UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2025, and request for comment.

SUMMARY: The United States Sentencing Commission hereby gives notice that the Commission has promulgated amendments to the sentencing guidelines, policy statements, and commentary; and the Commission requests comment regarding whether it should include in the *Guidelines Manual* as changes that may be applied retroactively to previously sentenced defendants any or all of the following amendments: Parts A and B of Amendment 1; and Subparts 1 and 2 of Part A of Amendment 2. This notice sets forth the text of the amendments and the reason for each amendment, and the request for comment regarding possible retroactive application of the amendments listed above.

DATES: *Effective Date of Amendments*. The Commission has specified an effective date of November 1, 2025, for the amendments set forth in this notice.

Written Public Comment. Written public comment regarding possible retroactive application of Parts A and B of Amendment 1, and Subparts 1 and 2 of Part A of Amendment 2, should be received by the Commission not later than **June 2, 2025**. Any public comment received after the close of the comment period may not be considered.

ADDRESSES: There are two methods for submitting written 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 – Issue for Comment on Retroactivity.

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). Absent action of the Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

(1) Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary

Pursuant to its authority under 28 U.S.C. 994(p), the Commission has promulgated amendments to the sentencing guidelines, policy statements, and commentary. Notices of proposed amendments were published in the *Federal Register* on January 2, 2025 (*see* 90 FR 128) and February 4, 2025 (*see* 90 FR 8968). The Commission held public hearings on the proposed amendments in Washington, D.C., on February 12, 2025, and March 12–13, 2025. On April 30, 2025, the Commission submitted the promulgated amendments to the Congress and specified an effective date of November 1, 2025.

The text of the amendments to the sentencing guidelines, policy statements, and commentary, and the reason for each amendment, is set forth below. Additional information pertaining to the amendments described in this notice may be accessed through the Commission's website at www.ussc.gov.

(2) Request for Comment on Possible Retroactive Application of Parts A and B of Amendment 1, and Subparts 1 and 2 of Part A of Amendment 2

This notice sets forth a request for comment regarding whether the Commission should list 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 any or all of the following subparts or parts of these amendments: Part A (Circuit Conflict Relating to "Physically Restrained" Enhancements) and Part B (Circuit Conflict Relating to the Meaning of "Intervening Arrest" in §4A1.2(a)(2)) of Amendment 1, and Subpart 1 (Mitigating Role Provisions at §2D1.1(a)(5)) and Subpart 2 (Special Instruction Relating to §3B1.2) of Part A of Amendment 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.

AUTHORITY: 28 U.S.C. 994(a), (o), (p), and (u); USSC Rules of Practice and Procedure 2.2, 4.1, and 4.1A.

Carlton W. Reeves,

Chair.

(1) AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. Amendment:

Part A (Circuit Conflict Concerning "Physically Restrained" Enhancements)

Section 2B3.1(b)(2)(B) is amended by striking "if a firearm was otherwise used" and inserting "if a firearm was used to convey a specific (not general) threat of harm (*e.g.*, pointing the firearm at a specific victim or victims; directing the movement of a specific victim or victims with the firearm) or to make physical contact with a victim (*e.g.*, pistol whip; firearm placed against victim's body)".

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 by 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 through physical contact or confinement, such as by being tied, bound, or locked up".

Section 2B3.2(b)(3)(A)(ii) is amended by striking "if a firearm was otherwise used" and inserting "if a firearm was used to convey a specific (not general) threat of harm (*e.g.*, pointing the firearm at a specific victim or victims; directing the movement of a specific victim or victims with the firearm) or to make physical contact with a victim (*e.g.*, pistol whip; firearm placed against victim's body)".

Section 2B3.2(b)(5)(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 by being tied, bound, or locked up,".

The Commentary to §2B3.2 captioned "Application Notes" is amended in Note 1 by striking " 'physically restrained,' ".

Section 2E2.1(b)(1)(B) is amended by striking "if a dangerous weapon (including a firearm) was otherwise used" and inserting "if a dangerous weapon (including a firearm) was used to convey a specific (not general) threat of harm (*e.g.*, pointing the weapon at a specific victim or victims; directing the movement of a specific

victim or victims with the weapon) or to make physical contact with a victim (*e.g.*, pistol whip; weapon placed against victim's body)".

Section 2E2.1(b)(3)(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 by being tied, bound, or locked up,".

The Commentary to §2E2.1 captioned "Application Notes" is amended in Note 1 by striking " 'otherwise used,' "; and by striking " 'abducted,' and 'physically restrained' " and inserting "and 'abducted' ".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 2 by striking "the defendants actually intended to physically restrain the teller, the specific offense characteristic for physical restraint would be added" and inserting "the defendants actually intended to restrict the teller's freedom of movement through physical contact or confinement, the specific offense characteristic for such restriction would be added".

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

Section 4A1.2(a)(2) is amended in the paragraph that begins "If the defendant" by inserting after "the second offense)." the following: "For purposes of this provision, a traffic stop is not an intervening arrest.".

Reason for Amendment: This two-part amendment addresses circuit conflicts involving §2B3.1 (Robbery) and §4A1.2 (Definitions and Instructions for Computing Criminal History).

Part A – Circuit Conflict Concerning "Physically Restrained" Enhancements

Part A of the amendment responds to a circuit conflict over whether §2B3.1(b)(4)(B)—which provides for a 2-level increase "if any person was physically restrained to facilitate commission of the offense or to facilitate escape"—applies where a robbery victim is restricted from moving at gunpoint but is not otherwise immobilized through measures like those in the definition of "physically restrained" in Application Note 1 to §1B1.1 (Application Instructions) (*i.e.*, "by being tied, bound, or locked up").

The Second, Third, Fifth, Seventh, and Ninth Circuits have largely agreed that the psychological coercion of pointing a gun at a victim, without more, does not qualify, and that a restraint must be "physical" for the enhancement to apply. *See*, *e.g.*, United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999); United States v. Bell, 947 F.3d 49, 57 (3d Cir. 2020); United States v. Garcia, 857 F.3d 708, 713–14 (5th Cir. 2017); United States v. Herman, 930 F.3d 872, 877 (7th Cir. 2019); United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001). By contrast, the First, Fourth, Sixth, Tenth, and Eleventh Circuits have held that restricting a victim's movement at gunpoint suffices for the enhancement. *See*, *e.g.*, United States v. Wallace, 461 F.3d 15, 34–35 (1st Cir. 2006); United States v. Dimache, 665 F.3d 603, 608 (4th Cir. 2011); United States v. Howell, 17 F.4th 673, 692 (6th Cir. 2021); United States v. Miera, 539 F.3d 1232, 1235–36 (10th Cir. 2008); United States v. Deleon, 116 F.4th 1260, 1264 (11th Cir. 2024).

The Commission received public comment and testimony indicating that the conduct at issue in the circuit split (pointing a gun at a victim during a robbery) is treated differently not only under §2B3.1(b)(4)(B) but also under the separate §2B3.1(b)(2) enhancement. Section 2B3.1(b)(2) provides for tiered offense level increases for threats and weapon involvement in a robbery, including a 5-level enhancement "if a firearm was brandished or possessed" and a 6-level enhancement "if a firearm was otherwise used." The terms "brandished" and "otherwise used" are defined in Application Note 1 to §1B1.1.

Circuits that have considered the difference between these definitions generally agree that while "brandished" covers the general display of a weapon, a firearm is "otherwise used" where it is employed for a specific threat. *See, e.g.*, United States v. Jordan, 945 F.3d 245, 264 (5th Cir. 2019) ("While brandishing 'can mean as little as displaying part of a firearm or making the presence of the firearm known in order to intimidate,' otherwise using a weapon includes pointing the weapon at an individual in a specifically threatening manner." (citation omitted)); United States v. Johnson, 803 F.3d 610, 616 (11th Cir. 2015) ("[T]he 'otherwise use[]' of a firearm includes the use of the firearm to make an explicit or implicit threat against a specific person.").

Commission data shows, however, that pointing a gun at a victim during a robbery has resulted in the 5-level "brandished" increase in some cases and the 6-level "otherwise used" increase in others. The combination of these differing applications of the firearms enhancement and the conflict among the circuits regarding the 2-level "physically restrained" enhancement has led to disparities: the total resulting enhancements have ranged from five to eight levels for pointing a gun at a victim during a robbery.

To promote uniformity and consistency in guideline application, Part A of the amendment generally adopts the approach of the Second, Third, Fifth, Seventh, and Ninth Circuits that §2B3.1(b)(4)(B) does not apply solely based on the coercion of using a firearm to restrict a victim's movement. Rather, the increase applies only "if

any person's freedom of movement was restricted through physical contact or confinement, such as by being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape."

Part A of the amendment also revises §2B3.1(b)(2) to ensure that use of a firearm during a robbery is accounted for under this enhancement with more uniformity. It amends §2B3.1(b)(2)(B) to state that the 6-level increase applies "if a firearm was used to convey a specific (not general) threat of harm (*e.g.*, pointing the firearm at a specific victim or victims; directing the movement of a specific victim or victims with the firearm) or to make physical contact with a victim (*e.g.*, pistol whip; firearm placed against victim's body)."

To further promote consistency in application of offense guidelines with similar specific offense characteristics, the amendment makes parallel changes to two Chapter Two guidelines with "physically restrained" and "otherwise used" enhancements: §§2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) and 2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means). The amendment does not make parallel changes to §3A1.3 (Restraint of Victim), which also uses the term "physically restrained" but differs from §2B3.1(b)(4)(B) in other respects. No inferences as to the scope of that Chapter Three adjustment should be drawn from this amendment.

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

Part B of the amendment addresses a circuit conflict over 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") under §4A1.2(a)(2).

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); United States v. Rogers, 86 F.4th 259, 264–65 (6th Cir. 2023); United States v. Leal-Felix, 665 F.3d 1037, 1041–42 (9th Cir. 2011) (en banc); United States v. Wright, 862 F.3d 1265, 1282 (11th Cir. 2017). 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).

After reviewing public comment and testimony, the Commission determined that a traffic stop should not be considered an "intervening arrest" for purposes of the single-sentence rule. The amendment revises §4A1.2(a)(2) to include that clarification.

2. Amendment:

Part A (Application of Mitigating Role Adjustment in Drug Trafficking Cases)

Subpart 1 (Mitigating Role Provisions at §2D1.1(a)(5))

Section 2D1.1(a)(5) is amended by striking "the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels. If the resulting offense level is greater than level 32 and the defendant receives the 4-level ('minimal participant') reduction in §3B1.2(a), decrease to level 32" and inserting "the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34, decrease by 3 levels; or (iii) above level 34, decrease to level 32. If the resulting offense level is greater than level 30 and the defendant receives the 4-level reduction in §3B1.2(a), decrease to level 30".

Section 2D1.1(b)(17) is amended by striking "('minimal participant')".

Subpart 2 (Special Instruction Relating to §3B1.2)

Section 2D1.1(e) is amended—

in the heading by striking "Instruction" and inserting "Instructions";

and by inserting at the end the following new paragraph (2):

"(2) Application of §3B1.2 (Mitigating Role) to §2D1.1 Cases

(A) Determine whether an adjustment under §3B1.2 (Mitigating Role) applies.

(B) In addition to the circumstances identified in §3B1.2, an adjustment under §3B1.2 is generally warranted if the defendant's primary function in the offense was performing a low-level trafficking function.

