(b)(1), (b)(4), (b)(5), (b)(6), (b)(7), and (c) currently apply to firearms defined in 18 U.S.C. 921(a)(3) (the GCA definition of firearm). Under Options 1 and 2, the term "firearm," as used in those provisions, would also include any firearm described in 26 U.S.C. § 5845(a) (the NFA definition of firearm), such as an MCD. The Commission seeks comment on whether this change should apply to all of the listed provisions. Should one or more of these provisions be excluded from the change? For example, should the Commission make an exception to §2K2.1(b)(4)(C), as redesignated, which provides an enhancement for certain cases involving firearms that were not marked with a

serial number, for MCDs, which are often privately made and not marked with a serial number?

5. With few exceptions (*e.g.*, MCDs), a weapon that meets the NFA definition of firearm also meets the GCA definition of firearm. Apart from MCDs, the Commission seeks comment on whether there are any exceptions (*i.e.*, weapons that meet the NFA definition of firearm but not the GCA definition) that should not be treated as firearms for purposes of §2K2.1. If so, what types of weapons should be excluded? In Option 2 of Part A of the proposed amendment, should the Commission expand the application of subsection (b)(1), (b)(4), (b)(5), (b)(6), (b)(7), or (c) to include machineguns (as defined in 26 U.S.C. § 5845(b)), rather than all NFA firearms?

6. In addition to amending the definition of "firearm" for purposes of §2K2.1, Option 1 of Part A of the amendment would move the definition from the Commentary to the guideline itself. However, the option would not move any other §2K2.1 definitions from the Commentary to the guideline. The Commission seeks comment on whether leaving some definitions in the Commentary will lead to inconsistent application of those definitions. Should the Commission move other definitions from the Commentary to §2K2.1 to the guideline itself? If so, which ones?

### (B) *Mens Rea* Requirement

**Synopsis of Proposed Amendment:** Section 2K2.1 provides for offense level increases in cases involving stolen firearms, firearms with modified serial numbers, and firearms not marked with a serial number (commonly referred to as ghost guns). *See* USSG §2K2.1(b)(4). Subsection (b)(4)(A) provides a 2-level enhancement if a firearm is stolen. USSG §2K2.1(b)(4)(A). Subsections (B)(i) and (ii) provide a 4-level enhancement based upon the existence and state of any serial number on firearms considered for purposes of §2K2.1. USSG §2K2.1(b)(4)(B)(i) and (ii). The 4-level enhancement may apply, under subsection (b)(4)(B)(i), if a "firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye," and, under subsection (b)(4)(B)(ii), if a "firearm involved in the offense was not otherwise marked with a serial number." *Id.* The court may not apply both §2K2.1(b)(4)(A) and (b)(4)(B) cumulatively, as the provisions are alternative. *See* USSG §1B1.1, comment. (n.4(A)) ("Within each specific offense characteristic subsection, . . . the offense level adjustments are alternative; only the one that best describes the conduct is to be used.").

The enhancements for stolen firearms and modified serial numbers impose no requirement of the defendant's knowledge or other mental state. USSG §2K2.1(b)(4)(A) and (B)(i). The Commentary to §2K2.1 states that these enhancements apply "regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had serial number that was modified such that the original information is rendered illegible or

unrecognizable to the unaided eye." USSG §2K2.1, comment. (n.8(B)). However, subsection (b)(4)(B)(ii) for firearms not marked with a serial number applies only "if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number . . . or was willfully blind to or consciously avoided knowledge of such fact." *Id.*

The enhancement regarding firearms not marked with a serial number is the result of a 2023 amendment. USSG App. C, amend. 819 (effective Nov. 1, 2023). The amendment extended the 4-level enhancement at §2K2.1(b)(4)(B) to firearms not marked with a serial number. *Id.* The Commission determined, however, "that the enhancement should apply only to those defendants who knew or consciously avoided knowing that the firearm was not marked with a serial number." *Id.*

Accordingly, in its current form, §2K2.1(b)(4) imposes a mental state requirement when the enhancement applies based on a firearm not marked with a serial number but includes no such requirement when it applies based on a stolen firearm or firearm with a modified serial number.

Part B of the proposed amendment would apply the current mental state requirement from §2K2.1(b)(4)(B)(ii) to all of subsection (b)(4).

Under the proposed amendment, a defendant would be subject to the 2-level enhancement under §2K2.1(b)(4)(A) only if the defendant "knew, was willfully blind to

the fact, or consciously avoided knowing that . . . any firearm was stolen." Similarly, a defendant would be subject to the 4-level enhancement under §2K2.1(b)(4)(B)(i) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye." The proposed amendment would also make conforming changes to Application Note 8 of the Commentary to §2K2.1.

An issue for comment is also provided.

**Proposed Amendment:**

Section 2K2.1(b)(4) is amended by inserting after "If" the following: "the defendant knew, was willfully blind to the fact, or consciously avoided knowing that"; by striking "or (B)(i) any firearm" and inserting "(B) any firearm"; by striking "(ii) the defendant knew that any firearm" and inserting "(C) any firearm"; and by striking "or was willfully blind to or consciously avoided knowledge of such fact".

The Commentary to §2K2.1 captioned "Application Notes" is amended by striking Note 8 as follows:

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

(A) *Interaction with Subsection (a)(7).*—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B)(i) or (ii).

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

any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(A) or (B)(ii).

(B) *Defendant's State of Mind.*—Subsection (b)(4)(A) or (B)(i) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. However, subsection (b)(4)(B)(ii) only applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.",

and inserting the following new Note 8:

"8. *Application of Subsection (b)(4).*—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the

enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the defendant knew, was willfully blind to the fact, or consciously avoided knowing that a firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, or that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968), apply subsection (b)(4)(B) or (C).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). However, if the defendant knew, was willfully blind to the fact, or consciously avoided knowing that a firearm or ammunition was stolen, or that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968), apply subsection (b)(4)(A) or (C).”.

**Issue for Comment**

1. Under Part B of the proposed amendment, a defendant would be subject to the 2-level enhancement under §2K2.1(b)(4)(A) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that" a firearm was stolen. Similarly, a defendant would be subject to the 4-level enhancement under §2K2.1(b)(4)(B) only if the defendant "knew, was willfully blind to the fact, or consciously avoided knowing that . . . any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye." The Commission seeks comment on whether there are evidentiary challenges in firearms cases to proving a defendant's mental state. Are there changes the Commission should make to the proposed amendment to address potential evidentiary issues? If so, what changes should the Commission make?

## 3. CIRCUIT CONFLICTS

**Synopsis of Proposed Amendment:** This proposed amendment addresses two circuit conflicts involving §2B3.1 (Robbery) and §4A1.2 (Definitions and Instructions for Computing Criminal History). *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 89 FR 66176, 66177 (Aug. 14, 2024) (identifying resolution of circuit conflicts as a priority). The proposed amendment contains two parts (Parts A and B). The Commission

is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

**Part A** addresses a circuit conflict concerning whether the “physically restrained” enhancement at §2B3.1(b)(4)(B) can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those listed in the “physically restrained” definition set forth in the Commentary to §1B1.1 (Application Instructions). Three options are presented. Issues for comment are also included.

**Part B** addresses a circuit conflict concerning whether a traffic stop is an “intervening arrest” for purposes of determining whether multiple prior sentences should be “counted separately or treated as a single sentence” when assigning criminal history points (“single-sentence rule”). *See* USSG §4A1.2(a)(2).

## (A) Circuit Conflict Concerning the “Physically Restrained” Enhancement at §2B3.1(b)(4)(B)

**Synopsis of Proposed Amendment:** Subsection (b)(4)(B) of §2B3.1 (Robbery) provides for a 2-level enhancement “if any person was physically restrained to facilitate commission of the offense or to facilitate escape.” For purposes of §2B3.1(b)(4)(B), the term “physically restrained” is defined in Application Note 1(L) to §1B1.1 (Application

Instructions) as “the forcible restraint of the victim such as by being tied, bound, or locked up.”

A circuit conflict has arisen concerning whether the enhancement at §2B3.1(b)(4)(B) can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those outlined in the Commentary to §1B1.1 (*i.e.*, “being tied, bound, or locked up”).

The First, Fourth, Sixth, Tenth, and Eleventh Circuits have held that restricting a victim from moving at gunpoint suffices for the enhancement. *See*, *e.g.*, United States v. Wallace, 461 F.3d 15, 34–35 (1st Cir. 2006) (affirming application of enhancement where one victim had her path blocked and was ordered at gunpoint to stop, and the other had a gun pointed directly at his face and chest, “at close range,” and was commanded to “look straight ahead into the gun and not to move”); United States v. Dimache, 665 F.3d 603, 608 (4th Cir. 2011) (upholding enhancement where “two bank tellers ordered to the floor at gunpoint were prevented from both leaving the bank and thwarting the bank robbery”); United States v. Howell, 17 F.4th 673, 692 (6th Cir. 2021) (noting that the Sixth Circuit has “rejected the notion of a ‘physical component’ limitation as inapt” and upholding enhancement where victim was ordered at gunpoint to lie down on the floor (citation omitted)); United States v. Miera, 539 F.3d 1232, 1235–36 (10th Cir. 2008) (pointing gun around, commanding bank occupants not to move, and blocking door sufficed for enhancement); United States v. Deleon, 116 F.4th 1260, 1261–62 (11th Cir.

2024) (affirming application of enhancement where the defendant "pointed a gun at the cashier while demanding money" but never "actually touched the cashier").

By contrast, the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits largely agree that a restraint must be "physical" for the enhancement to apply and that the psychological coercion of pointing a gun at a victim, without more, does not qualify. *See*, *e.g.*, United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999) ("displaying a gun and telling people to get down and not move, without more, is insufficient to trigger the 'physical restraint' enhancement"); United States v. Bell, 947 F.3d 49, 57, 60–61 (3d Cir. 2020) (adopting "the requirement that the restraint involve some physical aspect"; placing fake gun on victim's neck and forcing him to floor did not suffice); United States v. Garcia, 857 F.3d 708, 713–14 (5th Cir. 2017) (vacating enhancement because "standing near a door, holding a firearm, and instructing a victim to get on the ground" did not "differentiate th[e] case in any meaningful way from a typical armed robbery"); United States v. Herman, 930 F.3d 872, 877 (7th Cir. 2019) ("more than pointing a gun at someone and ordering that person not to move is necessary"); United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001) ("briefly pointing a gun at a victim and commanding her once to get down" did not constitute "physical restraint, given that nearly all armed bank robberies will presumably involve such acts"); *see also* United States v. Drew, 200 F.3d 871, 880 (D.C. Cir. 2000) ("the phrase 'being tied, bound, or locked up' indicates that physical restraint requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way"; physically restrained adjustment did not apply where victim was ordered to walk down the stairs at gunpoint).

Part A of the proposed amendment presents three options for responding to this circuit conflict by amending the enhancement at §2B3.1(b)(4)(B).

**Option 1** would generally adopt the approach of the First, Fourth, Sixth, Tenth, and Eleventh Circuits that the enhancement applies with or without physical measures. It would amend the language of §2B3.1(b)(4)(B) to specify that the increase applies to cases in which "any person's freedom of movement was restricted through physical contact or confinement (such as being tied, bound, or locked up) or other means (such as being held at gunpoint or having a path of escape blocked) to facilitate commission of the offense or to facilitate escape." Option 1 also includes conforming changes to the Commentary to §2B3.1.

**Option 2** would generally adopt the approach of the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits that physical measures must be used for the enhancement to apply. It would amend the language of §2B3.1(b)(4)(B) to clarify that the increase applies only in cases in which "any person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape." Option 2 also includes conforming changes to the Commentary to §2B3.1.

**Option 3** would combine the approaches from both sides of the circuit split into a two-tiered enhancement that would replace the current "physically restrained" enhancement at

§2B3.1(b)(4)(B). The new enhancement would provide for a 2-level enhancement for offenses in which "any person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape." It would also add a 1-level enhancement for offenses in which "any person's freedom of movement was restricted through means other than physical contact or confinement, such as being held at gunpoint or having a path of escape blocked, to facilitate commission of the offense or to facilitate escape." Option 3 includes conforming changes to the Commentary to §2B3.1.

Issues for comment are also provided.

**Proposed Amendment:**

**Option 1 (First, Fourth, Sixth, Tenth, and Eleventh Approach – *Physical or Non-Physical Means*):**

Section 2B3.1(b)(4)(B) is amended by striking "if any person was physically restrained" and inserting "if any person's freedom of movement was restricted through physical contact or confinement (such as being tied, bound, or locked up) or other means (such as being held at gunpoint or having a path of escape blocked)".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 1 by striking " 'abducted,' and 'physically restrained' are defined" and inserting "and 'abducted,' have the meaning given such terms".

The Commentary to §2B3.1 captioned "Background" is amended by striking "was physically restrained by being tied, bound, or lock up" and inserting "a victim's freedom of movement was restricted".

**Option 2 (Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits Approach –** ***Physical Contact or Confinement Required*****):**

Section 2B3.1(b)(4)(B) is amended by striking "if any person was physically restrained" and inserting "if any person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up,".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 1 by striking " 'abducted,' and 'physically restrained' are defined" and inserting "and 'abducted,' have the meaning given such terms".

The Commentary to §2B3.1 captioned "Background" is amended by striking "was physically restrained by being tied, bound, or lock up" and inserting "a victim's freedom of movement was restricted".

**Option 3 (Combination of Both Approaches):**

Section 2B3.1(b)(4) is amended by striking the following:

"(A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels";

and inserting the following:

"(A) If any person was abducted to facilitate escape, increase by 4 levels; (B) if any person's freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape, increase by 2 levels; or (C) if any person's freedom of movement was restricted through means other than physical contact or confinement, such as being held at gunpoint or having a path of escape blocked, to facilitate commission of the offense or to facilitate escape, increase by 1 level".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 1 by striking " 'abducted,' and 'physically restrained' are defined" and inserting "and 'abducted,' have the meaning given such terms".

The Commentary to §2B3.1 captioned “Background” is amended by striking “was physically restrained by being tied, bound, or lock up” and inserting “a victim’s freedom of movement was restricted”.

**Issues for Comment**

1. Part A of the proposed amendment sets forth three options to address the circuit conflict described in the synopsis above. The Commission seeks comment on whether it should address the circuit conflict in a manner other than the options provided in Part A of the proposed amendment. If so, how?

2. The term “physically restrained,” as used in §2B3.1 (Robbery), is defined in Application Note 1(L) of the Commentary to §1B1.1 (Application Instructions). Other guidelines also use the term “physically restrained” and define such term by reference to the Commentary to §1B1.1. *See* §§2B3.2(b)(5)(B) (“[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.”), 2E2.1(b)(3)(B) (“[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.”), 3A1.3 (“If a victim was physically restrained in the course of the offense, increase by 2 levels.”).