(i) An adjustment under §3B1.2(a) is generally warranted if the defendant's primary function in the offense was plainly among the lowest level of drug trafficking functions, such as serving as a courier, running errands, sending or receiving phone calls or messages, or acting as a lookout; or

(ii) an adjustment under §3B1.2(b) is generally warranted if the defendant's primary function in the offense was performing another low-level trafficking function, such as distributing controlled substances in user-level quantities for little or no monetary compensation or with a primary motivation other than profit (*e.g.*, the defendant was otherwise unlikely to commit such an offense and was motivated by an intimate or familial relationship, or by threats or fear to commit the offense).

For purposes of subsection (e)(2)(B), the provisions of §3B1.2 apply in determining whether a mitigating role adjustment is warranted, except that the adjustment shall apply regardless of whether the offense involved other participants in addition to the defendant, and regardless of whether the defendant was substantially less culpable than the average participant in the criminal activity. The extent of the adjustment shall be based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

(C) The mitigating role provisions at subsection (a)(5) and the 2-level reduction at subsection (b)(17) apply regardless of whether the

defendant receives the required adjustment from §3B1.2 (Mitigating Role) by direct application of §3B1.2 or by use of the special instruction in subsection (e)(2)(B).".

The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 3(A) by striking the following:

"A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline.

Likewise, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.";

and inserting the following:

"A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline. For example, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.".

Part B (Representing or Marketing Fentanyl or a Fentanyl Analogue as a Legitimately Manufactured Drug)

Section 2D1.1(b)(13)(B) is amended by striking "and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug" and inserting "with reckless disregard that such mixture or substance was not the legitimately manufactured drug".

Reason for Amendment: This two-part amendment is the result of Commission study on the operation of §2D1.1 (Unlawful Manufacturing, Importing, Exporting,

or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). As part of its study, the Commission considered feedback from the field, including at a roundtable discussion on drug sentencing, a public hearing, and public comment. The Commission also analyzed a range of drug trafficking sentencing data, including data on sentences imposed at the highest base offense levels, the application of the "mitigating role cap" and mitigating role adjustment, sentences imposed based on function, and the application of enhancements in fentanyl and fentanyl analogue cases. The Commission determined that targeted changes were warranted to ensure appropriate penalties commensurate with an individual's function in a drug trafficking offense and to better address the harms of representing or marketing fentanyl or a fentanyl analogue as a legitimately manufactured drug.

Part A – Application of Mitigating Role Adjustment in Drug Trafficking Cases

Part A of the amendment contains two subparts to address concerns that §2D1.1 and §3B1.2 (Mitigating Role) as they currently apply in tandem do not adequately account for the lower culpability of individuals performing low-level functions in a drug trafficking offense.

Subpart 1 (Mitigating Role Provisions at §2D1.1(a)(5))

Subpart 1 of Part A amends the mitigating role provisions in §2D1.1(a)(5) to refine the drug trafficking guideline in cases where an individual receives an adjustment under §3B1.2. The Commission initially added the mitigating role cap to "somewhat limit[] the sentencing impact of drug quantity for offenders who perform relatively low level trafficking functions." USSG App. C, amend. 640 (effective Nov. 1, 2002). As previously amended, §2D1.1(a)(5) provided a graduated 2-, 3-, or 4-level decrease, depending on the base offense level under §2D1.1(c), when a defendant received a mitigating role adjustment under §3B1.2. USSG App. C, amend. 668 (effective Nov. 1, 2004).

This amendment maintains the approach of graduated decreases depending on the base offense level but amends §2D1.1(a)(5) in two ways. First, it sets a mitigating role cap at level 32 if the defendant receives an adjustment under §3B1.2 and has a base offense level above 34. Second, if the defendant has a resulting offense level greater than 30 and receives a 4-level adjustment under §3B1.2(a), then a mitigating role cap of 30 applies.

As explained further below in Subpart 2, the mitigating role provisions in §2D1.1(a)(5) and the 2-level reduction at §2D1.1(b)(17) apply regardless of whether the defendant receives the required adjustment from §3B1.2 by direct application of §3B1.2 or by use of the new special instruction in §2D1.1(e)(2)(B).

Thus, the amendment deletes the phrase "minimal participant" from §2D1.1(a)(5) and §2D1.1(b)(17) to clarify that those provisions are triggered regardless of whether a defendant receives a 4-level reduction by direct application of §3B1.2(a) or by use of the new special instruction in §2D1.1(e)(2)(B).

Subpart 2 (Special Instruction Relating to §3B1.2)

Subpart 2 of Part A adds a new special instruction at §2D1.1(e) to address the inconsistent application of §3B1.2 in §2D1.1 cases and to encourage broader use of §3B1.2 in these cases.

Section 3B1.2 provides a range of reductions depending on the defendant's role in the criminal activity. Subsection (a) sets forth a 4-level reduction if the defendant was a "minimal participant in any criminal activity." Subsection (b) sets forth a 2-level reduction if the defendant was "a minor participant in any criminal activity." Section 3B1.2 also provides for a 3-level reduction where the case "fall[s] between (a) and (b)."

The Commission previously amended the Commentary to §3B1.2 to increase its usage (*see, e.g.*, USSG App. C, amend. 794 (effective Nov. 1, 2015)). However, Commission data shows that the prior amendment did not result in a sustained increase in application of the mitigating role adjustment in §2D1.1 cases. Commission data show that when §3B1.2 is applied in §2D1.1 cases, the vast

majority of these cases receive only a 2-level reduction; 3- and 4-level reductions are rarely applied. Furthermore, Commission data shows variations across districts in application of §3B1.2 to §2D1.1 cases. The new special instruction at §2D1.1(e) addresses the application of §3B1.2 to §2D1.1 cases as follows.

The amendment expands the circumstances in which an adjustment under §3B1.2 is warranted in §2D1.1 cases by instructing courts that an adjustment is generally warranted if the defendant's "primary function" in the offense was performing a low-level trafficking function. Section 2D1.1(e)(2)(A) directs the court to determine whether an adjustment under §3B1.2 applies as a court already does under the *Guidelines Manual*. Section 2D1.1(e)(2)(B) then provides that, in addition to the circumstances identified in §3B1.2, an adjustment under §3B1.2 is generally warranted if the defendant's primary function in the offense was performing a low-level trafficking function. Thus, a defendant sentenced under §2D1.1 may qualify for a mitigating role adjustment under §3B1.2 by direct application of that adjustment or by use of the special instruction in §2D1.1(e)(2)(B).

To ensure courts focus on a defendant's predominant trafficking-related activities, the Commission selected "primary function" to guide courts in determining whether an adjustment is appropriate. Due to the wide variety of functions performed by individuals in drug trafficking offenses, the examples listed in §2D1.1(e)(2)(B) are illustrative rather than a definitive list.

To assist courts in determining the appropriate level of reduction, the amendment provides examples of functions generally warranting an adjustment under §3B1.2(a) and (b). Section 2D1.1(e)(2)(B)(i) states that a four-level adjustment under §3B1.2(a) is generally warranted if the defendant's primary function in the offense was plainly among the lowest level of drug trafficking functions. It lists as examples serving as a courier, running errands, sending or receiving phone calls or messages, or acting as a lookout. Section 2D1.1(e)(2)(B)(ii) states that a two-level adjustment under §3B1.2(b) is generally warranted if the defendant's primary function in the offense was another low-level trafficking function. It lists as examples distributing controlled substances in user-level quantities for little or no monetary compensation or with a primary motivation other than profit (*e.g.*, the defendant was otherwise unlikely to commit such an offense and was motivated by an intimate or familial relationship or by threats or fear to commit the offense).

The amendment places the special instruction in §2D1.1 instead of §3B1.2 to highlight that the rules for determining §3B1.2 eligibility are different in §2D1.1 cases. For purposes of the special instruction at §2D1.1(e)(2)(B), the provisions of §3B1.2 apply in determining whether a mitigating role adjustment is warranted, with two exceptions: the amendment provides that the adjustment shall apply regardless of whether the offense involved other participants in addition to the defendant, and also regardless of whether the defendant was substantially less culpable than the average participant in the criminal activity. The Commission

determined that these two provisions in the Commentary to §3B1.2 may discourage a court from applying a mitigating role adjustment in single-defendant drug trafficking cases or drug trafficking cases where the defendant performed a similar low-level function as other participants in the criminal activity, but an adjustment may nevertheless be appropriate. Accordingly, the Commission concluded that these provisions shall not apply in assessing whether a mitigating role adjustment is warranted based on a defendant's low-level function in a drug trafficking offense.

The amendment specifies that the mitigating role provisions in §2D1.1(a)(5) and the 2-level reduction at §2D1.1(b)(17) apply regardless of whether the defendant receives the §3B1.2 adjustment by direct application of §3B1.2 or by use of the special instruction in §2D1.1(e)(2)(B). This instruction ensures that any individual who receives a mitigating role adjustment, regardless of the mechanism, may also receive the reductions in §2D1.1(a)(5) and §2D1.1(b)(17).

Part B – Representing or Marketing Fentanyl or a Fentanyl Analogue as a Legitimately Manufactured Drug

Part B of the amendment changes the *mens rea* requirement in §2D1.1(b)(13)(B). In light of the continuing danger associated with the misrepresentation of fake prescription pills containing fentanyl or a fentanyl analogue, the Commission addressed concerns that the *mens rea* requirement was vague and difficult to apply.

Section 2D1.1(b)(13)(A) provides a 4-level increase when the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue. The Commission added this specific offense characteristic in 2018 in response to rising numbers of fentanyl and fentanyl analogue cases. *See* USSG, App. C. amend. 807 (effective Nov. 1, 2018). In 2023, the Commission added an alternative 2-level enhancement at §2D1.1(b)(13)(B) for offenses where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug. The Commission added this specific offense characteristic based on the continued increase in fentanyl and fentanyl analogue distribution and data showing that most fake prescription pills seized containing fentanyl had a potentially lethal dose of the substance. *See* USSG, App. C. amend. 818 (effective Nov. 1, 2023).

The Commission received comment that §2D1.1(b)(13)(B) is being applied inconsistently, in part, because the current *mens rea* requirement has generated confusion. In particular, commenters have urged the Commission to revise §2D1.1(b)(13)(B) because the mental state of "willful blindness or conscious avoidance of knowledge" is vague, and cases construe willful blindness as legally equivalent to knowledge, causing uncertainty over when the enhancement should be applied. The Commission further heard concerns about the continuing dangers

associated with representing or marketing fentanyl or a fentanyl analogue as a legitimately manufactured drug.

Informed by those concerns, the amendment changes the *mens rea* requirement in §2D1.1(b)(13)(B) from "willful blindness or conscious avoidance of knowledge" to "reckless disregard."

3. Amendment: Section 2K2.1(b) is amended—

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

by redesignating paragraphs (5) through (9) as paragraphs (6) through (10), respectively;

by inserting after paragraph (4) the following new paragraph (5):

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

(A) (i) possessed four or more machinegun conversion devices; or

(ii) transferred or sold any machinegun conversion device to another person, or attempted or conspired to commit such a transfer or sale, increase by 2 levels; or

(B) possessed 30 or more machinegun conversion devices, increase by 4 levels.

For purposes of subsection (b)(5), 'machinegun conversion device' means any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun (*i.e.,* any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger).";

in the paragraph that begins "The cumulative offense level" by striking "(b)(4)" and inserting "(b)(5)";

in paragraph (6) (as so redesignated), in the subparagraph that begins "*Provided*, however," by striking "(b)(5)(C)(i)(I)" and inserting "(b)(6)(C)(i)(I)";

in paragraph (9)(A) (as so redesignated) by striking "(b)(5)" and inserting "(b)(6)";

and in paragraph (10)(A) (as so redesignated) by striking "(b)(5)" and inserting "(b)(6)".

The Commentary to §2K2.1 caption "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";

in Note 3 by striking "(b)(5)" and inserting "(b)(6)";

in Note 9 by striking "*Application of Subsection (b)(7).*—Under subsection (b)(7), if a record-keeping offense" and inserting "*Application of Subsection (b)(8).*—Under subsection (b)(8), if a recordkeeping offense";

in Note 13—

in the heading by striking "(b)(5)" and inserting "(b)(6)";

and in subparagraph (C) by striking "(b)(5)" and inserting "(b)(6)"; and by striking "(b)(6)(B)" and inserting "(b)(7)(B)";

and in Note 14—

in the heading by striking "(b)(6)(B)" and inserting "(b)(7)(B)";

in subparagraph (A) by striking "(b)(6)(B)" and inserting "(b)(7)(B)";

in subparagraph (B) by striking "(b)(6)(B)" both places it appears and inserting "(b)(7)(B)";

in subparagraph (C) by striking "(b)(6)(B)" and inserting "(b)(7)(B)";

and in subparagraph (E) by striking "(b)(6)(B)" each place it appears and inserting "(b)(7)(B)".

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4(A) in the paragraph that begins "If the explosive" by striking "§2K2.1(b)(6)(B)" both places it appears and inserting "§2K2.1(b)(7)(B)".

Reason for Amendment: This amendment revises §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), the primary firearms guideline, to more fully account for machinegun conversion devices (MCDs).

Commonly referred to as "Glock switches" and "auto sears," MCDs are devices designed to convert semi-automatic firearms into fully automatic weapons. Under the National Firearms Act (NFA), 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). An MCD therefore qualifies as a machinegun under federal

law, and—as in the case of other machineguns—federal law generally prohibits the possession and transfer of such devices, with limited exceptions. *See* 18 U.S.C. § 922(o).

As a technical matter, the definition of "firearm" is not uniform throughout federal law. Because the NFA defines "firearm" to include machineguns—and "machinegun" to include MCDs—MCDs qualify as "firearms" under the NFA definition at 26 U.S.C. § 5845(a). By contrast, MCDs are not firearms under the definition of that term provided in the Gun Control Act (GCA), which is limited (as relevant) to a weapon "which will or is designed to or may readily be converted to expel a projectile by the action of an explosive" and "the frame or receiver of any such weapon." 18 U.S.C. § 921(a)(3).

Prior to this amendment, §2K2.1 accounted for MCDs solely through base offense levels. It provided certain enhanced base offense levels for offenses involving NFA firearms, including MCDs. *See* USSG §2K2.1(a)(1), (3), (4), (5). Although §2K2.1's base offense levels specifically incorporated the NFA definition of firearm, the remainder of §2K2.1 used the GCA definition. *See* USSG §2K2.1, comment. (n.1). Therefore, MCDs did not trigger the specific offense characteristics in §2K2.1. For example, if an individual were convicted of a firearms offense in which he possessed one semi-automatic firearm and five MCDs, an enhanced base offense level would apply because the offense involved a firearm described in 26 U.S.C. § 5845(a), *see* USSG §2K2.1(a)(1), (3), (4), (5), but

there would be no enhancement under the specific offense characteristic at §2K2.1(b)(1) for the number of MCDs possessed because MCDs are not firearms under the GCA definition. *See* USSG §2K2.1(b)(1). For the same reason, if the individual transferred the MCDs to another person, this conduct would not support a trafficking enhancement under the specific offense characteristic at §2K2.1(b)(5) the way the transfer of a GCA firearm (or ammunition) would. *See* USSG §2K2.1(b)(5).

The Commission's amendment responds to concerns by the Department of Justice and other commenters about the proliferation of MCDs, which pose a heightened danger to the public because a weapon equipped with an MCD fires more rapidly and with less control than an identical weapon without an MCD. Of note, the Department of Justice pointed to a 570% rise in MCD recoveries in 2021 as compared to 2017 and to the growing involvement of automatic gunfire reported in shootings. Commission data similarly reflects a recent rise in firearms cases involving MCDs. In fiscal year 2023, 4.5 percent of cases sentenced under §2K2.1 involved an MCD—an increase from one percent of §2K2.1 cases in fiscal year 2019. While most cases involving MCDs in fiscal year 2023 involved a single MCD, more than 18 percent involved four or more devices. In addition, in more than 25 percent of §2K2.1 cases involving MCDs, the sentenced individual transferred at least one MCD to another person.

To address these concerns and in recognition that MCDs pose different risks than functional firearms, the amendment establishes a new tiered specific offense characteristic at §2K2.1(b)(5) for cases involving MCDs. New subsection (b)(5)(A) provides a two-level enhancement when a defendant (i) possessed four or more MCDs or (ii) transferred or sold an MCD or attempted or conspired to commit such a transfer or sale. New subsection (b)(5)(B) provides a four-level enhancement when a defendant possessed 30 or more MCDs. The amendment includes a definition of "machinegun conversion device" consistent with the NFA's statutory definition at 26 U.S.C. § 5845(b). To tailor the enhancement to the most culpable conduct, the Commission determined that it should apply only to the acts of the defendant. The Commission also concluded that the new specific offense characteristic should be subject to the offense level cap in §2K2.1. The amendment revises the cap to provide that the cumulative offense level may not exceed level 29 after application of subsections (b)(1) through the new subsection (b)(5), unless subsection (b)(3)(A) applies.

The amendment also includes conforming changes, including to the Commentary to §2K2.1 and §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), to address the renumbering of the prior §2K2.1(b)(5) through (9).

4. **Amendment:** The Commentary to §1B1.10 captioned "Application Notes" is amended in Note 8(B) by inserting after "18 U.S.C. § 3583(e)(1)." the following:

"*See* §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)).".

The Commentary to §4B1.5 captioned "Application Notes" is amended in Note 5 by striking the following:

"*Treatment and Monitoring.*—

(A) *Recommended Maximum Term of Supervised Release.*—The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.

(B) *Recommended Conditions of Probation and Supervised Release.*—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.";

and by inserting the following:

"*Treatment and Monitoring.*—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.".

Section 5B1.3(d)(7) is amended by striking ", as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release)".

The Commentary to §5B1.3 captioned "Application Note" is amended—

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

and by inserting at the end the following new Note 2:

"2. *Application of Subsection (d)(7).*—For purposes of subsection (d)(7):

'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (v) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer

represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.".

Chapter Five, Part D is amended by inserting at the beginning the following new Introductory Commentary:

" *Introductory Commentary*

The Sentencing Reform Act of 1984 requires the court to assess a wide range of factors 'in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release.' 18 U.S.C. § 3583(c). These determinations aim to make the imposition and scope of supervised release 'dependent on the needs of the defendant for supervision.' *See* S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983). In conducting such an individualized assessment, the court can 'assure that [those] who will need post-release supervision will receive it' while 'prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them.' *Id*. at 54; *see also Johnson v. United States,* 529 U.S. 694, 709 (2000) ('Supervised release departed from the parole system it replaced by giving district courts the freedom to provide postrelease supervision for those, and only those, who needed it . . . . Congress

aimed, then, to use the district courts' discretionary judgment to allocate supervision to those releasees who needed it most.'). Supervised release 'fulfills rehabilitative ends, distinct from those served by incarceration.' *United States v. Johnson*, 529 U.S. 53, 59 (2000). Accordingly, a court should consider whether the defendant needs supervision in order to ease transition into the community or to provide further rehabilitation and whether supervision will promote public safety. *See* 18 U.S.C. §§ 3583(c), 3553(a)(2)(C)); *see also* S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983) (indicating that a 'primary goal of [a term of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release').".

Section 5D1.1 is amended—

by striking subsections (a) and (b) as follows:

"(a) The court shall order a term of supervised release to follow imprisonment—

(1) when required by statute (*see* 18 U.S.C. § 3583(a)); or

(2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed.

(b) The court may order a term of supervised release to follow imprisonment in any other case. *See* 18 U.S.C. § 3583(a).";

and inserting the following new subsections (a) and (b):

"(a) The court shall order a term of supervised release to follow imprisonment when required by statute (*see* 18 U.S.C. § 3583(a)).

(b) When a term of supervised release is not required by statute, the court should order a term of supervised release to follow imprisonment when warranted by an individualized assessment of the need for supervision.";

and by inserting at the end the following new subsection (d):

"(d) The court should state in open court the reasons for imposing or not imposing a term of supervised release. *See* 18 U.S.C. § 3553(c).".

The Commentary to §5D1.1 captioned "Application Notes" is amended—

by striking Notes 1, 2, and 3 as follows:

"1. *Application of Subsection (a).*—Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment when supervised release is required by statute or, except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed. The court may depart from this guideline and not impose a term of supervised release if supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.

2. *Application of Subsection (b).*—Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment in any other case, after considering the factors set forth in Note 3.

3. *Factors to Be Considered.*—

(A) *Statutory Factors.*—In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:

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

(ii) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

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

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

See 18 U.S.C. § 3583(c).

(B) *Criminal History.*—The court should give particular consideration to the defendant's criminal history (which is one aspect of the 'history and characteristics of the defendant' in subparagraph (A)(i), above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.

(C) *Substance Abuse.*—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be

imposed. *See* §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

(D) *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 supervised release is required by statute. *See* 18 U.S.C. § 3583(a). 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. § 3583(d); §5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.";

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

by inserting at the beginning the following new Notes 1, 2, 3, and 4:

"1. *Individualized Assessment.*—The statutory framework of supervised release aims to 'assure that [those] who will need post-release supervision will receive it' while 'prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them.' *See* S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983). To that end, 18 U.S.C.

§ 3583(c) requires the court to, 'in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release,' consider the following:

(A) the nature and circumstances of the offense and the history and characteristics of the defendant (18 U.S.C. § 3553(a)(1));

(B) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(B)–(D));

(C) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines (18 U.S.C. § 3553(a)(4));

(D) any pertinent policy statement issued by the Sentencing Commission (18 U.S.C. § 3553(a)(5));

(E) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (18 U.S.C. § 3553(a)(6)); and

(F) the need to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7)).

See 18 U.S.C. § 3583(c).

2. *Criminal History.*—The court should give particular consideration to the defendant's criminal history (which is one aspect of the 'history and characteristics of the defendant' in Application Note 1(A) above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.

3. *Substance Abuse.*—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. *See* §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

4. *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

supervised release is required by statute. *See* 18 U.S.C. § 3583(a). 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. § 3583(d); §5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.";

and by inserting at the end the following new Note 7:

"7. *Evidence-Based Recidivism Reduction Programming.*—Whether a defendant's sentence includes a term of supervised release may impact the application of time credits earned by the defendant under the First Step Act of 2018, Pub. L. 115–391. The First Step Act of 2018 allows individuals in custody who successfully complete evidence-based recidivism reduction programming or productive activities to earn time credits. *See* 18 U.S.C. § 3632(d)(4)(A). Regarding the application of those time credits, the First Step Act of 2018 provides: 'If the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment pursuant to [18 U.S.C. § 3583], the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months,

based on the application of time credits under [18 U.S.C. § 3632].' 18 U.S.C. § 3624(g)(3).".