If the Commission were to promulgate Part A of the proposed amendment, should the Commission also amend any or all of these other guidelines to mirror the proposed approach for §2B3.1? Instead of amending §2B3.1 or the other guidelines, should the Commission amend Application Note 1(L) of the Commentary to §1B1.1 to mirror the proposed approach for §2B3.1?

**(B) Circuit Conflict Concerning Meaning of "Intervening Arrest" in §4A1.2(a)(2)**

**Synopsis of Proposed Amendment:** Subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History) outlines whether multiple prior sentences should be "counted separately or treated as a single sentence" for purposes of assigning criminal history points ("single-sentence rule"). Prior sentences should be "counted separately if the sentences were imposed for offenses that were separated by an *intervening arrest* (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." USSG §4A1.2(a)(2) (emphasis added). If "there is no *intervening arrest*, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day." *Id.* (emphasis added).

There is a circuit split over the meaning of "intervening arrest." The Third, Sixth, Ninth, and Eleventh Circuits have held that a formal, custodial arrest is required, and that a citation or summons following a traffic stop does not qualify. *See* United States v. Ley,

876 F.3d 103, 109 (3d Cir. 2017) ("[A] traffic stop, followed by the issuance of a summons, is not an arrest. The Court therefore holds that, for purposes of section 4A1.2(a)(2) of the Sentencing Guidelines, an arrest is a formal, custodial arrest."); United States v. Rogers, 86 F.4th 259, 264–65 (6th Cir. 2023) ("for purposes of § 4A1.2(a)(2), an arrest requires placing someone in police custody as part of a criminal investigation"; "subtle interactions with law enforcement—such as traffic stops" are not "the focus of the Guidelines' approach" to prior sentences); United States v. Leal-Felix, 665 F.3d 1037, 1041 (9th Cir. 2011) (en banc) (for purposes of the guidelines, "an arrest is a 'formal arrest' " not a "mere citation" and "may be indicated by informing the suspect that he is under arrest, transporting the suspect to the police station, and/or booking the suspect into jail"); United States v. Wright, 862 F.3d 1265, 1282 (11th Cir. 2017) ("traffic citation for driving with a suspended license is not an arrest under § 4A1.2(a)(2)"). By contrast, the Seventh Circuit has adopted a broad view of the term, holding that a traffic stop amounts to an intervening arrest. *See* United States v. Morgan, 354 F.3d 621, 624 (7th Cir. 2003) ("A traffic stop is an 'arrest' in federal parlance.").

Part B of the proposed amendment responds to this circuit conflict. It would add a provision to §4A1.2(a)(2) clarifying that an "[i]ntervening arrest . . . requires a formal, custodial arrest and is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or booking the suspect into jail." It would also specify that a "noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest."

**Proposed Amendment:**

Section 4A1.2(a)(2) is amended by inserting at the end the following new paragraph:

" 'Intervening arrest,' for purposes of this provision, requires a formal, custodial arrest and is ordinarily indicated by placing someone in police custody as part of a criminal investigation, informing the suspect that the suspect is under arrest, transporting the suspect to the police station, or booking the suspect into jail. A noncustodial encounter with law enforcement, such as a traffic stop, is not an intervening arrest.".

## 4. SIMPLIFICATION OF THREE-STEP PROCESS

**Synopsis of Proposed Amendment:** In August 2024, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2025, "[s]implifying the guidelines and clarifying their role in sentencing," including "possibly amending the *Guidelines Manual* to address the three-step process set forth in §1B1.1 (Application Instructions) and the use of departures and policy statements relating to specific personal characteristics." U.S. Sent'g Comm'n, "Notice of Final Priorities," 89 FR 66176 (Aug. 14, 2024).

In December 2023, the Commission published a proposed amendment that would have provided for a two-step process in §1B1.1 (Application Instructions) with accompanying changes throughout the *Guidelines Manual* to convert the Commission's existing departures and policy statements to "additional considerations." More specifically, that proposed amendment would have revised §1B1.1 to account for a two-step sentencing process, established a new Chapter Six further addressing the court's consideration of the factors set forth in 18 U.S.C. § 3553(a), eliminated Chapter Five, Part H and most of Part K, and reclassified most "departures" currently provided throughout the *Guidelines Manual* as "Additional Considerations" that may be relevant to the court's determination under 18 U.S.C. § 3553(a). *See* Proposed Amendments to the Sentencing Guidelines (Dec. 2023) at https://www.ussc.gov/guidelines/amendments/proposed-2024-amendments-federal-sentencing-guidelines.

*The Three-Step Process in the Guidelines Manual*

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the "Act") provides the Commission with broad authority to develop guidelines that will further the basic purposes of criminal sentencing: deterrence, incapacitation, retribution, and rehabilitation. The Act contains detailed instructions as to how this determination should be made, including that the Commission establish categories of offenses and categories of defendants for use in prescribing guideline ranges that specify an appropriate sentence and to consider whether, and to what extent, specific offense-based and defendant-based factors are relevant to sentencing. *See* 28 U.S.C. § 994(c), (d).

In relation to the establishment of categories of defendants, the Act placed several limitations upon the Commission's ability to consider certain personal and individual characteristics in establishing the guidelines and policy statements. *See* 28 U.S.C. § 994(d), (e).

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the portion of 18 U.S.C. § 3553 making the guidelines mandatory was unconstitutional. The Court has further explained that the guideline range should continue to be "the starting point and the initial benchmark" in sentencing proceedings. *See* Gall v. United States, 552 U.S. 38, 49 (2007); *see also* Peugh v. United States, 569 U.S. 530 (2013) (noting that "the post-Booker federal sentencing system adopted procedural measures that make the guidelines the 'lodestone' of sentencing"). After determining the kinds of sentence and guideline range, the court must also fully consider the factors in 18 U.S.C. § 3553(a), including, among other factors, "the nature and circumstances of the offense and the history and characteristics of the defendant," to determine a sentence that is sufficient but not greater than necessary. *See* Rita v. United States, 551 U.S. 338, 347–48 (2007).

Section 1B1.1 (Application Instructions) sets forth the instructions for determining the applicable guideline range and type of sentence to impose, in accordance with the *Guidelines Manual*. Post-*Booker*, the Commission incorporated a three-step process for determining the sentence to be imposed, which is reflected in the three main subdivisions of §1B1.1 (subsections (a) through (c)). The three-step process can be summarized as follows: (1) the court calculates the applicable guideline range; (2) the court considers

policy statements and guideline commentary relating to departures and specific personal characteristics that might warrant consideration in imposing the sentence; and (3) the court considers the applicable factors in 18 U.S.C. § 3553(a) in imposing a sentence that is sufficient, but not greater than necessary (whether within or outside the applicable guideline range).

The first step in the three-step process, as set forth in §1B1.1(a), requires the court to calculate the applicable guideline range and determine the kind of sentence by applying Chapters Two (Offense Conduct), Three (Adjustments), and Four (Criminal History and Criminal Livelihood), and Parts B through G of Chapter Five (Determining the Sentence).

The second step in the three-step process, as set forth in §1B1.1(b), requires the court to consider "Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence." Authorized grounds for departures based on various circumstances of the offense, specific personal characteristics of the defendant, and certain procedural history of the case are described throughout the *Guidelines Manual*: several Chapter Two offense guidelines and Chapter Eight organizational guidelines contain departure provisions within their corresponding Commentary; grounds for departure based on criminal history are generally provided in Chapter Four; and Chapter Five sets forth various policy statements with additional grounds for departure. Chapter Five, Part H, addresses the relevance of certain specific personal characteristics

in sentencing by allocating them into three general categories. The first category includes specific personal characteristics that Congress has prohibited from consideration or that the Commission has determined should be prohibited. *See*, *e.g.*, USSG §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)). The second category includes specific personal characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. *See*, *e.g.*, §§5H1.2 (Employment Record); 5H1.6 (Family Ties and Responsibilities (Policy Statement)). The third category includes specific personal characteristics that Congress directed the Commission to consider in the guidelines only to the extent that they have relevance to sentencing. *See, e.g.*, USSG §§5H1.1 (Age (Policy Statement)); 5H1.3 (Mental and Emotional Conditions (Policy Statement)).

The third step in the three-step process, as set forth in §1B1.1(c), requires the court to "consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole." Specifically, section 3553(a) provides:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such

guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

Post-*Booker*, courts have been using departures provided under step two of the three-step process with less frequency in favor of variances. For further information pertaining to the application of departure provisions other than §5K1.1 or §5K3.1 (either alone or in conjunction with §5K1.1 or §5K3.1), see

https://www.ussc.gov/education/backgrounders/2024-simplification-data. Given this trend, the Commission has identified the reconceptualization of the three-step process as one potential method of simplifying the guidelines.

*Proposed Amendment*

The proposed amendment contains two parts. Part A contains issues for comment on whether any changes should be made to the *Guidelines Manual* relating to the three-step process set forth in §1B1.1 and the use of departures and policy statements relating to specific personal characteristics. Part B contains a proposed amendment that would restructure the *Guidelines Manual* to simplify both (1) the current three-step process utilized in determining a sentence that is "sufficient, but not greater than necessary," and (2) existing guidance in the *Guidelines Manual* regarding a court's consideration of the individual circumstances of the defendant as well as certain offense characteristics.

Part B of the proposed amendment would make changes to better align the requirements placed on the court and acknowledge the growing shift away from the use of departures provided for within the *Guidelines Manual* in the wake of *Booker* and subsequent decisions. *See* United States v. Booker, 543 U.S. 220 (2005); Irizarry v. United States, 553 U.S. 708 (2008) (holding that Rule 32(h) of the Federal Rules of Criminal Procedure, which requires a court to give "reasonable notice" that the court is contemplating a "departure" from the recommended guideline range on a ground not identified for

departure in the presentence report or in a party's prehearing submission, does not apply to a "variance" from a recommended guideline range).

Part B of the proposed amendment would revise Chapter One in multiple ways. First, it would delete the "Original Introduction to the Guidelines Manual" currently contained in Chapter One, Part A. This introduction would be published as a historical background in an Appendix of the *Guidelines Manual*. Second, Part B of the proposed amendment would revise the application instructions provided in §1B1.1 to reflect the simplification of the three-step process into two steps. Part B of the proposed amendment sets forth the calculation of guideline range and determination of sentencing requirements and options under the *Guidelines Manual* as the first step of the sentencing process in §1B1.1(a). The court's consideration of the section 3553(a) factors is set forth as the second and final step of the sentencing process in §1B1.1(b). As revised, §1B1.1(b) expressly lists the factors courts must consider pursuant to 18 U.S.C. § 3553(a). Additionally, the definition of "departures" is removed from the application notes to §1B1.1, and the Background Commentary is revised accordingly.

In addition, Part B of the proposed amendment seeks to better address the distinction between the statutory limitations on the Commission's ability to consider certain offense characteristics and individual circumstances in recommending a term of imprisonment or length of imprisonment, and the requirement that the court consider a broad range of individual and offense characteristics in determining an appropriate sentence pursuant to 18 U.S.C. § 3553(a). More specifically, Part B of the proposed amendment revises

current §1A3.1 (Authority), which sets forth the Commission’s authority in developing the guidelines. First, the provision is redesignated as §1A1.1 and, for clarity, is retitled as “Commission’s Authority.” Second, in addition to referring to 28 U.S.C. § 994(a) as the basis of the Commission’s authority to promulgate guidelines, policy statements, and commentary, the provision would also explain how the Commission has complied with the requirements placed by Congress, noting what is not considered by the Commission in formulating the guidelines used to calculate the guideline range.

A new background commentary explains that the requirements and limitations imposed upon the Commission by 28 U.S.C. § 994, do not apply to sentencing courts. It makes clear that “Congress set forth the factors that a court must consider in imposing a sentence that is ‘sufficient but not greater than necessary’ to comply with the purposes of sentencing in 18 U.S.C. § 3553(a)” and that “[t]hese statutory factors permit a sentencing court to consider the ‘widest possible breadth of information’ about a defendant ensuring the court is in ‘possession of the fullest information possible concerning the defendant’s life and characteristics.’ ” The new background commentary concludes by noting that the application instructions set forth in §1B1.1 are structured to reflect a two-step process in which the sentencing court must first correctly calculate the applicable guideline range as the “starting point and initial benchmark” and then must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a).

Consistent with the revised approach, Part B of the proposed amendment would delete most "departures" currently provided throughout the *Guidelines Manual*. Changes would be made throughout the *Guidelines Manual* by deleting the departure provisions currently contained in commentary to various guidelines. Part B of the proposed amendment would also retitle Chapter Five to reflect its focus on the rules pertaining to the calculation of the guideline range, specifically to better reflect the chapter's purpose in the introductory commentary noting that "a sentence is within the guidelines if it complies with each applicable section of this chapter." All current provisions contained in Chapter Five, Part H (Specific Offender Characteristics) would be deleted. Similarly, all provisions in Chapter Five, Part K (Departures), with the exception of those pertaining to substantial assistance to the authorities and early disposition programs, would be deleted. Only the provisions pertaining to substantial assistance would be retained, while the provision pertaining to early disposition programs would be moved to a new Part F in Chapter Three.

Finally, Chapter Five is also amended by revising the Commentary to §5B1.1 (Imposition of a Term of Probation) and §5D1.1 (Imposition of a Term of Supervised Release) to emphasize the factors courts are statutorily required to consider in determining the conditions of probation or supervised release. The commentary is further revised to retain factors the Commission had previously identified as relevant in Chapter Five, Part H pursuant to the congressional guidance provided to the Commission in 28 U.S.C. § 994(d) and (e).

The issues for comment set forth below are informed by the proposed amendment contained in Part B.

**(A) Issues for Comment**

1. Part B of the proposed amendment would remove the second step in the three-step process, as set forth in subsection (b) of §1B1.1 (Application Instructions), requiring the court to consider the departure provisions set forth throughout the *Guidelines Manual* and the policy statements contained in Chapter Five, Part H, relating to specific personal characteristics.

   The Commission invites general comment on whether reconceptualizing the three-step process in this manner streamlines the application of the *Guidelines Manual* and better reflects the interaction between 18 U.S.C. § 3553(a) and the guidelines. Does the approach set forth in Part B of the proposed amendment better achieve these goals than the proposed amendment published in December 2023 (available at https://www.ussc.gov/guidelines/amendments/proposed-2024-amendments-federal-sentencing-guidelines), which would have retained current departure provisions in more generalized language and reclassified them as "Additional Considerations" that may be relevant to the court's determination under 18 U.S.C. § 3553(a)? Are there any other approaches that the Commission should consider to reconceptualize and simplify the three-step process, and if so, what are they?