Section 5D1.2 is amended—

by striking subsections (a), (b), and (c) as follows:

"(a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:

(1) At least two years but not more than five years for a defendant convicted of a Class A or B felony. *See* 18 U.S.C. § 3583(b)(1).

(2) At least one year but not more than three years for a defendant convicted of a Class C or D felony. *See* 18 U.S.C. § 3583(b)(2).

(3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor. *See* 18 U.S.C. § 3583(b)(3).

(b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—

(1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or

(2) a sex offense.

(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.

(c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.";

and by inserting the following new subsections (a) and (b):

"(a) If a term of supervised release is ordered, the court shall conduct an individualized assessment to determine the length of the term, which shall not be less than any statutorily required minimum term. Except as otherwise provided by statute, the maximum term of supervised release is as follows:

(1) Not more than five years for a defendant convicted of a Class A or B felony. *See* 18 U.S.C. § 3583(b)(1).

(2) Not more than three years for a defendant convicted of a Class C or D felony. *See* 18 U.S.C. § 3583(b)(2).

(3) Not more than one year for a defendant convicted of a Class E felony or a misdemeanor (other than a petty offense). *See* 18 U.S.C. § 3583(b)(3).

(b) The court should state in open court the reasons for the length of the term imposed. *See* 18 U.S.C. § 3553(c).".

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

by striking Note 1 as follows:

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

'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (v) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy

to commit any offense described in subdivisions (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.";

by striking Notes 4, 5, and 6 as follows:

"4. *Factors Considered.*—The factors to be considered in determining the length of a term of supervised release are the same as the factors considered in determining whether to impose such a term. *See* 18 U.S.C. § 3583(c); Application Note 3 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is long enough to address the purposes of imposing supervised release on the defendant.

5. *Early Termination and Extension.*—The court has authority to terminate or extend a term of supervised release. *See* 18 U.S.C. § 3583(e)(1), (2). The

court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.

6. *Application of Subsection (c).*—Subsection (c) specifies how a statutorily required minimum term of supervised release may affect the minimum term of supervised release provided by the guidelines.

For example, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of three years and a maximum term of life, the term of supervised release provided by the guidelines is restricted by subsection (c) to three years to five years. Similarly, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, the term of supervised release provided by the guidelines is five years.

The following example illustrates the interaction of subsections (a) and (c) when subsection (b) is also involved. In this example, subsection (a) provides a range of two years to five years; the relevant statute requires a minimum term of supervised release of five years and a maximum term of life; and the offense is a sex offense under subsection (b). The effect of subsection (b) is to raise the maximum term of supervised release from five years (as provided by subsection (a)) to life, yielding a range of two years to life. The term of supervised release provided by the guidelines is then restricted by subsection (c) to five years to life. In this example, a term of supervised release of more than five years would be a guideline sentence. In addition, subsection (b) contains a policy statement recommending that the maximum — a life term of supervised release — be imposed.";

by redesignating Notes 2 and 3 as Notes 4 and 5, respectively;

by inserting at the beginning the following new Notes 1, 2, and 3:

"1. *Individualized Assessment.*—When conducting an individualized assessment to determine the length of a term of supervised release, the factors to be considered are the same as the factors considered in determining whether to impose such a term. *See* 18 U.S.C. § 3583(c); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is

sufficient, but not greater than necessary, to address the purposes of imposing supervised release on the defendant.

2. *Terrorism and Sex Offenses.*—Congress has authorized a term of supervised release that exceeds the maximum terms described in subsection (a) for certain serious offenses. *See* 18 U.S.C. § 3583(j), (k). For certain terrorism offenses, the authorized term of supervised release is any term of years or life. 18 U.S.C. § 3583(j). For certain sex offenses, the authorized term of supervised release is any term of years not less than five, or up to life. 18 U.S.C. § 3583(k).

3. *Drug Offenses.*—For certain drug offenses, Congress has established statutory minimum terms of supervised release. *See, e.g.*, 21 U.S.C. §§ 841(b), 960(b) (providing minimum terms of supervised release depending on drug type and quantity and criminal history).";

in Note 4 (as so redesignated) by striking "shall be determined" and inserting "is determined";

in Note 5 (as so redesignated) by striking "or the guidelines";

and by inserting at the end the following new Note 6:

"6. *Early Termination and Extension.*—The court has authority to terminate or extend a term of supervised release. *See* 18 U.S.C. § 3583(e)(1), (2); §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)).".

The Commentary to §5D1.2 is amended by striking the Commentary captioned "Background" in its entirety as follows:

"*Background:* This section specifies the length of a term of supervised release that is to be imposed. Subsection (c) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.".

Section 5D1.3 is amended—

by striking subsections (b), (c), (d), and (e) as follows:

"(b) *Discretionary Conditions*

The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate

deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

(c) *'Standard' Conditions (Policy Statement)*

The following 'standard' conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

(1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about

how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(4) The defendant shall answer truthfully the questions asked by the probation officer.

(5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the

conditions of the defendant's supervision that he or she observes in plain view.

(7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(11) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

(13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

(d) *'Special' Conditions (Policy Statement)*

The following 'special' conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) *Support of Dependents*

(A) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

(B) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant shall make the payments and comply with the other terms of the order.

(2) *Debt Obligations*

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring

new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) *Access to Financial Information*

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) *Substance Abuse*

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant shall not use or possess alcohol.

(5) *Mental Health Program Participation*

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) *Deportation*

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)[*]); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

[*]So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) *Sex Offenses*

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) —

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation

officer in the lawful discharge of the officer's supervision functions.

(8) *Unpaid Restitution, Fines, or Special Assessments*

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

(e) *Additional Conditions (Policy Statement)*

The following 'special conditions' may be appropriate on a case-by-case basis:

(1) *Community Confinement*

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. *See* §5F1.1 (Community Confinement).

(2) *Home Detention*

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. *See* §5F1.2 (Home Detention).

(3) *Community Service*

Community service may be imposed as a condition of supervised release. *See* §5F1.3 (Community Service).

(4) *Occupational Restrictions*

Occupational restrictions may be imposed as a condition of supervised release. *See* §5F1.5 (Occupational Restrictions).

(5) *Curfew*

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic

monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) *Intermittent Confinement*

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* §5F1.8 (Intermittent Confinement).";

and inserting at the end the following new subsection (b):

"(b) *Discretionary Conditions*

(1) *In General.*—The court should conduct an individualized assessment to determine what, if any, other conditions of supervised release are warranted.

Such conditions are warranted to the extent that they (A) are reasonably related to (i) the nature and circumstances of the offense and the history and characteristics of the defendant; (ii) the need for

the sentence imposed to afford adequate deterrence to criminal conduct; (iii) the need to protect the public from further crimes of the defendant; and (iv) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (B) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission. *See* 18 U.S.C. § 3583(d).

(2) *'Standard' Conditions (Policy Statement)*

The following are 'standard' conditions of supervised release, which the court may modify, expand, or omit in appropriate cases:

(A) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(B) After initially reporting to the probation office, the defendant will receive instructions from the court or the

probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(C) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(D) The defendant shall answer truthfully the questions asked by the probation officer.

(E) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(F) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and

the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

(G) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(H) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate

or interact with that person without first getting the permission of the probation officer.

(I) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(J) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.*, anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(K) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(L) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the

person and confirm that the defendant has notified the person about the risk.

(M) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

(3) *'Special' Conditions (Policy Statement)*

One or more conditions from the following non-exhaustive list of 'special' conditions of supervised release may be appropriate in a particular case, including in the circumstances described therein:

(A) *Support of Dependents*

(i) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

(ii) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant shall make the

payments and comply with the other terms of the order.

(B) *Debt Obligations*

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(C) *Access to Financial Information*

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(D) *Substance Abuse*

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (i) a condition requiring the defendant to

participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (ii) a condition specifying that the defendant shall not use or possess alcohol.

(E) *Mental Health Program Participation*

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(F) *Deportation*

If (i) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (ii) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a

condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(G) *Sex Offenses*

If the instant offense of conviction is a sex offense—

(i) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(ii) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(iii) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other

electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(iv) A condition prohibiting the defendant from communicating, or otherwise interacting, with any victim of the offense, either directly or through someone else.

(H) *Unpaid Restitution, Fines, or Special Assessments*

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

(I) *Educational or Vocational Training*

If the court has reason to believe that a course of study or vocational training would be appropriate and would equip the defendant for suitable employment, a condition specifying that the defendant participate in a General Education Development (or similar) program, vocational training, or skills training, unless the probation officer excuses the defendant from doing so.

(J) *Victim Contact*

If there is an identifiable victim of the offense, a condition prohibiting the defendant from communicating, or otherwise interacting, with any of the victims, either directly or through someone else.

(K) *Community Confinement*

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. *See* §5F1.1 (Community Confinement).

(L) *Home Detention*

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. *See* §5F1.2 (Home Detention).

(M) *Community Service*

Community service may be imposed as a condition of supervised release. *See* §5F1.3 (Community Service).

(N) *Occupational Restrictions*

Occupational restrictions may be imposed as a condition of supervised release. *See* §5F1.5 (Occupational Restrictions).

(O) *Curfew*

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation

of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(P) *Intermittent Confinement*

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* §5F1.8 (Intermittent Confinement).".

The Commentary to §5D1.3 captioned "Applications Note" is amended—

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

by redesignating Note 1 as Note 2;

by inserting at the beginning the following new Note 1:

"1. *Individualized Assessment.*—When conducting an individualized assessment under this section, the court must consider the same factors used

to determine whether to impose a term of supervised release, and shall impose conditions of supervision not required by statute only to the extent such conditions meet the requirements listed at 18 U.S.C. § 3583(d). *See* 18 U.S.C. § 3583(c), (d); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).";

in Note 2 (as so redesignated) by striking "(c)(4)" both places it appears and inserting "(b)(2)(D)";

and by inserting at the end the following new Note 3:

"3. *Application of Subsection (b)(3)(G).*— For purposes of subsection (b)(3)(G):

'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. § 1201; or (v) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.".

Chapter Five, Part D is amended by inserting at the end the following new §5D1.4:

"§5D1.4. *Modification, Early Termination, and Extension of Supervised Release (Policy Statement)*

(a) *Modification of Conditions.*—At any time prior to the expiration or termination of the term of supervised release, the court may modify, reduce, or enlarge the conditions of supervised release whenever warranted by an individualized assessment of the appropriateness of existing conditions. *See* 18 U.S.C. § 3583(e)(2). The court is encouraged to conduct such an assessment in consultation with the probation officer after the defendant's release from imprisonment.

(b) *Early Termination.*—Any time after the expiration of one year of supervised release and after an individualized assessment of the

need for ongoing supervision, the court may terminate the remaining term of supervision and discharge the defendant if the court determines, following consultation with the government and the probation officer, that the termination is warranted by the conduct of the defendant and in the interest of justice. *See* 18 U.S.C. § 3583(e)(1).

(c) *Extending a Term of Supervised Release.*—The court may, at any time prior to the expiration or termination of a term of supervised release, extend the term of supervised release if less than the maximum authorized term of supervised release was previously imposed and the extension is warranted by an individualized assessment of the need for further supervision. *See* 18 U.S.C. § 3583(e)(2).