2. The Commission seeks comment on whether revising the three-step process, either in general or as implemented in Part B of the proposed amendment, is consistent with the Commission's authority under 28 U.S.C. §§ 994 and 995 and all other provisions of federal law. Similarly, the Commission seeks comment on whether revising the three-step process is consistent with other congressional directives to the Commission, such as the restrictions on the Commission's authority to promulgate further reasons for downward departures set forth in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108–21, 117 Stat. 649 (2003).

3. The *Guidelines Manual* currently contains more than two hundred departure provisions in Chapter Five, Part K (Departures), and the commentary to various guidelines elsewhere in the Manual. Chapter Five, Part H contains twelve policy statements addressing the relevance of certain specific personal characteristics in sentencing. Such provisions were either included by the original Commission or through subsequent guideline amendments to provide guidance to courts in identifying "aggravating or mitigating circumstance(s) of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *See* 18 U.S.C. § 3553(b).

The proposed amendment contained in Part B would delete most "departures" currently provided throughout the *Guidelines Manual*. Only the provisions pertaining to substantial assistance to authorities (currently provided for in Chapter Five, Part K, Subpart 1) and early disposition programs (currently provided for in §5K3.1 (Early Disposition Programs (Policy Statement)) would be retained in the Manual, while other deleted "departures" would be accounted for through the court's consideration of the applicable factors in 18 U.S.C. § 3553(a). If the Commission were to remove the second step in the three-step process, as proposed in Part B, should the Commission continue to expressly account for any "departure provisions" in the *Guidelines Manual* beside substantial assistance and Early Disposition Programs? If so, which provisions should be retained and how? Alternatively, should the Commission remove the departures contained in Chapter Five, Part K, and the provisions in Chapter Five, Part H, addressing the relevance of certain specific personal characteristics in sentencing, while retaining other departure provisions throughout the *Guidelines Manual*?

The Commission also seeks comment on whether it should consolidate and preserve for historical purposes any deleted departure provisions. If so, how should the Commission do so? For example, should the Commission somehow preserve the content of deleted departures in a new Appendix to the *Guidelines Manual* or in some other format?

4. At some places in the *Guidelines Manual*, commentary including a departure provision also provides background information that the Commission determined was relevant to the court's consideration. For example, in setting forth a series of departure considerations, Application Note 27 of the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) also provides background information regarding the nature and impact of certain controlled substances, such as synthetic cathinones and cannabinoids, that may be informative to a court's determination as to whether a departure is warranted. The Commission seeks comment on whether it should retain such type of background information even if the departure language is removed. If so, which provisions in the *Guidelines Manual* currently contain background information that should be retained?

**(B) Proposed Amendment**

Chapter One is amended by striking Part A as follows:

" PART A — INTRODUCTION AND AUTHORITY

*Introductory Commentary*

Subparts 1 and 2 of this Part provide an introduction to the Guidelines Manual describing the historical development and evolution of the federal

sentencing guidelines. Subpart 1 sets forth the original introduction to the Guidelines Manual as it first appeared in 1987, with the inclusion of amendments made occasionally thereto between 1987 and 2000. The original introduction, as so amended, explained a number of policy decisions made by the United States Sentencing Commission ('Commission') when it promulgated the initial set of guidelines and therefore provides a useful reference for contextual and historical purposes. Subpart 2 further describes the evolution of the federal sentencing guidelines after the initial guidelines were promulgated.

Subpart 3 of this Part states the authority of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary.

## 1. ORIGINAL INTRODUCTION TO THE GUIDELINES MANUAL

The following provisions of this Subpart set forth the original introduction to this manual, effective November 1, 1987, and as amended through November 1, 2000:

### 1. *Authority*

The United States Sentencing Commission ('Commission') is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. Its principal purpose is to establish sentencing policies

and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

2. *The Statutory Mission*

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of ‘bank robbery/committed with a gun/$2500 taken.’ An offender characteristic category might be ‘offender with one prior conviction not resulting in imprisonment.’ The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender

characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. *The Basic Approach (Policy Statement)*

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective

length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity — sentencing every offender to five years — destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without)

a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender

characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the

constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system

by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data

might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who

recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

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

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) *Real Offense vs. Charge Offense Sentencing*.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when

ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the

Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines

treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) *Departures*.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds 'an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of

§5K2.12 (Coercion and Duress), and §5K2.19 (Post-Sentencing Rehabilitative Efforts)* list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

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

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the

guidelines, offense by offense, seek to take account of those factors that the Commission’s data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (*e.g.*, physical injury) may infrequently occur in connection with a particular crime (*e.g.*, fraud). Such rare occurrences are precisely the type of events that the courts’ departure powers were designed to cover — unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures ‘unreasonable’ where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) *Plea Agreements*.

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a ‘loophole’ large enough to undo the good that sentencing guidelines would bring.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing

general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) *Probation and Split Sentences*.

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

The Commission’s solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation

for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention.* The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.**

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

application note in §5C1.1 that addressed 'nonviolent first offenders' to focus on 'zero-point' offenders. (*See* USSG App. C, amendment 821.)

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

(e) *Multi-Count Convictions*.

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to sentences of life imprisonment — sentences that neither just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) when the conduct involves fungible items (*e.g.*, separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) *Regulatory Offenses*.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal

provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the

release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (*e.g.*, 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.

(g) *Sentencing Ranges*.

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)), required the Commission to promulgate

guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.

(h) *The Sentencing Table*.

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible

range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.

5. *A Concluding Note*

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based

on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment regarding their seriousness and they will be addressed as the Commission refines the guidelines over time.

## 2. CONTINUING EVOLUTION AND ROLE OF THE GUIDELINES

The Sentencing Reform Act of 1984 changed the course of federal sentencing. Among other things, the Act created the United States Sentencing Commission as an independent agency in the Judicial Branch, and directed it to

develop guidelines and policy statements for sentencing courts to use when sentencing offenders convicted of federal crimes. Moreover, it empowered the Commission with ongoing responsibilities to monitor the guidelines, submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes, and establish education and research programs. The mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.

This statement finds resonance in a line of Supreme Court cases that, taken together, echo two themes. The first theme is that the guidelines are the product of a deliberative process that seeks to embody the purposes of sentencing set forth in the Sentencing Reform Act, and as such they continue to play an important role in the sentencing court's determination of an appropriate sentence in a particular case. The Supreme Court alluded to this in *Mistretta v. United States*, 488 U.S. 361 (1989), which upheld the constitutionality of both the federal sentencing guidelines and the Commission against nondelegation and separation of powers challenges. Therein the Court stated:

> Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an

> expert body is especially appropriate. Although Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models, . . . [w]e have no doubt that in the hands of the Commission 'the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose' of the Act.

*Id.* at 379 (internal quotation marks and citations omitted).

The continuing importance of the guidelines in federal sentencing was further acknowledged by the Court in *United States v. Booker*, 543 U.S. 220 (2005), even as that case rendered the guidelines advisory in nature. In *Booker*, the Court held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the Sixth Amendment. The Court reasoned that an advisory guideline system, while lacking the mandatory features that Congress enacted, retains other features that help to further congressional objectives, including providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted. The Court concluded that an advisory guideline system would 'continue to move sentencing in Congress' preferred

direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.' *Id.* at 264–65. An advisory guideline system continues to assure transparency by requiring that sentences be based on articulated reasons stated in open court that are subject to appellate review. An advisory guideline system also continues to promote certainty and predictability in sentencing, thereby enabling the parties to better anticipate the likely sentence based on the individualized facts of the case.

The continuing importance of the guidelines in the sentencing determination is predicated in large part on the Sentencing Reform Act's intent that, in promulgating guidelines, the Commission must take into account the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). *See* 28 U.S.C. §§ 994(f), 991(b)(1). The Supreme Court reinforced this view in *Rita v. United States*, 551 U.S. 338 (2007), which held that a court of appeals may apply a presumption of reasonableness to a sentence imposed by a district court within a properly calculated guideline range without violating the Sixth Amendment. In *Rita*, the Court relied heavily on the complementary roles of the Commission and the sentencing court in federal sentencing, stating:

> [T]he presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the *sentencing judge* and the *Commission* what to do, Congress

> referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a) . . . . The provision also tells the sentencing judge to 'impose a sentence sufficient, but not greater than necessary, to comply with' the basic aims of sentencing as set out above. Congressional statutes then tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives.

*Id.* at 347–48 (emphasis in original). The Court concluded that '[t]he upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale[,]' *id.* at 348, and that the Commission's process for promulgating guidelines results in 'a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice.' *Id.* at 350.

Consequently, district courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. *See* 18 U.S.C. § 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 ('The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.'); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) ('As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.'). The district court, in determining the appropriate

sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). *See Rita*, 551 U.S. at 351. The appellate court engages in a two-step process upon review. The appellate court 'first ensure[s] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . [and] then consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard[,] . . . tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range.' *Gall*, 552 U.S. at 51.

The second and related theme resonant in this line of Supreme Court cases is that, as contemplated by the Sentencing Reform Act, the guidelines are evolutionary in nature. They are the product of the Commission's fulfillment of its statutory duties to monitor federal sentencing law and practices, to seek public input on the operation of the guidelines, and to revise the guidelines accordingly. As the Court acknowledged in *Rita*:

> The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by

> imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

*Rita*, 551 U.S. at 350; *see also Booker*, 543 U.S. at 264 ('[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.'); *Gall*, 552 U.S. at 46 ('[E]ven though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.').

Provisions of the Sentencing Reform Act promote and facilitate this evolutionary process. For example, pursuant to 28 U.S.C. § 994(x), the Commission publishes guideline amendment proposals in the *Federal Register* and conducts hearings to solicit input on those proposals from experts and other members of the public. Pursuant to 28 U.S.C. § 994(o), the Commission periodically reviews and revises the guidelines in consideration of comments it receives from members of the federal criminal justice system, including the

courts, probation officers, the Department of Justice, the Bureau of Prisons, defense attorneys and the federal public defenders, and in consideration of data it receives from sentencing courts and other sources. Statutory mechanisms such as these bolster the Commission's ability to take into account fully the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) in its promulgation of the guidelines.

Congress retains authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines. As the Supreme Court noted in *Kimbrough v. United States*, 552 U.S. 85 (2007), 'Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum.' *Id.* at 103; 28 U.S.C. § 994(h).

As envisioned by Congress, implemented by the Commission, and reaffirmed by the Supreme Court, the guidelines are the product of a deliberative and dynamic process that seeks to embody within federal sentencing policy the purposes of sentencing set forth in the Sentencing Reform Act. As such, the guidelines continue to be a key component of federal sentencing and to play an important role in the sentencing court's determination of an appropriate sentence in any particular case.

3. AUTHORITY

§1A3.1. *Authority*

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.";

and inserting the following:

" PART A — INTRODUCTION AND AUTHORITY

*Introductory Commentary*

The United States Sentencing Commission ('Commission') is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. Congress directed the Commission to establish sentencing policies and practices for the federal criminal justice system and

develop guidelines that further the purposes of sentencing. The guidelines set forth throughout this Manual represent the first step in the sentencing process and are one of multiple factors judges must consider in arriving at sentence that is sufficient but not greater than necessary under 18 U.S.C. § 3553(a).

This Part provides the statutory authority and mission of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary. Information describing the historical development and evolution of the federal sentencing guidelines is set forth in **[**Appendix D of the Guidelines Manual**]**.

## 1. AUTHORITY

### §1A1.1. *Commission's Authority*

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides that a sentencing court 'shall impose a sentence sufficient, but not greater than necessary, to comply with' the purposes of sentencing: (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (2) deterrence; (3) protection of the public from further crimes; and (4) rehabilitation. *See* 18 U.S.C. § 3553(a). The Act also provides for the development of guidelines by the Commission that further those purposes.

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.

The Commission has ensured that the guidelines, policy statements, and commentary used to calculate the guideline range are: (1) neutral as to the race, sex, national origin, creed, and socioeconomic status of the defendant; and (2) generally do not reflect consideration of education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant, in recommending a term of imprisonment or length of imprisonment. *See* 28 U.S.C. § 994(d), (e).

*Commentary*

*Background*: The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the 'Act') provides that courts must consider a variety of factors when imposing a sentence 'sufficient, but not greater than necessary' to

comply with the purposes of sentencing as set forth in the Act—to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, deterrence, protection of the public from further crimes, and rehabilitation. 18 U.S.C. § 3553(a). The Act provides for the development of guidelines that will (1) further these statutory purposes of sentencing; (2) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and (3) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process. 28 U.S.C. § 994(f).

As background, Congress provided specific directives to the Commission when setting a guideline range for 'each category of offense involving each category of defendant.' 28 U.S.C. § 994(b)(1).

First, the Act directs the Commission to consider, for purposes of establishing categories of offenses, whether the following seven matters, 'among others,' have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence: (1) the grade of the offense; (2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense; (3) the nature and degree of the harm caused by the offense, including

whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust; (4) the community view of the gravity of the offense; (5) the public concern generated by the offense; (6) the deterrent effect a particular sentence may have on the commission of the offense by others; and (7) the current incidence of the offense in the community and in the Nation as a whole.
*See* 28 U.S.C. § 994(c).

Second, the Act directs the Commission to consider, for purposes of establishing categories of defendants, whether the following eleven matters, 'among others,' have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance: (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood. *See* 28 U.S.C. § 994(d). The Act also directs the Commission to ensure that the guidelines and policy statements 'are entirely neutral' as to five characteristics – race, sex, national origin, creed, and socioeconomic status. *See* 28 U.S.C. § 994(d).

Third, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the 'general inappropriateness' of considering five of those characteristics – education; vocational skills; employment record; family ties and responsibilities; and community ties. *See* 28 U.S.C. § 994(e).

In formulating the guidelines used to calculate the guideline range, the Commission remains cognizant of these detailed instructions directing the Commission to consider whether, and to what extent, specific offense-based and offender-based factors are relevant to sentencing. *See* 28 U.S.C. § 994(c), (d). Similarly, the Commission has ensured that the guidelines, policy statements, and commentary used to calculate the guideline range are: (1) neutral as to the race, sex, national origin, creed, and socioeconomic status of the defendant; and (2) generally do not reflect consideration of education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant in recommending a term of imprisonment or length of imprisonment. *See* 28 U.S.C. § 994(d), (e).

The requirements and limitations imposed upon the Commission by 28 U.S.C. § 994, however, do not apply to the sentencing court. To the contrary, Congress set forth the factors that a court must consider in imposing a sentence that is 'sufficient but not greater than necessary' to comply with the purposes of sentencing in 18 U.S.C. § 3553(a). These statutory factors permit a sentencing court

to consider the ‘widest possible breadth of information’ about a defendant ensuring the court is in ‘possession of the fullest information possible concerning the defendant’s life and characteristics.’ *See Pepper v. United States*, 562 U.S. 476, 488 (2011); *see also Concepcion v. United States,* 597 U.S. 481, 493 (2022). Accordingly, the application instructions set forth in the following part are structured to reflect this two-step process whereby the sentencing court must first correctly calculate the applicable guideline range as the ‘starting point and initial benchmark’ and then must determine an appropriate sentence upon consideration of all the factors set forth by Congress in 18 U.S.C. § 3553(a). *See Gall v. United States*, 552 U.S. 38, 49–51 (2007).”.

Section 1B1.1(a) is amended—

by inserting at the beginning the following new heading: “*Step One: Calculation of Guideline Range and Determination of Sentencing Requirements and Options under the Guidelines Manual*.—”;

in paragraph 5 by striking “Apply the adjustment as appropriate for the defendant’s acceptance of responsibility from Part E of Chapter Three” and inserting “Apply the adjustment for the defendant’s acceptance of responsibility and the reduction pursuant to an early disposition program, as appropriate, from Parts E and F of Chapter Three”;

and by inserting at the end the following new paragraph 9:

“(9) Apply, as appropriate, Part K of Chapter Five.”.

Section 1B1.1 is amended by striking subsections (b) and (c) as follows:

“(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5).

(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. *See* 18 U.S.C. § 3553(a).”;

and inserting the following new subsection (b):

“(b) *Step Two: Consideration of Factors Set Forth in 18 U.S.C. § 3553(a)*.— After determining the kinds of sentence and guidelines range pursuant to subsection (a) of §1B1.1 (Application Instructions) and 18 U.S.C. § 3553(a)(4) and (5), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing.

Specifically, as set forth in 18 U.S.C. § 3553(a), in determining the particular sentence to be imposed, the court shall also consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2);

(3) the kinds of sentences available;

(4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(5) the need to provide restitution to any victims of the offense.”.

The Commentary to §1B1.1 captioned “Application Notes” is amended in Note 1—

by striking subparagraph (F) as follows:

“(F) ‘Departure’ means (i) for purposes other than those specified in clause (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. ‘Depart’ means grant a departure.

‘Downward departure’ means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. ‘Depart downward’ means grant a downward departure.

‘Upward departure’ means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. ‘Depart upward’ means grant an upward departure.”;

and by redesignating subparagraphs (G) through (M) as subparagraphs (F) through (L), respectively.

The Commentary to §1B1.1 captioned "Background" is amended by striking the following:

"The court must impose a sentence 'sufficient, but not greater than necessary,' to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a). Subsections (a), (b), and (c) are structured to reflect the three-step process used in determining the particular sentence to be imposed. If, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a 'variance'. *See Irizarry v. United States*, 553 U.S. 708, 709–16 (2008) (describing within-range sentences and departures as 'sentences imposed under the framework set out in the Guidelines').";

and inserting the following:

"The court must impose a sentence 'sufficient, but not greater than necessary,' to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a). This guideline is structured to reflect the advisory sentencing scheme established following the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), by setting forth both essential steps of the court's inquiry in making this determination.

Originally, the guidelines were mandatory, with limited exceptions. *See* 18 U.S.C. § 3553(b). Later, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the provision in 18 U.S.C. § 3553(b) making the guidelines mandatory was unconstitutional. Following *Booker,* district courts are first required to properly calculate and consider the guidelines when sentencing. *See* 18 U.S.C. § 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 ('The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.'); *Rita v. United States*, 551 U.S. 338, 351 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) ('As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.'); *Peugh v. United States*, 569 U.S. 530 (2013) (noting that 'the post-*Booker* federal sentencing system adopted procedural measures that make the guidelines the 'lodestone' of sentencing'). Step one sets forth the steps for properly calculating the guidelines.

District courts are then required to fully and carefully consider the additional factors set forth in 18 U.S.C. § 3553(a), which include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2); (3) the kinds of sentence available; (4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (5) the need to

provide restitution to any victims of the offense. *See Rita*, 551 U.S. at 351. Step two, as set forth in subsection (b), reflects this step of the sentencing process.".

The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 1 by striking "the court would be forced to use an artificial guideline and then depart from it" and inserting "the court would be forced to use an artificial guideline and then impose a sentence that is greater than the otherwise applicable guideline range"; and by striking "the probation officer might need to calculate the robbery guideline to assist the court in determining the appropriate degree of departure" and inserting "the probation officer might need to calculate the robbery guideline to assist the court in determining an appropriate sentence".

Section 1B1.3(b) is amended in the heading by striking "*Five (Determining the Sentence)*" and inserting "*Five (Determining the Sentencing Range and Options Under the Guidelines)*".

The Commentary to §1B1.3 captioned "Application Notes" is amended—

in Note 3(B) by striking "The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.";

and in Note 6(B) by striking “In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted. *See generally* §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure).”.

Section 1B1.4 is amended—

in the heading by striking “*(Selecting a Point Within the Guideline Range or Departing from the Guidelines)*”;

and by striking “In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted” and inserting “In determining the sentence to impose”.

The Commentary to 1B1.4 captioned “Background” is amended by striking the following:

“This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing a sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may

consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for an upward departure. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.*, Chapter Five, Part H (Specific Offender Characteristics).";

and inserting the following:

"This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing a sentence. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not

take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines may provide a reason for sentencing at the top of, or above, the guideline range.”.

Section 1B1.7 is amended by striking the following:

“The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.”;

and inserting the following:

“The Commentary that accompanies the guideline sections may serve a number of purposes. It may interpret the guideline or explain how it is to be applied. Failure

to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C. § 3742. In addition, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline.”.

Section 1B1.8(b)(5) is amended by striking “in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities)” and inserting “in determining whether, or to what extent, to impose a sentence that is below the otherwise applicable guideline range pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities)”.

The Commentary to §1B1.8 captioned “Application Notes” is amended in Note 1 by striking “Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to depart upward. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities); *e.g.*, a court may refuse to depart downward on the basis of such information.” and inserting “In contrast, subsection (b)(5) provides that consideration of such information is appropriate in

determining whether, or to what extent, to impose a sentence that is below the otherwise applicable guideline range pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities). For example, a court may refuse to impose a sentence that is below the otherwise applicable guideline range on the basis of such information.”.

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

in Note 1(A) by striking “(*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)” and inserting “(*i.e.*, the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a)(1)–(7), which is determined before consideration of Part K of Chapter Five and §1B1.1(b))”;

and in Note 3 by striking “(constituting a downward departure or variance)” and inserting “(constituting a sentence that is below the otherwise applicable guideline range)”; by striking “representing a downward departure of 20 percent” and inserting “representing a reduction of 20 percent”; and by striking “authorizing, upon government motion, a downward departure based on the defendant’s substantial assistance” and inserting “authorizing the court, upon government

motion, to impose a sentence that is below the otherwise applicable guideline range based on the defendant's substantial assistance".

Section 1B1.12 is amended by striking "sufficient to warrant an upward departure from that guideline range. *United States v. R.L.C.*, 503 U.S. 291 (1992)" and inserting "sufficient to warrant imposing a sentence greater than that guideline range in determining the appropriate sentence to impose pursuant to 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 5037(c); *United States v. R.L.C.*, 503 U.S. 291 (1992)".

Chapter Two is amended in the Introductory Commentary by striking "Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders); and Chapter Five, Part K (Departures)" and inserting: "and Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)".

The Commentary to §2A1.1 captioned "Application Notes" is amended in Note 2 by striking the following:

"*Imposition of Life Sentence*.—

(A) *Offenses Involving Premeditated Killing*.—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death

is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. § 3553(e).

(B) *Felony Murder*.—If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant's state of mind (*e.g.*, recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, departure below the minimum guideline sentence provided for second degree murder in §2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.";

and inserting the following:

“*Offenses Involving Premeditated Killing*.—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. If a mandatory statutory term of life imprisonment applies, a lesser term of imprisonment is permissible only in cases in which the government files a motion pertaining to the defendant’s substantial assistance, as provided in 18 U.S.C. § 3553(e).”.

The Commentary to §2A1.2 is amended by striking the Commentary captioned “Application Note” in its entirety as follows:

“*Application Note:*

1. *Upward Departure Provision*.—If the defendant’s conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted. *See* §5K2.8 (Extreme Conduct).”.

The Commentary to §2A2.1 captioned “Application Notes” is amended—

in the caption by striking “Notes” and inserting “Note”;

and by striking Note 2 as follows:

“2. *Upward Departure Provision*.—If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted.”.

The Commentary to §2A2.4 captioned “Application Notes” is amended by striking Note 3 as follows:

“3. *Upward Departure Provision*.—The base offense level does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. *See* §5K2.7 (Disruption of Governmental Function).”.

The Commentary to §2A3.1 captioned “Application Notes” is amended by striking Note 6 as follows:

“6. *Upward Departure Provision*.—If a victim was sexually abused by more than one participant, an upward departure may be warranted. *See* §5K2.8 (Extreme Conduct).”.

The Commentary to §2A3.2 captioned “Application Notes” is amended by striking Note 6 as follows:

“6. *Upward Departure Consideration*.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.”.

The Commentary to §2A3.6 captioned “Application Notes” is amended by striking Note 4 as follows:

“4. *Upward Departure*.—In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. § 2250(d) is an upward departure from the guideline sentence. A departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.”.

The Commentary to §2A5.3 captioned “Application Notes” is amended—

in the caption by striking “Notes” and inserting “Note”;

and by striking Note 2 as follows:

“2. If the conduct intentionally or recklessly endangered the safety of the aircraft or passengers, an upward departure may be warranted.”.

The Commentary to §2A6.1 captioned “Application Notes” is amended by striking Note 4 as follows:

“4. *Departure Provisions*.—

(A) *In General*.—The Commission recognizes that offenses covered by this guideline may include a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. *See* Chapter Five, Part K (Departures).

(B) *Multiple Threats, False Liens or Encumbrances, or Victims; Pecuniary Harm*.—If the offense involved (i) substantially more than two threatening communications to the same victim, (ii) a prolonged period of making harassing communications to the same victim, (iii) substantially more than two false liens or encumbrances against the real or personal property of the same

victim, (iv) multiple victims, or (v) substantial pecuniary harm to a victim, an upward departure may be warranted.”.

The Commentary to §2A6.2 captioned “Application Notes” is amended by striking Note 5 as follows:

“5. If the defendant received an enhancement under subsection (b)(1) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant stalked the victim on many occasions over a prolonged period of time.”.

The Commentary to §2B1.1 captioned “Application Notes” is amended—

in Note 8(A) by striking “If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.”;

and by striking Note 21 as follows:

“21. *Departure Considerations*.—

(A) *Upward Departure Considerations*.—There may be cases in which the offense level determined under this guideline substantially

understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.

(ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed. Similarly, an

upward departure would be warranted in a case involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.

(iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).

(iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.

(v) In a case involving stolen information from a 'protected computer', as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.

(vi) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:

(I) The offense caused substantial harm to the victim's reputation, or the victim suffered a substantial inconvenience related to repairing the victim's reputation.

(II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.

(III) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.

(B) *Upward Departure for Debilitating Impact on a Critical Infrastructure*.—An upward departure would be warranted in a case in which subsection (b)(19)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a

debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.

(C) *Downward Departure Consideration*.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.

(D) *Downward Departure for Major Disaster or Emergency Victims*.—If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and

(iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.”.

The Commentary to §2B1.5 captioned “Application Notes” is amended by striking Note 9 as follows:

“9. *Upward Departure Provision*.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources or paleontological resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources) or paleontological resources; or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (*e.g.*, the Statue of Liberty or the Liberty Bell).”.

The Commentary to §2B2.1 captioned “Background” is amended by striking “Weapon use would be a ground for upward departure.”.

The Commentary to §2B3.1 captioned "Application Notes" is amended—

by striking Note 5 as follows:

"5. *Upward Departure Provision*.—If the defendant intended to murder the victim, an upward departure may be warranted; *see* §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).";

and by renumbering Note 6 as Note 5.

The Commentary to §2B3.2 captioned "Application Notes" is amended by striking Notes 7 and 8 as follows:

"7. *Upward Departure Based on Threat of Death or Serious Bodily Injury to Numerous Victims*.—If the offense involved the threat of death or serious bodily injury to numerous victims (*e.g.*, in the case of a plan to derail a passenger train or poison consumer products), an upward departure may be warranted.

8. *Upward Departure Based on Organized Criminal Activity or Threat to Family Member of Victim*.—If the offense involved organized criminal activity, or a threat to a family member of the victim, an upward departure may be warranted.".

The Commentary to §2B5.3 captioned "Application Notes" is amended by striking Note 5 as follows:

"5. *Departure Considerations*.—If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:

(A) The offense involved substantial harm to the reputation of the copyright or trademark owner.

(B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.

(C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.

(D) The offense resulted in death or serious bodily injury.".

The Commentary to §2C1.1 captioned "Application Notes" is amended—

in Note 5 by striking "Chapter Three, Parts A–D" and inserting "Chapter Three, Parts A–E";

and by striking Note 7 as follows:

"7. *Upward Departure Provisions*.—In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the enhancements in §2C1.1(b)(2) and (c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. *See* Chapter Five, Part K (Departures).

In a case in which the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. *See* §5K2.7 (Disruption of Governmental Function).".

The Commentary to §2C1.8 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. *Departure Provision*.—In a case in which the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted.".

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

in Note 3 by striking the following:

"An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.";

in Note 10 by striking the following:

"In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not

adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.";

in Note 18(A) by striking "In some cases, the enhancement under subsection (b)(14)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining"; and inserting "In determining";

in Note 22 by striking the following:

"*Application of Subsection (e)(1)*.—

(A) *Definition*.—For purposes of this guideline, 'sexual offense' means a 'sexual act' or 'sexual contact' as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.

(B) *Upward Departure Provision*.—If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.",

and inserting the following:

"*Application of Subsection (e)(1)*.—For purposes of this guideline, 'sexual offense' means a 'sexual act' or 'sexual contact' as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.";

in Note 24 by striking "a lower sentence imposed (including a downward departure)" and inserting "a lower sentence imposed";

and by striking Note 27 as follows:

"27. *Departure Considerations*.—

(A) *Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations*.—If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

(B) *Upward Departure Based on Drug Quantity*.—In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.

(C) *Upward Departure Based on Unusually High Purity*.—Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone for which the guideline itself provides for the consideration of purity (*see* the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal

enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.