Commentary

Application Notes:

1. *Individualized Assessment.*—

(A) *In General.*—When making an individualized assessment under this section, the factors to be considered are the same factors used to

determine whether to impose a term of supervised release. *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

(B) *Early Termination.*—When determining whether to terminate the remaining term of supervised release under subsection (b), the court may wish to consider such factors as:

(i) any history of court-reported violations over the term of supervision;

(ii) the ability of the defendant to lawfully self-manage (*e.g.,* the ability to problem-solve and avoid situations that may result in a violation of a condition of supervised release or new criminal charges);

(iii) the defendant's substantial compliance with all conditions of supervision;

(iv) the defendant's engagement in appropriate prosocial activities and the existence or lack of prosocial support to remain lawful beyond the period of supervision;

(v) a demonstrated reduction in risk level or maintenance of the lowest category of risk over the period of supervision; and

(vi) whether termination will jeopardize public safety, as evidenced by the nature of the defendant's offense, the defendant's criminal history, the defendant's record while incarcerated, the defendant's efforts to reintegrate into the community and avoid recidivism, any statements or information provided by the victims of the offense, and other factors the court finds relevant.

2. *Notification of Victims.*—When determining whether to modify any condition of supervised release that would be relevant to a victim or to terminate the remaining term of supervised release, the Commission encourages the court, in coordination with the government, to ensure that any victim of the offense is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified.

3. *Application of Subsection (c).*—Subsection (c) addresses a court's authority to extend a term of supervised release. In some cases, extending a term may be more appropriate than taking other measures, such as revoking the term of supervised release.".

The Commentary to §5G1.3 captioned "Application Notes" is amended in Note 4(C) by striking "Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release)" and inserting "Application Note 3 and subsection (f) of §7B1.3 (Revocation of Probation)".

Section 5H1.3 is amended in the paragraph that begins "Mental and emotional conditions may be relevant in determining the conditions" by striking "5D1.3(d)(5)" and inserting "5D1.3(b)(3)(E)".

Section 5H1.4 is amended in the paragraph that begins "Drug or alcohol dependence or abuse" by striking "§5D1.3(d)(4)" and inserting "§5D1.3(b)(3)(D)".

Chapter Seven, Part A is amended—

in Subpart 1 by striking the following:

" Under 28 U.S.C. § 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. At this time, the Commission has chosen to promulgate policy statements only. These policy statements will provide guidance while allowing for the identification of any substantive or procedural issues that require further review. The Commission views these policy statements as evolutionary and will

review relevant data and materials concerning revocation determinations under these policy statements. Revocation guidelines will be issued after federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment on these policy statements.";

and inserting the following:

" Under 28 U.S.C. § 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. The Commission chose to promulgate policy statements only. These policy statements were intended to provide guidance and allow for the identification of any substantive or procedural issues that require further review. The Commission viewed these policy statements as evolutionary and intended to review relevant data and materials concerning revocation determinations under these policy statements. Updated policies would be issued after federal judges, probation officers, practitioners, and others had the opportunity to evaluate and comment on these policy statements.";

in Subpart 3(a), in the paragraph that begins "Moreover, the Commission" by striking "anticipates" and inserting "anticipated"; by striking "will provide" and inserting "would provide"; by striking "represent" and inserting "represented"; and by striking "intends to promulgate revocation guidelines" and inserting "intended to promulgate updated revocation policies";

in Subpart 3(b)—

in the paragraph that begins “The Commission debated” by striking “debated” and inserting “initially debated”;

and in the paragraph that begins “Given the relatively narrow ranges” by striking “this time” and inserting “that time”;

in Subpart 4—

in the paragraph that begins “The revocation policy statements” by striking “categorize” and inserting “categorized”; and by striking “fix” and inserting “fixed”;

and in the paragraph that begins “The Commission” by striking “has elected” and inserting “initially elected”; by striking “the Commission determined” and inserting “the Commission had determined”; and by striking “the Commission has initially concluded” and inserting “the Commission initially concluded”;

by striking Subpart 5 as follows:

"*5. A Concluding Note*

The Commission views these policy statements for revocation of probation and supervised release as the first step in an evolutionary process. The Commission expects to issue revocation guidelines after judges, probation officers, and practitioners have had an opportunity to apply and comment on the policy statements.

In developing these policy statements, the Commission assembled two outside working groups of experienced probation officers representing every circuit in the nation, officials from the Probation Division of the Administrative Office of the U.S. Courts, the General Counsel's office at the Administrative Office of the U.S. Courts, and the U.S. Parole Commission. In addition, a number of federal judges, members of the Criminal Law and Probation Administration Committee of the Judicial Conference, and representatives from the Department of Justice and federal and community defenders provided considerable input into this effort.";

and by inserting at the end the following new Subpart 5:

"*5. Updating the Approach*

The Commission viewed the original policy statements for revocation of probation and supervised release as the first step in an evolutionary process. The Commission intended to revise its approach after judges, probation officers, and practitioners had an opportunity to apply and comment on the policy statements. Since the promulgation of those policy statements, a broad array of stakeholders has identified the need for more flexible, individualized responses to violations of supervised release.

In response, the Commission updated the policy statements in this chapter to ensure judges have the discretion necessary to properly manage supervised release. The revised policy statements encourage judges to take an individualized approach in: (1) responding to reports of non-compliance before initiating revocation proceedings; (2) addressing violations found during revocation proceedings; and (3) imposing a sentence of imprisonment upon revocation. These changes are intended to better allocate taxpayer dollars and probation resources, encourage compliance and improve public safety, and facilitate the reentry and rehabilitation of defendants.

This chapter proceeds in two parts: Part B addresses violations of probation, and Part C addresses violations of supervised release. Both parts maintain an approach in which the court addresses primarily the defendant's failure to comply

with court-ordered conditions, while reflecting, to a limited degree, the seriousness of the underlying violation and the criminal history of the individual. The Commission determined that violations of probation and supervised release should be addressed separately to reflect their different purposes. While probation serves all the goals of sentencing, including punishment, supervised release primarily 'fulfills rehabilitative ends, distinct from those served by incarceration.' *United States v. Johnson*, 529 U.S. 53, 59 (2000). In light of these differences, Part B continues to recommend revocation for most probation violations. Part C encourages courts to consider a graduated response to a violation of supervised release, including considering all available options focused on facilitating a defendant's transition into the community and promoting public safety. Parts B and C both recognize the important role of the court, which is best situated to consider the individual defendant's risks and needs and respond accordingly within its broad discretion.".

Chapter Seven, Part B is amended—

in the heading by striking "Probation and Supervised Release Violations" and inserting "Violations of Probation";

and in the Introductory Commentary—

in the paragraph that begins “The policy statements” by striking “chapter” and inserting “part”; and by striking “supervision” and inserting “probation”;

by striking the following paragraph:

“ Because these policy statements focus on the violation of the court-ordered supervision, this chapter, to the extent permitted by law, treats violations of the conditions of probation and supervised release as functionally equivalent.”;

by striking the last paragraph as follows:

“ This chapter is applicable in the case of a defendant under supervision for a felony or Class A misdemeanor. Consistent with §1B1.9 (Class B or C Misdemeanors and Infractions), this chapter does not apply in the case of a defendant under supervision for a Class B or C misdemeanor or an infraction.”;

and by inserting at the end the following new paragraph:

“ This part is applicable in the case of a defendant on probation for a felony or Class A misdemeanor. Consistent with §1B1.9 (Class B or C Misdemeanors and Infractions), this part does not apply in the case of a defendant on probation for a Class B or C misdemeanor or an infraction.”.

Section 7B1.1 is amended—

in subsection (a) by striking “and supervised release”;

in subsection (a)(3) by striking “supervision” and inserting “probation”;

and in subsection (b) by striking “supervision” and inserting “probation”.

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

in Note 1 by striking “18 U.S.C. §§ 3563(a)(1) and 3583(d), a mandatory condition of probation and supervised release” and inserting “18 U.S.C. § 3563(a)(1), a mandatory condition of probation”;

and in Note 5 by striking “under supervision” and inserting “on probation”.

Section 7B1.2 is amended in the heading by striking “and Supervised Release”.

Section 7B1.3 is amended—

in the heading by striking “or Supervised Release”;

in subsection (a)(1) by striking “or supervised release”;

in subsection (a)(2) by striking "(A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision" and inserting "(A) revoke probation; or (B) extend the term of probation and/or modify the conditions thereof";

in subsection (b) by striking "or supervised release";

in subsection (e) by striking "or supervised release" both places such phrase appears;

in subsection (f) by striking "or supervised release" both places such phrase appears;

in subsection (g) by striking the following:

"(1) If probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1–1.3 shall apply to the imposition of a term of supervised release.

(2) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not

exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h).";

and inserting the following:

"If probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1–1.3 shall apply to the imposition of a term of supervised release.".

The Commentary to §7B1.3 captioned "Application Notes" is amended—

in Note 1 by striking "or supervised release"; and by striking "supervision" both places such term appears and inserting "probation";

by striking Note 2 as follows:

"2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. § 3583(e), (g)–(i). Under 18 U.S.C. § 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release, may order an additional period of supervised release to follow imprisonment.";

by redesignating Notes 3, 4, and 5 as Notes 2, 3, and 4, respectively;

in Note 2 (as so redesignated) by striking "or supervised release"; and by striking "Bureau of Prisons" and inserting "Federal Bureau of Prisons";

in Note 3 (as so redesignated) by striking "or supervised release" both places such phrase appears;

and in Note 4 (as so redesignated) by striking ". Intermittent confinement is authorized as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. *See* §5F1.8 (Intermittent Confinement)" and inserting "; *see also* §5F1.8 (Intermittent Confinement)".

Section 7B1.4 is amended in the heading by striking "*Imprisonment*" and inserting "*Imprisonment—Probation*".

Section 7B1.4(a) is amended in the Table—

in the heading by striking "*Revocation Table*" and inserting "*Probation Revocation Table*";

and by striking the following:

"*Grade A* *(1)* Except as provided in subdivision (2) below:

12–18 15–21 18–24 24–30 30–37 33–41.

(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:

24–30 27–33 30–37 37–46 46–57 51–63.

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision.";

and inserting the following:

"*Grade A* 12–18 15–21 18–24 24–30 30–37 33–41.

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of probation.".

The Commentary to §7B1.4 captioned "Application Notes" is amended—

in Note 1 by striking the following:

"The criminal history category to be used in determining the applicable range of imprisonment in the Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Revocation Table have been designed to take into account that the defendant violated supervision. In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of supervision being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of supervision. (*See* the criminal history provisions of §§4A1.1–4B1.4.)";

and inserting the following:

"The criminal history category to be used in determining the applicable range of imprisonment in the Probation Revocation Table is the category determined at the time the defendant originally was sentenced to the term of probation. The criminal history category is not to be recalculated because the ranges set forth in the Probation Revocation Table have been designed to take into account that the defendant violated probation. *Example:* A defendant, who was originally sentenced in 2022, was determined to have a criminal history category of II due in part to having committed the offense 'while under any criminal justice sentence.'

See §4A1.1(d) (Criminal History Category) (Nov. 2021). For purposes of determining the applicable range of imprisonment in the Probation Revocation Table, the defendant's criminal history category is category II, regardless of whether the defendant's criminal history category would be reduced for other purposes based on the retroactive application of Part A of Amendment 821 pursuant to §1B1.10 (Reduction of Imprisonment as a Result of Amended Guideline Range (Policy Statement)). *See* USSG App. C, Amendment 825 (effective November 1, 2023).

In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of probation being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of probation. (*See* the criminal history provisions of §§4A1.1–4B1.4.)";

in Note 2 by striking "Revocation Table" and inserting "Probation Revocation Table"; and by striking "supervision" both places such term appears and inserting "probation";

in Note 3 by striking "under supervision" and inserting "on probation";

in Note 5 by striking "or supervised release" both places such phrase appears; and by striking "18 U.S.C. §§ 3565(b), 3583(g)" and inserting "18 U.S.C. § 3565(b)";

and in Note 6 by striking "under 18 U.S.C. §§ 3565(b) and 3583(g). 18 U.S.C. §§ 3563(a), 3583(d)" and inserting "under 18 U.S.C. § 3565(b). 18 U.S.C. § 3563(a)".

Section 7B1.5 is amended—

in the heading by striking "*Under Supervision*" and inserting "*on Probation*";

by striking subsections (a), (b), and (c) as follows:

"(a) Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.

(b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.

(c) *Provided,* that in the case of a person serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A, credit shall be given for time on supervision prior to revocation, except that no credit shall be given for any time in escape or absconder status.";

and inserting the following:

"Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.".

The Commentary to §7B1.5 is amended by striking the Commentary captioned "Application Note" in its entirety as follows:

"*Application Note:*

1. Subsection (c) implements 18 U.S.C. § 4106A(b)(1)(C), which provides that the combined periods of imprisonment and supervised release in transfer treaty cases shall not exceed the term of imprisonment imposed by the foreign court.".

The Commentary to §7B1.5 captioned "Background" is amended by striking "or supervised release"; by striking "with supervision" and inserting "with probation"; and by striking "under supervision" and inserting "on probation".

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

“ *Part C—Violations of Supervised Release*

Introductory Commentary

At the time of original sentencing, the court may—and in some cases, must—impose a term of supervised release to follow the sentence of imprisonment. *See* 18 U.S.C. § 3583(a). During that term, the court may receive allegations that the defendant has violated a condition of supervision. In responding to such allegations, addressing a violation found during revocation proceedings, and imposing a sentence upon revocation, the court should conduct the same kind of individualized assessment used ‘in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release.’ *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

If the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release under existing conditions, modify the conditions, extend the term, or revoke supervised release and impose a term of imprisonment. *See* 18 U.S.C. § 3583(e)(3). The court also has authority to terminate a term of supervised release and discharge the defendant at any time after the expiration of one year of supervised release if it is satisfied that

such action is warranted by the conduct of the defendant and the interest of justice. 18 U.S.C. § 3583(e)(1).

Because supervised release is intended to promote rehabilitation and ease the defendant's transition back into the community, the Commission encourages courts—where possible—to consider a wide array of options to respond to non-compliant behavior and violations of the conditions of supervised release. These interim steps before revocation are intended to allow courts to address the defendant's failure to comply with court-imposed conditions and to better address the needs of the defendant while also maintaining public safety. If revocation is mandated by statute or the court otherwise determines revocation to be appropriate, the sentence imposed upon revocation should be tailored to address the failure to abide by the conditions of the court-ordered supervision; imposition of an appropriate punishment for new criminal conduct is not the primary goal of a revocation sentence. The determination of the appropriate sentence on any new criminal conviction that is also a basis of the violation should be a separate determination for the court having jurisdiction over such conviction.

§7C1.1. *Classification of Violations (Policy Statement)*

(a) There are four grades of supervised release violations:

(1) *Grade A Violations* — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;

(2) *Grade B Violations* — conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;

(3) *Grade C Violations* — conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervised release.

(b) Where there is more than one violation of the conditions of supervised release, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

Commentary

Application Notes:

1. Under 18 U.S.C. § 3583(d), a mandatory condition of supervised release is that the defendant not commit another federal, state, or local crime. A violation of this condition may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct. The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct.

2. '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.

3. '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.

4. A 'firearm or destructive device of a type described in 26 U.S.C. § 5845(a)' includes a shotgun, or a weapon made from a shotgun, with a barrel or

barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or a weapon made from a rifle, with a barrel or barrels of less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain large bore weapons.

5. Where the defendant is on supervised release in connection with a felony conviction, or has a prior felony conviction, possession of a firearm (other than a firearm of a type described in 26 U.S.C. § 5845(a)) will generally constitute a Grade B violation, because 18 U.S.C. § 922(g) prohibits a convicted felon from possessing a firearm. The term 'generally' is used in the preceding sentence, however, because there are certain limited exceptions to the applicability of 18 U.S.C. § 922(g). *See, e.g.*, 18 U.S.C. § 925(c).

§7C1.2. *Reporting of Violations of Supervised Release (Policy Statement)*

(a) The probation officer shall promptly report to the court any alleged Grade A or B violation.

(b) The probation officer shall promptly report to the court any alleged Grade C violation unless the officer determines: (1) that such violation is minor, and not part of a continuing pattern of violations;

and (2) that non-reporting will not present an undue risk to an individual or the public or be inconsistent with any directive of the court relative to the reporting of violations.

Commentary

Application Note:

1. Under subsection (b), a Grade C violation must be promptly reported to the court unless the probation officer makes an affirmative determination that the alleged violation meets the criteria for non-reporting. For example, an isolated failure to file a monthly report or a minor traffic infraction generally would not require reporting.

§7C1.3. *Responses to Violations of Supervised Release (Policy Statement)*

(a) *Report of Non-Compliance*.—Upon receiving a report that the defendant is in non-compliance with a condition of supervised release, the court should conduct an individualized assessment to determine what response, if any, is appropriate.

(b) *Finding of a Violation*.—Upon a finding of a violation for which revocation is required by statute (*see* 18 U.S.C. § 3583(g)), the court

shall revoke supervised release. Upon a finding of any other violation, the court should conduct an individualized assessment, taking into consideration the grade of the violation, to determine whether to revoke supervised release. Revocation is generally appropriate for a Grade A violation, often appropriate for a Grade B violation, and may be appropriate for a Grade C violation.

Commentary

Application Notes:

1. *Individualized Assessment.*—When making an individualized assessment under this section, the factors to be considered are the same as the factors considered in determining whether to impose a term of supervised release. *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

2. *Responses.*—Upon a report of non-compliance or a finding of a violation, the court may take any appropriate action provided under 18 U.S.C. § 3583, which includes extension, modification, revocation, or termination of supervised release. If revocation is not statutorily required, the court may also consider an informal response, such as issuing a warning while maintaining supervised release without modification, continuing the

violation hearing to provide the defendant time to come into compliance, or directing the defendant to additional resources needed to come into compliance.

3. *Issuing Summons.*—If the defendant's presence in court is required to address a report of non-compliance, the court should consider issuing a summons rather than an arrest warrant where appropriate.

§7C1.4. *Revocation of Supervised Release (Policy Statement)*

(a) In the case of a revocation of supervised release, the court shall conduct an individualized assessment to determine the appropriate length of the term of imprisonment, given the recommended range of imprisonment set forth in §7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)).

(b) Any term of imprisonment imposed upon the revocation of supervised release generally should be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of supervised release.

(c) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. § 3583(h).

Commentary

Application Notes:

1. *Individualized Assessment.*—When making an individualized assessment under subsection (a), the factors to be considered are the same as the factors considered in determining whether to impose a term of supervised release. *See* 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release).

2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. § 3583(e), (g)–(i). Under 18 U.S.C. § 3583(h) (effective September 13, 1994), the

court, in the case of revocation of supervised release, may order an additional period of supervised release to follow imprisonment.

3. In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.

4. Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under §7C1.5 (Term of Imprisonment—Supervised Release), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.

§7C1.5. *Term of Imprisonment—Supervised Release (Policy Statement)*

Unless otherwise required by statute, and subject to an individualized assessment, the recommended range of imprisonment applicable upon revocation is set forth in the following table:

Supervised Release Revocation Table

(in months of imprisonment)

	*Criminal History Category**					
Grade of Violation	*I*	*II*	*III*	*IV*	*V*	*VI*
Grade C	3–9	4–10	5–11	6–12	7–13	8–14
Grade B	4–10	6–12	8–14	12–18	18–24	21–27
Grade A *(1)* Except as provided in subdivision (2) below:	12–18	15–21	18–24	24–30	30–37	33–41
(2) Where the defendant was on supervised release as a result of a sentence for a Class A felony:	24–30	27–33	30–37	37–46	46–57	51–63.

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervised release.

Commentary

Application Notes:

1. The criminal history category to be used in determining the applicable range of imprisonment in the Supervised Release Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Supervised Release Revocation Table have been designed to take into account that the defendant violated supervision. *Example:* A defendant, who was originally sentenced in 2022, was determined to have a criminal history category of II due in part to having committed the offense 'while under any criminal justice sentence.' *See* §4A1.1(d) (Criminal History Category) (Nov. 2021). For purposes of determining the applicable range of imprisonment in the Supervised Release Revocation Table, the defendant's criminal history category is category II, regardless of whether the defendant's criminal history category would be reduced for other purposes based on the retroactive application of Part A of Amendment 821 pursuant to §1B1.10 (Reduction of Imprisonment as a Result of Amended Guideline Range (Policy Statement)). *See* USSG App. C, Amendment 825 (effective November 1, 2023).

In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of supervision being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of supervision. (*See* the criminal history provisions of §§4A1.1–4B1.4.)

2. Departure from the applicable range of imprisonment in the Supervised Release 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 supervised release. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in supervised release, 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 supervised release 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.

5. Upon a finding that a defendant violated a condition of supervised release by being in possession of a controlled substance or firearm or by refusing to comply with a condition requiring drug testing, the court is required to revoke supervised release and impose a sentence that includes a term of imprisonment. 18 U.S.C. §3583(g).

6. The availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, may warrant an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. § 3583(g). 18 U.S.C. § 3583(d).

§7C1.6. *No Credit for Time Under Supervision (Policy Statement)*

(a) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision. *See* 18 U.S.C. § 3583(e)(3).

(b) *Provided,* that in the case of a person serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A, credit shall be given for time on supervision prior to revocation, except that no credit shall be given for any time in escape or absconder status.

Commentary

Application Note:

1. Subsection (b) implements 18 U.S.C. § 4106A(b)(1)(C), which provides that the combined periods of imprisonment and supervised release in transfer treaty cases shall not exceed the term of imprisonment imposed by the foreign court.

Background: This section provides that time served on supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation. Other aspects of the defendant's conduct, such as compliance with supervision conditions and adjustment while under supervision, appropriately may be considered by the court in the determination of the sentence to be imposed within the applicable revocation range.".

Reason for Amendment: This amendment updates the *Guidelines Manual*'s approach to supervised release by revising Part D (Supervised Release) of Chapter Five (Determining the Sentence) and Chapter Seven (Violations of Probation and Supervised Release).

The Sentencing Reform Act of 1984 established "supervised release" as a tool a court could use to impose post-release supervision on a defendant sentenced to a term of imprisonment. *See* 18 U.S.C. § 3583. The primary goal of supervised release is to "ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison . . . but still needs supervision and training programs after release." S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983). Supervised release also functions as an important tool to promote public safety. *See* 18 U.S.C. §§ 3583(c), 3553(a)(2)(C).

While statutes mandate the imposition and minimum length of supervised release in some cases, courts generally have discretion to determine whether to impose supervised release, to set its length and conditions, modify those conditions, and to extend, revoke, or terminate the term. In making these decisions, the Act requires courts to examine a set of factors similar, but not identical, to those considered when imposing a sentence. *Compare* 18 U.S.C. § 3553(a) *with* 18 U.S.C. § 3583(c)–(e).