(D) *Departure Based on Potency of Synthetic Cathinones*.—In addition to providing converted drug weights for specific controlled substances and groups of substances, the Drug Conversion Tables provide converted drug weights for certain classes of controlled substances, such as synthetic cathinones. In the case of a synthetic cathinone that is not specifically referenced in this guideline, the converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class, such as methcathinone or alpha-PVP. In such a case, a departure may be warranted. For example, an upward departure may be warranted in cases involving MDPV, a substance of which a lesser quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone. In contrast, a downward departure may be warranted in cases involving methylone, a substance of which a greater quantity is usually needed to produce

an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

(E) *Departures for Certain Cases involving Synthetic Cannabinoids*.—

(i) *Departure Based on Concentration of Synthetic Cannabinoids*.—Synthetic cannabinoids are manufactured as powder or crystalline substances. The concentrated substance is then usually sprayed on or soaked into a plant or other base material, and trafficked as part of a mixture. Nonetheless, there may be cases in which the substance involved in the offense is a synthetic cannabinoid not combined with any other substance. In such a case, an upward departure would be warranted.

There also may be cases in which the substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material. In such a case, a downward departure may be warranted.

(ii) *Downward Departure Based on Potency of Synthetic Cannabinoids*.—In the case of a synthetic cannabinoid that is not specifically referenced in this guideline, the

converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class, such as JWH-018 or AM-2201. In such a case, a downward departure may be warranted.”.

The Commentary to §2D1.5 captioned “Application Notes” is amended—

by striking Note 2 as follows:

“2. *Upward Departure Provision*.—If as part of the enterprise the defendant sanctioned the use of violence, or if the number of persons managed by the defendant was extremely large, an upward departure may be warranted.”;

and by renumbering Notes 3 and 4 as Notes 2 and 3, respectively.

The Commentary to §2D1.7 is amended by striking the Commentary captioned “Application Note” in its entirety as follows:

"*Application Note:*

1. The typical case addressed by this guideline involves small-scale trafficking in drug paraphernalia (generally from a retail establishment that also sells items that are not unlawful). In a case involving a large-scale dealer, distributor, or manufacturer, an upward departure may be warranted. Conversely, where the offense was not committed for pecuniary gain (*e.g.*, transportation for the defendant's personal use), a downward departure may be warranted.".

The Commentary to §2D1.11 captioned "Application Notes" is amended—

in Note 1 by striking subparagraph (C) as follows:

"(C) *Upward Departure*.—In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.";

and in Note 4 by striking "In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health

or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs"; and inserting "Any costs".

The Commentary to §2D1.12 captioned "Application Notes" is amended—

by striking Note 1 as follows:

"1. If the offense involved the large-scale manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material, an upward departure may be warranted.";

by redesignating Notes 2, 3, and 4 as Notes 1, 2, and 3, respectively;

and in Note 2 (as so redesignated) by striking "In some cases, the enhancement under subsection (b)(2) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs"; and inserting "Any costs".

The Commentary to §2D2.1 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

“*Application Note:*

1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant’s own consumption. Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.”.

The Commentary to §2D2.3 captioned “Background” is amended by striking “If no or only a few passengers were placed at risk, a downward departure may be warranted. If the offense resulted in the death or serious bodily injury of a large number of persons, such that the resulting offense level under subsection (b) would not adequately reflect the seriousness of the offense, an upward departure may be warranted.”.

The Commentary to §2E1.1 captioned “Application Notes” is amended in Note 4 by striking “If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.”.

The Commentary to §2E3.1 captioned “Application Notes” is amended—

in the caption by striking “Notes” and inserting “Note”;

and by striking Note 2 as follows:

"2. *Upward Departure Provision*.—The base offense levels provided for animal fighting ventures in subsection (a)(1) and (a)(3) reflect that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. Nonetheless, there may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. For example, an upward departure may be warranted if (A) the offense involved extraordinary cruelty to an animal beyond the violence inherent in such a venture (such as by killing an animal in a way that prolongs the suffering of the animal); or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).".

The Commentary to §2G1.1 captioned "Application Notes" is amended—

in Note 2 by striking "If bodily injury results, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).";

and by striking Note 6 as follows:

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

The Commentary to §2G1.3 captioned “Application Notes” is amended by striking Note 7 as follows:

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

The Commentary to §2G2.1 captioned “Application Notes” is amended by striking Note 8 as follows:

“8. *Upward Departure Provision*.—An upward departure may be warranted if the offense involved more than 10 minors.”.

The Commentary to §2G2.2 captioned “Application Notes” is amended—

in Note 6(B)(i) by striking “If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.”;

in Note 6(B)(ii) by striking “If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.”;

and by striking Note 9 as follows:

“9. *Upward Departure Provision*.—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.”.

The Commentary to §2H2.1 is amended by striking the Commentary captioned “Application Note” in its entirety as follows:

“*Application Note:*

1. *Upward Departure Provision*.—If the offense resulted in bodily injury or significant property damage, or involved corrupting a public official, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”.

The Commentary to §2H3.1 captioned “Application Notes” is amended by striking Note 5 as follows:

“5. *Upward Departure*.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:

(A) The offense involved personal information, means of identification, confidential phone records information, or tax return information of a substantial number of individuals.

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

The Commentary to §2H4.1 captioned “Application Notes” is amended by striking Notes 3 and 4 as follows:

“3. If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted.

4. In a case in which the defendant was convicted under 18 U.S.C. §§ 1589(b) or 1593A, a downward departure may be warranted if the defendant benefitted from participating in a venture described in those sections without knowing that (*i.e.*, in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections.”.

The Commentary to §2J1.2 captioned “Application Notes” is amended—

by striking Note 4 as follows:

“4. *Upward Departure Considerations*.—If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures). In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness’s face) or a particularly serious sex offense, an upward departure would be warranted.”;

and by redesignating Note 5 as Note 4.

The Commentary to §2J1.3 captioned “Application Notes” is amended—

by striking Note 4 as follows:

“4. If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”;

and by redesignating Note 5 as Note 4.

The Commentary to §2J1.6 captioned “Application Notes” is amended—

by striking Note 4 as follows:

“4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (*e.g.*, perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice) is made because of the operation of the rules set out in Application Note 3.”;

and by redesignating Note 5 as Note 4.

The Commentary to §2K1.3 captioned “Application Notes” is amended—

by striking Note 10 as follows:

"10. An upward departure may be warranted in any of the following circumstances: (A) the quantity of explosive materials significantly exceeded 1000 pounds; (B) the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives (*e.g.*, plastic explosives); (C) the defendant knowingly distributed explosive materials to a person under twenty-one years of age; or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals.";

by redesignating Note 11 as Note 10;

and in Note 10 (as so redesignated) by striking "However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.".

The Commentary to §2K1.4 captioned "Application Notes" is amended by striking Note 3 as follows:

“3. *Upward Departure Provision*.—If bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”.

Section 2K2.1(b)(9)(B) is amended by striking “, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category)”.

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

in Note 7 by striking the following:

“Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may

be warranted. *See also* §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).";

by striking Note 11 as follows:

"11. *Upward Departure Provisions*.—An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (*e.g.*, machineguns, destructive devices), military type assault rifles, non-detectable ('plastic') firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (*see* Application Note 7).";

by redesignating Notes 12, 13, and 14 as Notes 11, 12, and 13, respectively;

in Note 12 (as so redesignated)—

by striking subparagraph (B) as follows:

"(B) *Upward Departure Provision*.—If the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to

transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms, an upward departure may be warranted.";

and by redesignating subparagraph (C) as subparagraph (B);

and in Note 13 (as so redesignated)—

by striking subparagraph (D) as follows:

"(D) *Upward Departure Provision*.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.";

and by redesignating subparagraph (E) as subparagraph (D).

Section 2K2.4(a) is amended by striking "Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood)" and inserting "Chapters Three (Adjustments), Parts A through E, and Four (Criminal History and Criminal Livelihood)".

Section 2K2.4(b) is amended by striking "Chapters Three and Four" and inserting "Chapters Three, Parts A through E, and Four".

Section 2K2.4(c) is amended by striking "Chapters Three and Four" and inserting "Chapters Three, Parts A through E, and Four".

The Commentary to §2K2.4 captioned "Application Notes" is amended—

in Note 2 by striking the following:

"*Application of Subsection (b)*.—

(A) *In General*.—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (*e.g.*, not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.

(B) *Upward Departure Provision*.—In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term

required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense but is not determined to be a career offender under §4B1.1.";

and inserting the following:

"*Application of Subsection (b)*.—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (*e.g.*, not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.";

in Note 4 by striking the subparagraph (C) as follows:

"(C) *Upward Departure Provision*.—In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total

maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).";

and in Note 5 by striking "Chapter Three (Adjustment) and Chapter Four (Criminal History and Criminal Livelihood)" and inserting "Chapter Three (Adjustment), Parts A through E, and Chapter Four (Criminal History and Criminal Livelihood)"; and by striking "no other adjustments in Chapter Three" and inserting "no other adjustments in Chapter Three, Parts A through D,".

The Commentary to §2K2.5 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. Where the firearm was brandished, discharged, or otherwise used, in a federal facility, federal court facility, or school zone, and the cross

reference from subsection (c)(1) does not apply, an upward departure may be warranted.”.

The Commentary to §2L1.1 captioned “Application Notes” is amended—

in Note 4 by striking “Application Note 1(M) of §1B1.1” and inserting “Application Note 1(L) of §1B1.1”;

and by striking Note 7 as follows:

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

(A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

(B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).

(C) The offense involved substantially more than 100 aliens.”.

The Commentary to §2L1.2 captioned "Application Notes" is amended by striking Notes 6, 7, and 8 as follows:

"6. *Departure Based on Seriousness of a Prior Offense*.—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (*see* §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.

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

that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

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

8. *Departure Based on Cultural Assimilation*.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood,

(B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

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

The Commentary to §2L2.1 captioned "Application Notes" is amended—

by striking Note 3 as follows:

"3. Subsection (b)(3) provides an enhancement if the defendant knew, believed, or had reason to believe that a passport or visa was to be used to

facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. If the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an especially serious type, an upward departure may be warranted.";

by redesignating Note 4 as Note 3;

and by striking Note 5 as follows:

"5. If the offense involved substantially more than 100 documents, an upward departure may be warranted.".

The Commentary to §2L2.2 captioned "Application Notes" is amended by striking Note 6 as follows:

"6. *Upward Departure Provision*.—If the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity, an upward departure may be warranted. *See* Application Note 4 of the Commentary to §3A1.4 (Terrorism).".

The Commentary to §2M3.1 captioned "Application Notes" is amended—

in Note 2 by striking "When revelation is likely to cause little or no harm, a downward departure may be warranted. *See* Chapter Five, Part K (Departures).";

and by striking Note 3 as follows:

"3. The court may depart from the guidelines upon representation by the President or his duly authorized designee that the imposition of a sanction other than authorized by the guideline is necessary to protect national security or further the objectives of the nation's foreign policy.".

The Commentary to §2M4.1 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. Subsection (b)(1) does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. If the offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict, an upward departure may be warranted.".

The Commentary to §2M5.1 captioned "Application Notes" is amended by striking Note 3 as follows:

“3. *Departure Provisions*.—

(A) *In General*.—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

(B) *War or Armed Conflict*.—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.”.

The Commentary to §2M5.2 captioned “Application Notes” is amended—

in the caption by striking “Notes” and inserting “Note”;

in Note 1 by striking the following:

“The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States.

In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted. In the case of a violation during time of war or armed conflict, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).";

and by striking Note 2 as follows:

"2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted.".

The Commentary to §2M5.3 captioned "Application Notes" is amended—

in the caption by striking "Notes" and inserting "Note";

and by striking Note 2 as follows:

"2. *Departure Provisions*.—

(A) *In General*.—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the funds or other material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. In a case in which such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

(B) *War or Armed Conflict*.—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.".

The Commentary to §2N1.1 captioned "Application Notes" is amended—

in the caption by striking "Notes" and inserting "Note";

by striking Note 1 as follows:

"1. The base offense level reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. Where the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property damage or monetary

loss, an upward departure may be warranted. In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.";

and by redesignating Note 2 as Note 1.

The Commentary to §2N1.2 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).".

The Commentary to §2N1.3 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”.

The Commentary to §2N2.1 captioned “Application Notes” is amended—

by striking Note 1 as follows:

“1. This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted. *See* Chapter Five, Part K (Departures).”;

by redesignating Note 2 as Note 1;

by striking Note 3 as follows:

“3. *Upward Departure Provisions*.—The following are circumstances in which an upward departure may be warranted:

(A) The offense created a substantial risk of bodily injury or death; or bodily injury, death, extreme psychological injury, property damage, or monetary loss resulted from the offense. *See* Chapter Five, Part K (Departures).

(B) The defendant was convicted under 7 U.S.C. § 7734.";

and by redesignating Note 4 as Note 2.

The Commentary to §2P1.1 captioned "Application Notes" is amended—

by striking Note 4 as follows:

"4. If death or bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).";

and by redesignating Notes 5 and 6 as Notes 4 and 5, respectively.

The Commentary to §2P1.3 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. If death or bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).".

The Commentary to §2Q1.1 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. If death or serious bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).".

The Commentary to §2Q1.2 captioned "Application Notes" is amended—

by striking Note 4 as follows:

"4. Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this section assumes knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.";

by redesignating Notes 5 through 8 as Notes 4 through 7, respectively;

in Note 4 (as so redesignated) by striking "Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.";

in Note 5 (as so redesignated) by striking "Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. *See* Chapter Five, Part K (Departures).";

in Note 6 (as so redesignated) by striking "Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.";

in Note 7 (as so redesignated) by striking "Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels either upward or downward may be warranted.";

and by striking Note 9 as follows:

"9. *Other Upward Departure Provisions*.—

(A) *Civil Adjudications and Failure to Comply with Administrative Order*.—In a case in which the defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure

may be warranted. *See* §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

(B) *Extreme Psychological Injury*.—If the offense caused extreme psychological injury, an upward departure may be warranted. *See* §5K2.3 (Extreme Psychological Injury).

(C) *Terrorism*.—If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. *See* Application Note 4 of the Commentary to §3A1.4 (Terrorism).".

The Commentary to §2Q1.3 captioned "Application Notes" is amended—

by striking Note 3 as follows:

"3. The specific offense characteristics in this section assume knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.";

by redesignating Notes 4 through 7 as Notes 3 through 6, respectively;

in Note 3 (as so redesignated) by striking "Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate.";

in Note 4 (as so redesignated) by striking "Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. *See* Chapter Five, Part K (Departures).";

in Note 5 (as so redesignated) by striking "Depending upon the nature of the contamination involved, a departure of up to two levels in either direction could be warranted.";

in Note 6 (as so redesignated) by striking "Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels in either direction may be warranted.";

and by striking Note 8 as follows:

"8. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an

administrative order, an upward departure may be warranted. *See* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).".

The Commentary to §2Q1.4 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. *Departure Provisions*.—

(A) *Downward Departure Provision*.—The base offense level in subsection (a)(1) reflects that offenses covered by that subsection typically pose a risk of death or serious bodily injury to one or more victims, or cause, or are intended to cause, bodily injury. In the unusual case in which such an offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

(B) *Upward Departure Provisions*.—If the offense caused extreme psychological injury, or caused substantial property damage or monetary loss, an upward departure may be warranted.

If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against

government conduct, an upward departure would be warranted. *See* Application Note 4 of §3A1.4 (Terrorism).".

The Commentary to §2Q2.1 captioned "Application Notes" is amended—

by striking Note 5 as follows:

"5. If the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value, an upward departure may be warranted.";

and by redesignating Note 6 as Note 5.

The Commentary to §2R1.1 captioned "Application Notes" is amended in Note 7 by striking "a sentence at the maximum of the applicable guideline range, or an upward departure, may be warranted. *See* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))" and inserting "a sentence at the maximum of the applicable guideline range may be warranted".

The Commentary to §2T1.8 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. If the defendant was attempting to evade, rather than merely delay, payment of taxes, an upward departure may be warranted.”.

The Commentary to §2T2.1 captioned “Application Notes” is amended—

in the caption by striking “Notes” and inserting “Note”;

and by striking Note 2 as follows:

“2. Offense conduct directed at more than tax evasion (*e.g.*, theft or fraud) may warrant an upward departure.”.

Chapter Two, Part T, Subpart 3 is amended in the Introductory Commentary by striking “, or for departing upward if there is not another more specific applicable guideline”.

The Commentary to §2T3.1 captioned “Application Notes” is amended—

by striking Note 2 as follows:

“2. Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful

or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, an upward departure may be warranted. A sentence based upon an alternative measure of the 'duty' evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States if the increase in market value due to importation is not readily ascertainable, might be considered.";

and by redesignating Note 3 as Note 2.

The Commentary to §2X5.1 captioned "Application Notes" is amended—

in Note 1 by inserting after "include:" the following: "§3F1.1 (Early Disposition Programs (Policy Statement));"; by striking "Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements)" and inserting "Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Assistance to Authorities); Chapter Six, Part A (Sentencing Procedures); and Chapter Six, Part B (Plea Agreements)";

and in Note 2 by striking the following:

"*Convictions under 18 U.S.C. § 1841(a)(1)*.—

(A) *In General*.—If the defendant is convicted under 18 U.S.C. § 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, *i.e.*, the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. § 1841(b) and that results in the death of, or bodily injury to, a child in utero at the time of the offense of conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child's mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(B) *Upward Departure Provision*.—For offenses under 18 U.S.C. § 1841(a)(1), an upward departure may be warranted if the offense level under the applicable guideline does not adequately account for the death of, or serious bodily injury to, the child in utero.";

and inserting the following:

"*Convictions under 18 U.S.C. § 1841(a)(1)*.—If the defendant is convicted under 18 U.S.C. § 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in,

*i.e.*, the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. § 1841(b) and that results in the death of, or bodily injury to, a child in utero at the time of the offense of conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child's mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).".

The Commentary to §2X7.2 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

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

    (A) The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. § 2285 to facilitate other felonies.

    (B) The offense involved use of the vessel as part of an ongoing criminal organization or enterprise.".

The Commentary to §3A1.1 captioned "Application Notes" is amended—

by striking Note 4 as follows:

"4. If an enhancement from subsection (b) applies and the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.";

and by redesignating Note 5 as Note 4.

The Commentary to §3A1.2 captioned "Application Notes" is amended by striking Note 5 as follows:

"5. *Upward Departure Provision*.—If the official victim is an exceptionally high-level official, such as the President or the Vice President of the United States, an upward departure may be warranted due to the potential disruption of the governmental function.".

The Commentary to §3A1.3 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. If the restraint was sufficiently egregious, an upward departure may be warranted. *See* §5K2.4 (Abduction or Unlawful Restraint).".

The Commentary to §3A1.4 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. *Upward Departure Provision*.—By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.".

The Commentary to §3B1.1 captioned "Application Notes" is amended in Note 2 by striking "An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.".

The Commentary to §3B1.4 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. If the defendant used or attempted to use more than one person less than eighteen years of age, an upward departure may be warranted.".

The Commentary to §3C1.2 captioned "Application Notes" is amended—

in Note 2 by striking "However, where a higher degree of culpability was involved, an upward departure above the 2-level increase provided in this section may be warranted.";

and by striking Note 6 as follows:

"6. If death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).".

The Commentary to §3D1.1 captioned "Background" is amended by striking "Chapter Three, Part E (Acceptance of Responsibility)" and inserting "Chapter Three, Parts E (Acceptance of Responsibility) and F (Early Disposition Program),"; and by striking "Chapter Five (Determining the Sentence)" both places such phrase appears and inserting "Chapter Five (Determining the Sentencing Range and Options Under the Guidelines)".

The Commentary to §3D1.2 captioned "Background" is amended by striking "it was rejected because it probably would require departure in many cases in order to capture adequately the criminal behavior" and inserting "it was rejected because, in many cases, it would not adequately capture the scope and impact of the criminal behavior".

The Commentary to §3D1.3 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. Sometimes the rule specified in this section may not result in incremental punishment for additional criminal acts because of the grouping rules. For example, if the defendant commits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same victim on a single occasion, all of the counts are grouped together under §3D1.2. The aggravated assault will increase the guideline range for the rape. The

robbery, however, will not. This is because the offense guideline for rape (§2A3.1) includes the most common aggravating factors, including injury, that data showed to be significant in actual practice. The additional factor of property loss ordinarily can be taken into account adequately within the guideline range for rape, which is fairly wide. However, an exceptionally large property loss in the course of the rape would provide grounds for an upward departure. *See* §5K2.5 (Property Damage or Loss).".

The Commentary to §3D1.4 captioned "Background" is amended by striking the following:

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

5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units.

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

and inserting the following:

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

The Commentary to §3D1.5 is amended by striking "Chapter Five (Determining the Sentence)" and inserting "Chapter Five (Determining the Sentencing Range and Options Under the Guidelines)"; and by striking "Chapter Three, Part E (Acceptance of Responsibility)" and inserting "Chapter Three, Parts E (Acceptance of Responsibility) and F (Early Disposition Program),".

Chapter Three is amended by inserting at the end the following new Part F:

" PART F — EARLY DISPOSITION PROGRAM

§3F1.1. *Early Disposition Programs (Policy Statement)*

Upon motion of the Government, the court may decrease the defendant's offense level pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. The level of the decrease shall be consistent with the authorized program within the filing district and the government motion filed, but shall be not more than 4 levels.

*Commentary*

*Background:* This policy statement implements the directive to the Commission in section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act', Public Law 108–21).".

Chapter Four, Part A is amended in the Introductory Commentary by striking "and §4A1.3".

The Commentary to §4A1.1 captioned "Background" is amended by striking "In recognition of the imperfection of this measure however, §4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.".

Section 4A1.2(h) is amended by striking ", but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))".

Section 4A1.2(i) is amended by striking ", but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))".

Section 4A1.2(j) is amended by striking ", but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))".

The Commentary to §4A1.2 captioned "Applications Notes" is amended—

in Note 3 by striking the following:

"*Application of 'Single Sentence' Rule (Subsection (a)(2)).—*

(A) *Predicate Offenses.—*In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should

be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (*see* §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted 'separately' from each other (*see* §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed

within ten years of the defendant's commencement of the instant offense. *See* §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

(B) *Upward Departure Provision.*—Treating multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes.";

and inserting the following:

"*Application of 'Single Sentence' Rule (Subsection (a)(2)).*—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single

sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (*see* §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted 'separately' from each other (*see* §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the

defendant's commencement of the instant offense. *See* §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.";

in Note 6 by striking the following:

"Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).";

and in Note 8 by striking "If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).".

Chapter Four, Part A is amended by striking §4A1.3 and its accompanying commentary in its entirety as follows:

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

(a) *Upward Departures.*—

(1) *Standard for Upward Departure.*—If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) *Types of Information Forming the Basis for Upward Departure.*—The information described in subsection (a)(1) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal convictions).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(3) *Prohibition.*—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.

(4) *Determination of Extent of Upward Departure.*—

(A) *In General.*—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.

(B) *Upward Departures from Category VI.*—In a case in which the court determines that the extent and

nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) *Downward Departures.*—

(1) *Standard for Downward Departure.*—If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) *Prohibitions.*—

(A) *Criminal History Category I.*—Unless otherwise specified, a departure below the lower limit of the

applicable guideline range for Criminal History Category I is prohibited.

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

(3) *Limitations.*—

(A) *Limitation on Extent of Downward Departure for Career Offender.*—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) *Limitation on Applicability of §5C1.2 in Event of Downward Departure.*—A defendant who receives a downward departure under this subsection does

not meet the criminal history requirement of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if the defendant did not otherwise meet such requirement before receipt of the downward departure.

(c) *Written Specification of Basis for Departure.*—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

*Commentary*

*Application Notes:*

1. *Definitions*.—For purposes of this policy statement, the terms 'depart', 'departure', 'downward departure', and 'upward departure' have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. *Upward Departures*.—

   (A) *Examples*.—An upward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

      (i) A previous foreign sentence for a serious offense.

      (ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.

      (iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.

(iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

(B) *Upward Departures from Criminal History Category VI.*—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

(C) *Upward Departures Based on Tribal Court Convictions.*—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider

the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

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

(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

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

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

3. *Downward Departures.*—

(A) *Examples.*—A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

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

(B) *Downward Departures from Criminal History Category I.*—A departure below the lower limit of the applicable guideline range

for Criminal History Category I is prohibited under subsection (b)(2)(A), unless otherwise specified.

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

The Commentary to §4B1.1 captioned "Application Notes" is amended by striking Note 4 as follows:

“4. *Departure Provision for State Misdemeanors.*—In a case in which one or both of the defendant’s ‘two prior felony convictions’ is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant’s criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in §4A1.3(b)(3)(A).”.

The Commentary to §4B1.2 captioned “Application Notes” is amended by striking Note 4 as follows:

“4. *Upward Departure for Burglary Involving Violence.*—There may be cases in which a burglary involves violence, but does not qualify as a ‘crime of violence’ as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a ‘crime of violence.’ In such a case, an upward departure may be appropriate.”.

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

"In a few cases, the rule provided in the preceding paragraph may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if subsections (b)(3)(A) and (c)(2) had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).".

The Commentary to §4B1.4 captioned "Background" is amended by striking "In some cases, the criminal history category may not adequately reflect the defendant's criminal history; *see* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).".

The Commentary to §4C1.1 captioned "Application Notes" is amended—

in the heading by striking "Notes" and inserting "Note";

and by striking Note 2 as follows:

“2. *Upward Departure.*—An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant’s criminal history. For example, an upward departure may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.”.

Chapter Five is amended—

in the heading by striking “Determining the Sentence” and inserting “Determining the Sentencing Range and Options Under the Guidelines”;

and in the Introductory Commentary by striking the following:

“ For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).”;

and inserting the following:

“ Chapter Five sets forth the steps used to determine the applicable sentencing range based upon the guideline calculations made in Chapters Two through Four. Additionally, the provisions in this chapter set forth the sentencing requirements and options under the guidelines related to probation, imprisonment, supervision conditions, fines, and restitution for the particular guideline range. For example, for certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. After applying the provisions of this chapter to determine the sentencing options recommended under the guidelines pursuant to subsection (a) of §1B1.1 (Application Instructions), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine the length and type of sentence that is sufficient but not greater than necessary. A sentence is within the guidelines if it complies with each applicable section of this chapter.”.

The Commentary to §5B1.1 captioned “Applications Notes” is amended by inserting at the end the following new Note 3—

“3. *Factors to Be Considered*.—

(A) *Statutory Factors*.—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, is required by statute to consider the factors set forth in 18 U.S.C. § 3553(a) to the extent that they are applicable. *See* 18 USC § 3562(a).

(B) *Substance Abuse*.—In a case in which a defendant sentenced to probation is an abuser of controlled substances or alcohol, it is recommended that the court consider imposing a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse may be appropriate. *See* §5B1.3(d)(4).

(C) *Domestic Violence*.—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of probation is required by statute if the defendant is not sentenced to a term of imprisonment. *See* 18 U.S.C. § 3561(b). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. *See* 18 U.S.C. § 3563(a); §5B1.3(a)(4).

(D) *Mental and Emotional Conditions*.—In a case in which a defendant sentenced to probation is in need of psychological or psychiatric treatment, it is recommended that the court consider imposing a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office. *See* §5B1.3(d)(5).

(E) *Education and Vocational Skills*.—Education and vocational skills may be relevant in determining the conditions of probation for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

(F) *Employment Record*.—A defendant's employment record may be relevant in determining the conditions of probation *(e.g.*, the appropriate hours of home detention).".

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

by striking Note 6 as follows:

"6. *Departures Based on Specific Treatment Purpose.*—There may be cases in which a departure from the sentencing options authorized for Zone C of

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

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

*Examples*: The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug

offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.";

by redesignating Notes 7 through 10 as Notes 6 through 9, respectively;

and in Note 9 (as so redesignated) by striking the following:

"*Zero-Point Offenders.*—

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

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

and inserting the following:

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

The Commentary to §5D1.1 captioned "Application Notes" is amended—

in Note 1 by striking "The court may depart from this guideline and not impose a term of supervised release" and inserting "The court need not impose a term of supervised release";

and in Note 3—

in subparagraph (C), by striking "*See* §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction)" and inserting "*See* §5D1.3(d)(4)";

and by inserting at the end the following new subparagraphs (E), (F), and (G):

"(E) *Mental and Emotional Conditions*.—In a case in which a defendant sentenced to imprisonment is in need of psychological or psychiatric treatment, it is recommended that the court consider imposing a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office. *See* 5D1.3(d)(5).

(F) *Education and Vocational Skills*.—Education and vocational skills may be relevant in determining the conditions of supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

(G) *Employment Record*.—A defendant's employment record may be relevant in determining the conditions of supervised release *(e.g.*, the appropriate hours of home detention).".

Section 5D1.3(d)(4) is amended by inserting after "possess alcohol." the following: "If participation in a substance abuse program is required, the length of the term of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.".

The Commentary to §5E1.2 captioned "Applications Notes" is amended—

by striking Note 4 as follows:

"4. The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.

Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from

the offense that otherwise would not be disgorged (*e.g.*, by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted.";

and by redesignating Notes 5, 6, and 7 as Notes 4, 5, and 6, respectively.