In November 2024, the Commission held a roundtable on supervised release attended by judges, retired federal probation officers, providers of reentry services, academics, federal probation, government and defense community representatives, and a reentry program graduate. The Commission also received extensive public comment and testimony from members of Congress, the Committee on Criminal Law of the Judicial Conference of the United States, the Department of Justice, the Federal Public and Community Defenders, the Commission's advisory groups, law professors, currently and formerly incarcerated individuals, and other criminal justice system stakeholders.

The amendment makes several overarching changes in response to this feedback and consistent with the statutory purposes and framework. First, it emphasizes the importance of judges making individualized decisions about supervised release at all relevant stages—including imposition, modification or extension, and revocation. Second, it underscores the authority of courts, in consultation with the probation officer, to reassess supervised release decisions after a defendant's release from imprisonment, including decisions about the length and conditions of supervision. Third, it underscores the rehabilitative purposes of supervised release by dividing the provisions addressing violations of probation and violations of supervised release into separate parts of Chapter Seven and providing courts with greater discretion to respond to a violation of a condition of supervised release, including where appropriate, through alternatives to revocation and imprisonment.

The amendment's specific changes to Chapters Five and Seven are discussed further below.

Chapter Five, Part D (Supervised Release)

The amendment revises Chapter Five, Part D of the *Guidelines Manual* to provide courts with greater discretion to impose a term of supervised release that is appropriate for the individual defendant. The amendment adds Introductory Commentary, revises each existing guideline, and adds a new policy statement at §5D1.4, which addresses extending or terminating supervised release or modifying the conditions thereof.

Introductory Commentary

The amendment adds Introductory Commentary to Part D of Chapter Five emphasizing that supervised release is intended to ease a defendant's transition into the community, provide needed rehabilitation, and promote public safety. It highlights the importance of conducting an individualized assessment to determine whether a defendant needs supervision and how to appropriately tailor the term and conditions, as required by 18 U.S.C. § 3583(c).

§5D1.1 (Imposition of a Term of Supervised Release)

The amendment revises §5D1.1 to provide greater judicial discretion in determining whether any term of supervised release is warranted. The amendment removes the requirement to impose supervised release whenever the sentence of imprisonment is more than one year and instead requires supervised release only when mandated by statute. In any other case, "the court should order a term of supervised release when warranted by an individualized assessment of the need for supervision." Application Note 1 defines the "individualized assessment" by reference to the 18 U.S.C. § 3553(a) factors that courts must consider under 18 U.S.C. § 3583(c). The Commentary to §5D1.1 continues to instruct courts to consider the defendant's criminal history, substance abuse history, and history of domestic violence in determining whether to impose a term of supervised release.

These changes respond to widespread concern that supervised release often is ordered reflexively, potentially diverting supervision resources from individuals who most need them. Commission data shows that courts currently impose supervised release in most cases (82.5%). This focus on an individualized assessment aims to "assure that [individuals] who will need post-release supervision will receive it" while "prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them," as Congress intended. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983).

The amendment also adds new §5D1.1(d), which instructs that "the court should state in open court the reasons for imposing or not imposing a term of supervised release," consistent with 18 U.S.C. § 3553(c).

Finally, it adds new Application Note 7, which alerts courts to the fact that the decision whether to impose a term of supervised release could affect subsequent application of First Step Act earned time credits.

§5D1.2 (Term of Supervised Release)

The amendment revises §5D1.2 to provide courts with greater discretion in determining the appropriate length of the term of supervised release. It removes the recommended minimum terms by class of offense from §5D1.2(a) and instead instructs the court to conduct an individualized assessment to determine the length of the term, which shall be not less than any statutorily required minimum term. It continues to list the maximum terms of supervised release by offense class, noting that some statutes may provide for a different term. Application Note 1 provides that the factors considered for purposes of determining the length of the term are the same as the factors considered in determining whether to impose a term and—consistent with 18 U.S.C. §§ 3583(c) and 3553(a)—instructs that the court should ensure the term "is sufficient, but not greater than necessary, to address the purposes of imposing supervised release on the defendant."

Similar to the changes made to §5D1.1, the amendment adds a new instruction to §5D1.2 that "the court should state in open court the reasons for the length of the term imposed."

Additionally, the amendment removes the policy statement recommending the statutory maximum term of supervised release for sex offense cases. Although imposition of a statutory maximum term may be warranted in certain cases, the amendment leaves the appropriate term to the court's discretion. As a related change, the amendment deletes a similar maximum-term recommendation in the Commentary to §4B1.5 (Repeat and Dangerous Sex Offender Against Minors), but it continues to recommend that treatment and monitoring be considered as special conditions of supervised release for individuals sentenced under that guideline.

Finally, in Application Notes 2 and 3, the amendment advises that Congress has authorized higher statutory maximum and/or minimum terms of supervised release for certain terrorism and sex offenses and for some drug offenses.

§5D1.3 (Conditions of Supervised Release)

Section 5D1.3 sets forth mandatory and discretionary conditions of supervised release. Discretionary conditions currently are further subdivided into "standard," "special," and additional conditions. The amendment restructures and revises the discretionary conditions of supervised release in four ways. First, it adds a general

instruction at §5D1.3(b)(1), which provides that the court "should conduct an individualized assessment to determine what, if any," discretionary conditions are warranted. Second, in §5D1.3(b)(2), it removes the instruction that "standard" conditions "are recommended for supervised release" and instead clarifies that they "may be modified, omitted, or expanded in appropriate cases." Third, in §5D1.3(b)(3), it removes the recommendation of imposing "special" conditions for listed circumstances and instead provides that "[o]ne or more conditions from the . . . non-exhaustive list of 'special conditions' may be appropriate in a particular case, including" the described circumstances. Fourth, it removes the "additional conditions" subheading and incorporates those conditions into the list of "special" conditions in §5D1.3(b)(3).

These changes emphasize that any standard, special, or other discretionary conditions of supervised release—*i.e.*, those not required by statute—should be imposed only when warranted by an individualized assessment, reflecting the requirements of 18 U.S.C. § 3583(d) and feedback that certain conditions are at times imposed by default. The Commission nonetheless recognizes the value of a list of "standard" conditions that establish basic behavioral expectations and facilitate probation officers' supervision. Accordingly, the amendment maintains the list of "standard" conditions without change but notes the court's authority to impose and adjust them as appropriate.

The amendment also adds three "special" conditions in response to commenters' concerns about cases where victims need special protection and cases where defendants could benefit from educational programs. The revised §5D1.3 lists the following as "special" conditions: (1) a condition prohibiting the defendant from interacting with any victim if the instant conviction is a sex offense; (2) a condition prohibiting the defendant from interacting with any identifiable victim, applicable to all offenses generally; and (3) a condition that the defendant participate in a General Education Development (or similar) program, vocational training, or skills training if the court has reason to believe it would be appropriate and would equip the defendant for suitable employment.

New §5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement))

The Commission sought to address with this amendment potential issues surrounding the fact that the terms and conditions of supervised release are imposed at original sentencing, often years before the defendant begins supervision. People and their circumstances may change in and after prison, such that the original term and conditions may no longer be appropriate after the defendant's release. Courts are encouraged to consider modifying the terms and conditions of supervised release whenever changed individual circumstances so warrant.

While Commentary to §5D1.2 previously noted the court's authority to terminate or extend supervised release and encouraged courts to "exercise this authority in appropriate cases," the amendment adds a new policy statement at §5D1.4 to more directly address a court's statutory authority to modify conditions or to terminate or extend the term of supervised release.

Subsection (a) (Modification of Conditions) restates the court's authority under 18 U.S.C. § 3583(e)(2) to modify, reduce, or enlarge the conditions of supervised release and encourages the court to conduct an individualized assessment, in consultation with the probation officer, to determine whether any change to the conditions is warranted after a defendant's release from imprisonment. The Commission received feedback that while probation officers often meet with defendants approaching and after their release, judicial involvement varies by jurisdiction and individual court practice. The Commission believes that more consistent judicial participation in revisiting the conditions of supervised release will facilitate successful reintegration, increase compliance, and promote public safety, and, therefore, it is encouraged as a best practice.

To encourage appropriate use of early termination, subsection (b) (Early Termination) restates the court's authority under 18 U.S.C. § 3583(e)(1) to terminate the remaining term of supervision any time after one year of supervised release if the court determines, following consultation with the government and the probation officer, that termination is warranted by the conduct of the defendant and

in the interest of justice. Application Note 1(B) specifies factors a court might consider in determining whether to terminate the remaining term of supervised release, which are modeled in part after the factors in the *Guide to Judiciary Policy*, Vol. 8E, Ch. 3, § 360.20. Considering early termination at appropriate intervals will help ensure that resources are allocated to the individuals most in need of continued supervision and that the term is "sufficient, but not greater than necessary" to fulfill the purposes of imposing supervision. *See* 18 U.S.C. § 3583(c); 18 U.S.C. § 3553(a); USSG §5D1.2 comment. (n.1) (as revised by this amendment).

Subsection (c) (Extending a Term of Supervised Release) provides that the court may extend the term of supervised release any time before the expiration of a term if less than the maximum term was imposed and extension is warranted by an individualized assessment of the need for further supervision. Application Note 3 notes that extending a term may be more appropriate than revoking a term of supervised release in some cases.

Application Note 2 encourages the court, in coordination with the government, to ensure that any victim is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified.

Conforming Changes

The amendment also makes conforming changes to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)), §5B1.3 (Conditions of Probation), §5H1.3 (Mental and Emotional Conditions (Policy Statement)), and §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)).

Chapter Seven (Violations of Probation and Supervised Release)

The amendment revises Chapter Seven of the *Guidelines Manual* in two main ways to underscore the different purposes of probation and supervised release. First, it divides Chapter Seven into Part B (Violations of Probation) and Part C (Violations of Supervised Release) to reflect that probation serves all the goals of sentencing, including punishment, while supervised release primarily "fulfills rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000). Second, it responds to stakeholder feedback on the need for a more flexible, individualized approach to supervised release violations by encouraging courts to consider a graduated response to a defendant's non-compliant behavior.

Chapter Seven – Part A (Introduction to Chapter Seven)

The amendment revises the Introduction to Chapter Seven to explain the Commission's updated approach that treats violations of probation and supervised release differently. To highlight the primarily rehabilitative purposes of supervised release, the new introductory language encourages courts to consider graduated responses to non-compliant behavior before revoking supervised release. The Commission believes that a graduated approach will better allocate resources, promote public safety, and facilitate the reentry and rehabilitation of defendants on supervised release.

Chapter Seven – Part B (Violations of Probation)

The amendment removes references to supervised release from Chapter Seven, Part B and adds an example to the commentary of §7B1.4 (criminal history calculation) that mirrors an addition to the commentary of new §7C1.5. The provisions in Chapter Seven, Part B are otherwise unchanged, reflecting the Commission's determination that violations of probation and supervised release should be treated differently.

Chapter Seven – Part C (Violations of Supervised Release), Introductory Commentary

The amendment includes Introductory Commentary to new Part C of Chapter Seven, which explains that in responding to a report of non-compliance, addressing a violation found during revocation proceedings, or imposing a sentence upon revocation, the court should conduct the same kind of individualized assessment used when imposing supervised release. The introduction highlights the Commission's view that courts should consider a wide array of options to address violations of supervised release and that any sentence imposed upon revocation should be tailored to address the failure to abide by supervision conditions, as imposition of an appropriate punishment for new criminal conduct is not the primary goal of a revocation sentence.