The Commentary to §5G1.1 is amended by striking "; a sentence of less than 48 months would be a guideline departure"; and by striking "; a sentence of more than 60 months would be a guideline departure".

The Commentary to §5G1.3 captioned "Application Notes" is amended—

by striking Note 4(E) as follows:

"(E) *Downward Departure.*—Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (d), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the

instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(d), rather than as a credit for time served.";

and by striking Note 5 as follows:

"5. *Downward Departure Provision.*—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. *See* §5K2.23 (Discharged Terms of Imprisonment).".

Chapter Five is amended by striking Part H in its entirety as follows:

“ PART H — SPECIFIC OFFENDER CHARACTERISTICS

*Introductory Commentary*

This part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the ‘Act’) contains several provisions regarding specific offender characteristics:

> *First*, the Act directs the Commission to ensure that the guidelines and policy statements ‘are entirely neutral’ as to five characteristics – race, sex, national origin, creed, and socioeconomic status. *See* 28 U.S.C. § 994(d).

> *Second*, the Act directs the Commission to consider whether eleven specific offender characteristics, ‘among others’, have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. *See* 28 U.S.C. § 994(d).

*Third*, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the 'general inappropriateness' of considering five of those characteristics – education; vocational skills; employment record; family ties and responsibilities; and community ties. *See* 28 U.S.C. § 994(e).

*Fourth*, the Act also directs the sentencing court, in determining the particular sentence to be imposed, to consider, among other factors, 'the history and characteristics of the defendant'. *See* 18 U.S.C. § 3553(a)(1).

Specific offender characteristics are taken into account in the guidelines in several ways. One important specific offender characteristic is the defendant's criminal history, *see* 28 U.S.C. § 994(d)(10), which is taken into account in the guidelines in Chapter Four (Criminal History and Criminal Livelihood). *See* §5H1.8 (Criminal History). Another specific offender characteristic in the guidelines is the degree of dependence upon criminal history for a livelihood, *see* 28 U.S.C. § 994(d)(11), which is taken into account in Chapter Four, Part B (Career Offenders and Criminal Livelihood). *See* §5H1.9 (Dependence upon Criminal Activity for a Livelihood). Other specific offender characteristics are accounted for elsewhere in this manual. *See*, *e.g.*, §§2C1.1(a)(1) and 2C1.2(a)(1) (providing alternative base offense levels if the defendant was a public official);

3B1.3 (Abuse of Position of Trust or Use of Special Skill); and 3E1.1 (Acceptance of Responsibility).

The Supreme Court has emphasized that the advisory guideline system should ‘continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.’ *See United States v. Booker*, 543 U.S. 220, 264–65 (2005). Although the court must consider ‘the history and characteristics of the defendant’ among other factors, *see* 18 U.S.C. § 3553(a), in order to avoid unwarranted sentencing disparities the court should not give them excessive weight. Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence. To avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, *see* 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1)(B), the guideline range, which reflects the defendant’s criminal conduct and the defendant’s criminal history, should continue to be ‘the starting point and the initial benchmark.’ *Gall v. United States*, 552 U.S. 38, 49 (2007).

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

This part allocates specific offender characteristics into three general categories.

In the first category are specific offender characteristics the consideration of which Congress has prohibited (*e.g.*, §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status)) or that the Commission has determined should be prohibited.

In the second category are specific offender characteristics that Congress directed the Commission to take into account in the guidelines only to the extent that they have relevance to sentencing. *See* 28 U.S.C. § 994(d). For some of these, the policy statements indicate that these characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted (*e.g.*, age; mental and emotional condition; physical condition). These characteristics may warrant a sentence outside the applicable guideline range if

the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. These specific offender characteristics also may be considered for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence.

In the third category are specific offender characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. *See* 28 U.S.C. § 994(e). The policy statements indicate that these characteristics are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, or various other aspects of an appropriate sentence (*e.g.*, the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a

combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. *See* §5K2.0 (Grounds for Departure).

As with the other provisions in this manual, these policy statements 'are evolutionary in nature'. *See* Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines); 28 U.S.C. § 994(o). The Commission expects, and the Sentencing Reform Act contemplates, that continuing research, experience, and analysis will result in modifications and revisions.

The nature, extent, and significance of specific offender characteristics can involve a range of considerations. The Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as the Sentencing Reform Act contemplates. *See*, *e.g.*, 28 U.S.C. § 995(a)(12)(A) (the Commission serves as a 'clearinghouse and information center' on federal sentencing). Among other things, this may include information on the use of specific offender characteristics, individually and in combination, in determining the sentence to be imposed (including, where available, information on rates of use, criteria for use, and reasons for use); the relationship, if any, between specific offender characteristics and (A) the 'forbidden factors' specified in 28 U.S.C. § 994(d) and (B) the 'discouraged factors' specified in 28 U.S.C. § 994(e); and the relationship, if any, between specific offender characteristics and the statutory purposes of sentencing.

§5H1.1. *Age (Policy Statement)*

Age may be relevant in determining whether a departure is warranted.

Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense or prior offenses. Certain risk factors may affect a youthful individual's development into the mid-20's and contribute to involvement in criminal justice systems, including environment, adverse childhood experiences, substance use, lack of educational opportunities, and familial relationships. In addition, youthful individuals generally are more impulsive, risk-seeking, and susceptible to outside influence as their brains continue to develop into young adulthood. Youthful individuals also are more amenable to rehabilitation.

The age-crime curve, one of the most consistent findings in criminology, demonstrates that criminal behavior tends to decrease with age. Age-appropriate interventions and other protective factors may promote

desistance from crime. Accordingly, in an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing.

Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

§5H1.2. *Education and Vocational Skills (Policy Statement)*

Education and vocational skills are not ordinarily relevant in determining whether a departure is warranted, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. *See* §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

§5H1.3. *Mental and Emotional Conditions (Policy Statement)*

Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. *See also* Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note 7.

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; *e.g.*, participation in a mental health program (*see* §§5B1.3(d)(5) and 5D1.3(d)(5)).

§5H1.4. *Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)*

Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. An extraordinary

physical impairment may be a reason to depart downward; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* §5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* §5C1.1, Application Note 7.

In a case in which a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (*see* §5B1.3(d)(4)).

Addiction to gambling is not a reason for a downward departure.

### §5H1.5. *Employment Record (Policy Statement)*

Employment record is not ordinarily relevant in determining whether a departure is warranted.

Employment record may be relevant in determining the conditions of probation or supervised release (*e.g.*, the appropriate hours of home detention).

### §5H1.6. *Family Ties and Responsibilities (Policy Statement)*

In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

*Commentary*

*Application Note:*

1. *Circumstances to Consider.*—

(A) *In General.*—In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:

(i) The seriousness of the offense.

(ii) The involvement in the offense, if any, of members of the defendant's family.

(iii) The danger, if any, to members of the defendant's family as a result of the offense.

(B) *Departures Based on Loss of Caretaking or Financial Support.*—A departure under this policy statement based on the loss of

caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:

(i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.

(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.

(iv) The departure effectively will address the loss of caretaking or financial support.

*Background*: Section 401(b)(4) of Public Law 108–21 directly amended this policy statement to add the second paragraph, effective April 30, 2003.

§5H1.7. *Role in the Offense (Policy Statement)*

A defendant's role in the offense is relevant in determining the applicable guideline range (*see* Chapter Three, Part B (Role in the Offense)) but is not a basis for departing from that range (*see* subsection (d) of §5K2.0 (Grounds for Departures)).

§5H1.8. *Criminal History (Policy Statement)*

A defendant's criminal history is relevant in determining the applicable criminal history category. *See* Chapter Four (Criminal History and Criminal Livelihood). For grounds of departure based on the defendant's criminal history, *see* §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

§5H1.9. *Dependence upon Criminal Activity for a Livelihood (Policy Statement)*

The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. *See* Chapter Four, Part B (Career Offenders and Criminal Livelihood).

§5H1.10. *Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)*

These factors are not relevant in the determination of a sentence.

§5H1.11. *Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)*

Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.

Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

§5H1.12. *Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)*

Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted.".

Chapter Five, Part K is amended in the heading by striking "DEPARTURES" and inserting "ASSISTANCE TO AUTHORITIES".

Chapter Five, Part K, Subpart 1 is amended by striking the heading as follows:

"1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES".

Section 5K1.1 is amended by striking "the court may depart from the guidelines" and inserting "a sentence that is below the otherwise applicable guideline range may be appropriate".

Chapter Five, Part K is amended by striking Subparts 2 and 3 in their entirety as follows:

"2. OTHER GROUNDS FOR DEPARTURE

§5K2.0. *Grounds for Departure (Policy Statement)*

(a) *Upward Departures in General and Downward Departures in Criminal Cases Other Than Child Crimes and Sexual Offenses*.—

(1) *In General*.—The sentencing court may depart from the applicable guideline range if—

(A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there exists an aggravating or mitigating circumstance; or

(B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there exists an aggravating circumstance,

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

(2) *Departures Based on Circumstances of a Kind Not Adequately Taken Into Consideration*.—

(A) *Identified Circumstances*.—This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (*e.g.*, as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. § 3553(b) and the provisions of this subpart may be warranted.

(B) *Unidentified Circumstances*.—A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

(3) *Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration*.—A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

(4) *Departures Based on Not Ordinarily Relevant Offender Characteristics and Other Circumstances*.—An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in the guidelines as not ordinarily relevant in determining whether a departure is warranted may be relevant to this

determination only if such offender characteristic or other circumstance is present to an exceptional degree.

(b) *Downward Departures in Child Crimes and Sexual Offenses*.—Under 18 U.S.C. § 3553(b)(2)(A)(ii), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as

a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.

(c) *Limitation on Departures Based on Multiple Circumstances*.—The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

(1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and

(2) each such offender characteristic or other circumstance is—

(A) present to a substantial degree; and

(B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.

(d) *Prohibited Departures*.—Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:

(1) Any circumstance specifically prohibited as a ground for departure in §§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the last sentence of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), and the last sentence of 5K2.12 (Coercion and Duress).

(2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility).

(3) The defendant's aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.

(4) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (*i.e.*, a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. *See* §6B1.2 (Standards for Acceptance of Plea Agreement).

(5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (*i.e.*, a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).

(6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.

(e) *Requirement of Specific Written Reasons for Departure*.—If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the statement of reasons form.

*Commentary*

*Application Notes:*

1. *Definitions.*—For purposes of this policy statement:

   'Circumstance' includes, as appropriate, an offender characteristic or any other offense factor.

   'Depart', 'departure', 'downward departure', and 'upward departure' have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. *Scope of this Policy Statement.*—

   (A) *Departures Covered by this Policy Statement.*—This policy statement covers departures from the applicable guideline range

based on offense characteristics or offender characteristics of a kind, or to a degree, not adequately taken into consideration in determining that range. *See* 18 U.S.C. § 3553(b).

Subsection (a) of this policy statement applies to upward departures in all cases covered by the guidelines and to downward departures in all such cases except for downward departures in child crimes and sexual offenses.

Subsection (b) of this policy statement applies only to downward departures in child crimes and sexual offenses.

(B) *Departures Covered by Other Guidelines.*—This policy statement does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant's criminal history (*see* Chapter Four (Criminal History and Criminal Livelihood), particularly §4A1.3 (Departures Based on Inadequacy of Criminal History Category)); (ii) departures based on the defendant's substantial assistance to the authorities (*see* §5K1.1 (Substantial Assistance to Authorities)); and (iii) departures based on early disposition programs (*see* §5K3.1 (Early Disposition Programs)).

3. *Kinds and Expected Frequency of Departures under Subsection (a).*—As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.

(A) *Departures Based on Circumstances of a Kind Not Adequately Taken into Account in Guidelines.*—Subsection (a)(2) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), of a kind not adequately taken into consideration in the guidelines.

(i) *Identified Circumstances.*—This subpart (Chapter Five, Part K, Subpart 2) identifies several circumstances that the Commission may have not adequately taken into consideration in setting the offense level for certain cases. Offense guidelines in Chapter Two (Offense Conduct) and adjustments in Chapter Three (Adjustments) sometimes identify circumstances the Commission may have not

adequately taken into consideration in setting the offense level for offenses covered by those guidelines. If the offense guideline in Chapter Two or an adjustment in Chapter Three does not adequately take that circumstance into consideration in setting the offense level for the offense, and only to the extent not adequately taken into consideration, a departure based on that circumstance may be warranted.

(ii) *Unidentified Circumstances.*—A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.

(B) *Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration in Guidelines.*—

(i) *In General.*—Subsection (a)(3) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), to a degree not adequately taken into consideration in the guidelines. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded the mitigating and aggravating circumstances specified in the guidelines, it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.

(ii) *Examples.*—As set forth in subsection (a)(3), if the applicable offense guideline and adjustments take into consideration a circumstance identified in this subpart, departure is warranted only if the circumstance is present to a degree substantially in excess of that which ordinarily is involved in the offense. Accordingly, a departure pursuant to §5K2.7 for the disruption of a governmental function would have to be substantial to warrant departure from the

guidelines when the applicable offense guideline is bribery or obstruction of justice. When the guideline covering the mailing of injurious articles is applicable, however, and the offense caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure may be warranted if several persons were injured.

(C) *Departures Based on Circumstances Identified as Not Ordinarily Relevant.*—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (*see*, *e.g.*, Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would

be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

In addition, as required by subsection (e), each circumstance forming the basis for a departure described in this subparagraph shall be stated with specificity in the statement of reasons form.

4. *Downward Departures in Child Crimes and Sexual Offenses.*—

(A) *Definition.*—For purposes of this policy statement, the term 'child crimes and sexual offenses' means offenses under any of the following: 18 U.S.C. § 1201 (involving a minor victim), 18 U.S.C. § 1591, or chapter 71, 109A, 110, or 117 of title 18, United States Code.

(B) *Standard for Departure.*—

(i) *Requirement of Affirmative and Specific Identification of Departure Ground.*—The standard for a downward departure in child crimes and sexual offenses differs from the standard for other departures under this policy

statement in that it includes a requirement, set forth in 18 U.S.C. § 3553(b)(2)(A)(ii)(I) and subsection (b)(1) of this guideline, that any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for downward departure in this part (*i.e.*, Chapter Five, Part K).

(ii) *Application of Subsection (b)(2)*.—The commentary in Application Note 3 of this policy statement, except for the commentary in Application Note 3(A)(ii) relating to unidentified circumstances, shall apply to the court's determination of whether a case meets the requirement, set forth in subsection 18 U.S.C. § 3553(b)(2)(A)(ii)(II) and subsection (b)(2) of this policy statement, that the mitigating circumstance forming the basis for a downward departure in child crimes and sexual offenses be of kind, or to a degree, not adequately taken into consideration by the Commission.

5. *Departures Based on Plea Agreements.*—Subsection (d)(4) prohibits a downward departure based only on the defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely

on the fact that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. *See* §6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the statement of reasons form, as required by subsection (e).

*Background:* This policy statement sets forth the standards for departing from the applicable guideline range based on offense and offender characteristics of a kind, or to a degree, not adequately considered by the Commission. Circumstances the Commission has determined are not ordinarily relevant to determining whether a departure is warranted or are prohibited as bases for departure are addressed in Chapter Five, Part H (Offender Characteristics) and in this policy statement. Other departures, such as those based on the defendant's criminal history, the defendant's substantial assistance to authorities, and early disposition programs, are addressed elsewhere in the guidelines.

As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, 'it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.' (*See* Chapter One, Part A).

Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain 'sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.' 28 U.S.C. § 991(b)(1)(B). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act', Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. § 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that

sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised, effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to—

> '(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and
>
> (2) promulgate, pursuant to section 994 of title 28, United States Code—
>
> > (A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced;
> >
> > (B) a policy statement authorizing a departure pursuant to an early disposition program; and
> >
> > (C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by the Act, including a revision of . . . section 5K2.0'.

The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the 'heartland', that have evolved in departure jurisprudence over time.

Section 401(b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003.

§5K2.1. *Death (Policy Statement)*

If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury.

For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

§5K2.2. *Physical Injury (Policy Statement)*

If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in §5K2.1.

§5K2.3. *Extreme Psychological Injury (Policy Statement)*

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The

extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

§5K2.4. *Abduction or Unlawful Restraint (Policy Statement)*

If a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime, the court may increase the sentence above the authorized guideline range.

## §5K2.5. *Property Damage or Loss (Policy Statement)*

If the offense caused property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

## §5K2.6. *Weapons and Dangerous Instrumentalities (Policy Statement)*

If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

## §5K2.7. *Disruption of Governmental Function (Policy Statement)*

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption

and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

§5K2.8. *Extreme Conduct (Policy Statement)*

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

§5K2.9. *Criminal Purpose (Policy Statement)*

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.

§5K2.10. *Victim's Conduct (Policy Statement)*

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding whether a sentence reduction is warranted, and the extent of such reduction, the court should consider the following:

(1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.

(2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.

(3) The danger reasonably perceived by the defendant, including the victim's reputation for violence.

(4) The danger actually presented to the defendant by the victim.

(5) Any other relevant conduct by the victim that substantially contributed to the danger presented.

(6) The proportionality and reasonableness of the defendant's response to the victim's provocation.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

§5K2.11. *Lesser Harms (Policy Statement)*

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

§5K2.12. *Coercion and Duress (Policy Statement)*

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may depart downward. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions, on the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. Notwithstanding this policy statement, personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure.

## §5K2.13. *Diminished Capacity (Policy Statement)*

A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

*Commentary*

*Application Note:*

1. For purposes of this policy statement—

‘Significantly reduced mental capacity’ means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

*Background*: Section 401(b)(5) of Public Law 108–21 directly amended this policy statement to add subdivision (4), effective April 30, 2003.

§5K2.14. *Public Welfare (Policy Statement)*

If national security, public health, or safety was significantly endangered, the court may depart upward to reflect the nature and circumstances of the offense.

§5K2.16. *Voluntary Disclosure of Offense (Policy Statement)*

If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a downward departure may be warranted. For example, a downward departure under this section might be considered where a

defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

§5K2.17. *Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)*

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A 'semiautomatic firearm capable of accepting a large capacity magazine' means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (1) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (2) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

*Commentary*

*Application Note:*

1. ‘Crime of violence’ and ‘controlled substance offense’ are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1).

§5K2.18. *Violent Street Gangs (Policy Statement)*

If the defendant is subject to an enhanced sentence under 18 U.S.C. § 521 (pertaining to criminal street gangs), an upward departure may be warranted. The purpose of this departure provision is to enhance the sentences of defendants who participate in groups, clubs, organizations, or associations that use violence to further their ends. It is to be noted that there may be cases in which 18 U.S.C. § 521 applies, but no violence is established. In such cases, it is expected that the guidelines will account adequately for the conduct and, consequently, this departure provision would not apply.

§5K2.20. *Aberrant Behavior (Policy Statement)*

(a) *In General*.—Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of

title 18, United States Code, a downward departure may be warranted in an exceptional case if (1) the defendant's criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c).

(b) *Requirements*.—The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.

(c) *Prohibitions Based on the Presence of Certain Circumstances*.—The court may not depart downward pursuant to this policy statement if any of the following circumstances are present:

(1) The offense involved serious bodily injury or death.

(2) The defendant discharged a firearm or otherwise used a firearm or a dangerous weapon.

(3) The instant offense of conviction is a serious drug trafficking offense.

(4) The defendant has either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.

*Commentary*

*Application Notes:*

1. *Definitions.*—For purposes of this policy statement:

‘Dangerous weapon,’ ‘firearm,’ ‘otherwise used,’ and ‘serious bodily injury’ have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

‘Serious drug trafficking offense’ means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that provides for a mandatory minimum term of

imprisonment of five years or greater, regardless of whether the defendant meets the criteria of §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases).

2. *Repetitious or Significant, Planned Behavior.*—Repetitious or significant, planned behavior does not meet the requirements of subsection (b). For example, a fraud scheme generally would not meet such requirements because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, and significant planning.

3. *Other Circumstances to Consider.*—In determining whether the court should depart under this policy statement, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense.

*Background*: Section 401(b)(3) of Public Law 108–21 directly amended subsection (a) of this policy statement, effective April 30, 2003.

§5K2.21. *Dismissed and Uncharged Conduct (Policy Statement)*

The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a

plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

§5K2.22. *Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)*

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code:

(1) Age may be a reason to depart downward only if and to the extent permitted by §5H1.1.

(2) An extraordinary physical impairment may be a reason to depart downward only if and to the extent permitted by §5H1.4.

(3) Drug, alcohol, or gambling dependence or abuse is not a reason to depart downward.

*Commentary*

*Background:* Section 401(b)(2) of Public Law 108–21 directly amended Chapter Five, Part K, to add this policy statement, effective April 30, 2003.

§5K2.23. *Discharged Terms of Imprisonment (Policy Statement)*

A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

§5K2.24. *Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (Policy Statement)*

If, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716, an upward departure may be warranted.

*Commentary*

*Application Note:*

1. *Definition*.—For purposes of this policy statement, 'official insignia or uniform' has the meaning given that term in 18 U.S.C. § 716(c)(3).

3. EARLY DISPOSITION PROGRAMS

§5K3.1. *Early Disposition Programs (Policy Statement)*

Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.

*Commentary*

*Background*: This policy statement implements the directive to the Commission in section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the 'PROTECT Act', Public Law 108–21).".

Chapter Six, Part A is amended by striking §6A1.4 and its accompanying commentary in its entirety as follows:

"§6A1.4. *Notice of Possible Departure (Policy Statement)*

> Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. Rule 32(h), Fed. R. Crim. P.

*Commentary*

*Background*: The Federal Rules of Criminal Procedure were amended, effective December 1, 2002, to incorporate into Rule 32(h) the holding in *Burns v. United States*, 501 U.S. 129, 138–39 (1991). This policy statement parallels Rule 32(h), Fed. R. Crim. P.".

Chapter Six, Part B is amended in the Introductory Commentary by striking "The policy statements also ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record.".

The Commentary to §6B1.2 is amended—

in the paragraph that begins "Similarly, the court" by striking "As set forth in subsection (d) of §5K2.0 (Grounds for Departure), however, the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement with respect to the offense.";

and in the paragraph that begins "The second paragraph of subsection (a)" by striking "Section 5K2.21 (Dismissed and Uncharged Conduct) addresses the use, as a basis for upward departure, of conduct underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement.".

The Commentary to §7B1.4 captioned "Application Notes" is amended—

by striking Notes 2, 3, and 4 as follows:

"2. Departure from the applicable range of imprisonment in the Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in §4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in supervision. Additionally, an upward departure may be

warranted when a defendant, subsequent to the federal sentence resulting in supervision, has been sentenced for an offense that is not the basis of the violation proceeding.

3. In the case of a Grade C violation that is associated with a high risk of new felonious conduct (*e.g.*, a defendant, under supervision for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.

4. Where the original sentence was the result of a downward departure (*e.g.*, as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.";

and by redesignating Notes 5 and 6 as Notes 2 and 3, respectively.

Section 8A1.2(b) is amended—

in paragraph (4) by striking "For grounds for departure from the applicable guideline fine range, refer to Part C, Subpart 4 (Departures from the Guideline Fine Range)" and inserting "Determine whether a sentence below the otherwise applicable guideline range is appropriate upon motion of the government pursuant

to §8C4.1 (Substantial Assistance to Authorities — Organizations (Policy Statement))";

and by inserting at the end the following new paragraph (5):

"(5) Consider as a whole the additional factors identified in 18 U.S.C. § 3553(a) to determine the sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a).".

The Commentary to §8A1.2 captioned "Application Notes" is amended in Note 2 by striking "and E (Acceptance of Responsibility)" and inserting "E (Acceptance of Responsibility), and F (Early Disposition Program)".

The Commentary to §8C2.3 captioned "Application Notes" is amended in Note 2 by striking "and E (Acceptance of Responsibility)" and inserting "E (Acceptance of Responsibility), and F (Early Disposition Program)".

The Commentary to §8C2.8 captioned "Application Notes" is amended in Note 5 by striking "In a case involving a pattern of illegality, an upward departure may be warranted.".

The Commentary to §8C2.8 captioned "Background" is amended by striking "In unusual cases, factors listed in this section may provide a basis for departure.".

Chapter Eight, Part C, Subpart 4 is amended—

in the heading by striking "DEPARTURES FROM THE GUIDELINE FINE RANGE" and inserting "SUBSTANTIAL ASSISTANCE TO AUTHORITIES";

and by striking the Introductory Commentary as follows:

" *Introductory Commentary*

The statutory provisions governing departures are set forth in 18 U.S.C. § 3553(b). Departure may be warranted if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' This subpart sets forth certain factors that, in connection with certain offenses, may not have been adequately taken into consideration by the guidelines. In deciding whether departure is warranted, the court should consider the extent to which that factor is adequately taken into consideration by the guidelines and the relative importance or substantiality of that factor in the particular case.

To the extent that any policy statement from Chapter Five, Part K (Departures) is relevant to the organization, a departure from the applicable guideline fine range may be warranted. Some factors listed in Chapter Five, Part K that are particularly applicable to organizations are listed in this subpart. Other factors listed in Chapter Five, Part K may be applicable in particular cases. While this subpart lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive.”.

Section 8C4.1(a) is amended by striking “the court may depart from the guidelines” and inserting “a fine that is below the otherwise applicable guideline fine range may be appropriate”.

The Commentary to §8C4.1 captioned “Application Note” is amended in Note 1 by striking “Departure under this section” and inserting “Fine reduction under this section”.

Chapter Eight, Part C is further amended by striking §§8C4.2 through 8C4.11 in their entirety as follows:

“§8C4.2. *Risk of Death or Bodily Injury (Policy Statement)*

If the offense resulted in death or bodily injury, or involved a foreseeable risk of death or bodily injury, an upward departure may be warranted. The

extent of any such departure should depend, among other factors, on the nature of the harm and the extent to which the harm was intended or knowingly risked, and the extent to which such harm or risk is taken into account within the applicable guideline fine range.

§8C4.3. *Threat to National Security (Policy Statement)*

If the offense constituted a threat to national security, an upward departure may be warranted.

§8C4.4. *Threat to the Environment (Policy Statement)*

If the offense presented a threat to the environment, an upward departure may be warranted.

§8C4.5. *Threat to a Market (Policy Statement)*

If the offense presented a risk to the integrity or continued existence of a market, an upward departure may be warranted. This section is applicable to both private markets (*e.g.*, a financial market, a commodities market, or a market for consumer goods) and public markets (*e.g.*, government contracting).

§8C4.6. *Official Corruption (Policy Statement)*

If the organization, in connection with the offense, bribed or unlawfully gave a gratuity to a public official, or attempted or conspired to bribe or unlawfully give a gratuity to a public official, an upward departure may be warranted.

§8C4.7. *Public Entity (Policy Statement)*

If the organization is a public entity, a downward departure may be warranted.

§8C4.8. *Members or Beneficiaries of the Organization as Victims (Policy Statement)*

If the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense, a downward departure may be warranted. If the members or beneficiaries of an organization are direct victims of the offense, imposing a fine upon the organization may increase the burden upon the victims of the offense without achieving a deterrent effect. In such cases, a fine may not be appropriate. For example, departure may be appropriate if a labor union is convicted of embezzlement of pension funds.

### §8C4.9. *Remedial Costs that Greatly Exceed Gain (Policy Statement)*

If the organization has paid or has agreed to pay remedial costs arising from the offense that greatly exceed the gain that the organization received from the offense, a downward departure may be warranted. In such a case, a substantial fine may not be necessary in order to achieve adequate punishment and deterrence. In deciding whether departure is appropriate, the court should consider the level and extent of substantial authority personnel involvement in the offense and the degree to which the loss exceeds the gain. If an individual within high-level personnel was involved in the offense, a departure would not be appropriate under this section. The lower the level and the more limited the extent of substantial authority personnel involvement in the offense, and the greater the degree to which remedial costs exceeded or will exceed gain, the less will be the need for a substantial fine to achieve adequate punishment and deterrence.

### §8C4.10. *Mandatory Programs to Prevent and Detect Violations of Law (Policy Statement)*

If the organization's culpability score is reduced under §8C2.5(f) (Effective Compliance and Ethics Program) and the organization had implemented its program in response to a court order or administrative

order specifically directed at the organization, an upward departure may be warranted to offset, in part or in whole, such reduction.

Similarly, if, at the time of the instant offense, the organization was required by law to have an effective compliance and ethics program, but the organization did not have such a program, an upward departure may be warranted.

§8C4.11. *Exceptional Organizational Culpability (Policy Statement)*

If the organization's culpability score is greater than 10, an upward departure may be appropriate.

If no individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense; the organization at the time of the offense had an effective program to prevent and detect violations of law; and the base fine is determined under §8C2.4(a)(1), §8C2.4(a)(3), or a special instruction for fines in Chapter Two (Offense Conduct), a downward departure may be warranted. In a case meeting these criteria, the court may find that the organization had exceptionally low culpability and therefore a fine based on loss, offense level, or a special Chapter Two instruction results in a guideline fine range higher

than necessary to achieve the purposes of sentencing. Nevertheless, such fine should not be lower than if determined under §8C2.4(a)(2).”.