New §7C1.1 (Classification of Violations (Policy Statement)) and §7C1.2 (Reporting of Violations of Supervised Release (Policy Statement))

The amendment duplicates §§7B1.1 and 7B1.2 into new §§7C1.1 and 7C1.2 and retains the three existing grades of supervised release violations.

§7C1.3 (Responses to Violations of Supervised Release (Policy Statement))

New §7C1.3 identifies actions a court may take in response to a report of non-compliance with supervised release conditions or a finding of a violation. This new policy statement underscores the importance of using a graduated response to non-compliant behavior.

Subsection (a) instructs the court to conduct an individualized assessment to determine what, if any, response is appropriate to a report of non-compliance. New §7C1.3(a) reflects feedback that supervision is a dynamic process and often benefits from regular communication between the defendant, the probation officer, and the court.

Subsection (b) instructs the court to (1) revoke supervised release upon a finding of a violation for which revocation is required by statute, and (2) upon a finding of any other violation, conduct an individualized assessment, taking into consideration the grade of the violation, to determine whether to revoke supervised release for any other violation. New §7C1.3(b) further provides that revocation is generally appropriate for a Grade A violation, often appropriate for a Grade B violation, and may be appropriate for a Grade C violation. While revocation previously was required for both Grade A or B violations—and Commission data shows similar rates of prison-only revocations for both grades in recent years, *see* U.S. SENT'G

COMM., FEDERAL PROBATION AND SUPERVISED RELEASE VIOLATIONS 35 & Fig.13 (2020)—the amendment provides flexibility to assess the seriousness of the underlying conduct and account for any jurisdictional differences affecting the grade assigned to similar conduct.

For both reports of non-compliance and findings of a violation, Application Note 2 references the court's authority to "take any appropriate action provided under 18 U.S.C. § 3583" and lists certain informal responses the court also may consider.

New Application Note 3 encourages the court to consider issuing a summons, rather than an arrest warrant, when appropriate, reflecting concerns that an arrest may result in unnecessary collateral consequences.

§7C1.4 (Revocation of Supervised Release (Policy Statement))

The amendment adds new §7C1.4, which, in subsection (a), instructs the court to conduct an individualized assessment to determine the appropriate length of the term of imprisonment upon revocation, given the recommended ranges set forth in §7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)).

Subsection (b) directs that any term of imprisonment "generally should" be ordered to be served consecutively to any sentence of imprisonment that the defendant is currently serving. This language replaces the former instruction that terms of

imprisonment upon revocation "shall" be ordered to be served consecutively. This new provision continues to underscore the seriousness of violation conduct while reserving flexibility for courts to run sentences concurrently in extraordinary cases where justified.

Subsection (c) retains the instruction from the prior version of §7B1.3(g)(2) which, consistent with 18 U.S.C. § 3583(h), allows a court to reimpose a term of supervised release upon release from a term of imprisonment imposed upon revocation.

New Application Note 3 adopts and modifies §7B1.3(c)(3) to state that "[i]n the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction *generally* is not recommended" (emphasis added).

New Application Note 4 adopts and modifies §7B1.3(d) to instruct that sentencing obligations that remain unpaid or unserved at the time of revocation "should" be ordered to be paid or served in addition to any sentence imposed upon revocation.

§7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement))

The new §7C1.5 adopts and modifies §7B1.4 to set forth the Supervised Release Revocation Table and affirms the importance of conducting an individualized assessment to determine the length of a revocation sentence, in addition to consulting the recommended ranges in the Supervised Release Revocation Table.

The amendment adds an example to Application Note 1 to clarify that a defendant's criminal history category for purposes of determining the applicable range of imprisonment is not recalculated to reflect an amendment made retroactive under §1B1.10 (Reduction of Imprisonment as a Result of Amended Guideline Range (Policy Statement)). It adds the same example to the commentary to §7B1.4 (Term of Imprisonment—Probation (Policy Statement)).

§7C1.6 (No Credit for Time Under Supervision (Policy Statement))

The amendment adds §7C1.6, which duplicates §7B1.5(b) and (c).

5. **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. This part provides the statutory authority and mission of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary.

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

The Guidelines Manual 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), recognizing both essential steps of the court's inquiry in imposing a sentence 'sufficient, but not greater than necessary.' *See* 18 U.S.C. § 3553(a). The guidelines and policy statements set forth throughout the Guidelines Manual represent the first step in the sentencing process and are one of multiple factors judges must consider under 18 U.S.C. § 3553(a).

Originally, consistent with the pre-*Booker* sentencing system, the Guidelines Manual included an additional step for determining a sentence by providing for a number of 'departures,' which were provisions that allowed the court to impose a sentence outside the applicable guideline range or otherwise different from the guideline sentence before the court's consideration of the additional sentencing factors set forth in 18 U.S.C. § 3553(a). The departure provisions were set forth throughout the Guidelines Manual as part of the commentary to numerous guidelines and in policy statements contained in Chapter Four, Part A, and Chapter Five, Parts H and K.

Following *Booker*, courts are permitted to impose sentences outside the applicable guideline range as 'variances,' both for reasons related to the operation of the applicable guideline provisions and in light of individual characteristics unrelated to guideline provisions. In the years after *Booker*, courts used departures with much less frequency in favor of variances.

In 2025, the Commission amended the Guidelines Manual to remove departures and policy statements relating to specific personal characteristics. (*See* USSG App. C, amendment 836). The Commission sought to make these 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. The Commission envisioned and framed this 2025 amendment to be outcome neutral, intending that judges who would have relied upon facts previously identified as a basis for a departure would continue to have the authority to rely upon such facts to impose a sentence outside of the applicable guideline range as a variance under 18 U.S.C. § 3553(a). The removal of departures from the Guidelines Manual does not limit the information courts may consider in imposing a sentence nor does it reflect a view from the Commission that such facts should no longer inform a court for purposes of determining the appropriate sentence. In this regard, Appendix B of the Guidelines Manual compiles the departure provisions as they were last provided in the 2024 edition of the Manual. Similarly, information describing the historical development and evolution of the federal sentencing guidelines is also set forth in Appendix B 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 §1B1.9 captioned "Application Notes" is amended in Note 2 by adding at the end of the paragraph the following: "For example, in a case where the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716 while committing an offense covered by the guidelines, it would be appropriate for the court to consider this fact as an aggravating factor in determining the appropriate sentence even though section 716 is a Class B misdemeanor not covered by the guidelines. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162, § 1191(c).".

The Commentary to §1B1.10 captioned "Application Notes," as amended by Amendment 4 of this document, is further 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," as amended by Amendment 1 of this document, is further 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 redesignating Note 6 as Note 5.

The Commentary to §2B3.2 captioned "Application Notes," as amended by Amendment 1 of this document, is further 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 paragraph:

"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 paragraph:

"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 redesignating 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)(10)(B), as redesignated by Amendment 3 of this document, 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," as amended by Amendment 3 of this document, is further 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," as amended by Amendment 3 of this document, is further 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 captioned "Application Note" is amended in Note 1 by striking the following:

"*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.";

and inserting the following:

"As identified by Congress in section 103 of Public Law 110–407, the following factors may also warrant consideration in imposing a sentence under this guideline:

(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 Programs),"; 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 Programs),".

Chapter Three is amended by inserting at the end the following new Part F:

“ PART F — EARLY DISPOSITION PROGRAMS

§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 paragraph:

"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 paragraph:

"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," as amended by Amendment 4 of this document, is further amended—

in Note 3, as redesignated by Amendment 4 of this document, by striking "*See* §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction)" and inserting "*See* §5D1.3(b)(3)(D)";

by further redesignating Notes 5, 6, and 7 (as redesignated by Amendment 4 of this document) as Notes 8, 9, and 10, respectively;

and by inserting after Note 4, as redesignated by Amendment 4 of this document, the following new Notes 5, 6, and 7:

"5. *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(b)(3)(E).

6. *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.

7. *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(b)(3)(D), as redesignated and amended by Amendment 4 of this document, is further 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," as amended by Amendment 4 of this document, is further amended—

in Note 2(C) by striking "(iii) the undischarged term of imprisonment for which the adjustment is being given" and inserting "(iii) the undischarged term of imprisonment for which the adjustment is being given and the relevant case information (including docket number)";

in Note 4(E) by striking the following:

"*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 inserting the following:

"*Imposition of Sentence.*—Unlike subsection (b), subsection (d) does not address an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. If the court does account for an undischarged term of imprisonment under subsection (d) in imposing the

sentence, the Commission recommends that the court clearly state that the sentence was imposed pursuant to 18 U.S.C. § 3553(a), rather than as a credit for time served, to avoid confusion with the Federal Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances.

The court should note on the Judgment in a Criminal Case Order (i) that the sentence was imposed pursuant to 18 U.S.C. § 3553(a); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given and the relevant case information (including docket number); and (iv) that the sentence imposed is to account for a period of imprisonment that will not be credited by the Federal Bureau of Prisons.";

and in Note 5 by striking the following:

"*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).";

and inserting the following:

"*Discharged Term of Imprisonment*.—This guideline does not address an adjustment of the sentence for the instant offense for a period of imprisonment already served on a discharged term of imprisonment. Nonetheless, nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3553(a) to consider a previously completed term of imprisonment in determining an appropriate sentence where subsection (b) above would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense.".

Chapter Five is amended by striking in its entirety Part H, as amended by Amendment 4 of this document, 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(b)(3)(E)).

§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(b)(3)(D)). 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," as amended by Amendment 4 of this document, is further amended—

by striking Notes 2, 3, and 4 as follows:

"2. Departure from the applicable range of imprisonment in the Probation 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 probation. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in probation, 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, on probation 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.

The Commentary to §7C1.5 captioned "Application Notes," as added by Amendment 4 of this document, is amended—

by striking Notes 2, 3, and 4 as follows:

"2. Departure from the applicable range of imprisonment in the Supervised Release 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 supervised release. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in supervised release, 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 supervised release 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 Programs)".

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 Programs)".

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).".

Reason for Amendment: This amendment is a result of the Commission's exploration of ways to simplify the guidelines and to reduce tension between 18 U.S.C. § 3553(a) and the *Guidelines Manual*. Specifically, the amendment

removes one of the steps in the current three-step sentencing process, which requires courts to consider departures provided for within the *Guidelines Manual*. As amended, the *Guidelines Manual* now provides a 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).

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, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be "the starting point and the initial benchmark" in sentencing proceedings. *See Gall*, 552 U.S. at 49; *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 provided for by the *Guidelines*, however, 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).

In the wake of *Booker* and subsequent cases, the *Guidelines Manual* provided a three-step process for determining the sentence to be imposed, which is reflected in the three main subdivisions of §1B1.1 (Application Instructions) (subsections (a) through (c)). The three-step process can be summarized as follows: (1) the court calculates the applicable guideline range and determines the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution; (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 deciding what sentence to impose (whether within the applicable guideline range, or whether as a departure or as a variance (or as both)).

In the years since *Booker*, the frequency of departures has steadily declined with courts relying to a greater extent on variances in a manner consistent with the statutory requirements in section 3553(a). The shift away from departures deepened as a direct result of the holding in *Irizarry v. United States*, 553 U.S. 708 (2008), in which the Court held that the "reasonable notice" requirement in Rule 32(h) of the Federal Rules of Criminal Procedure does not apply to variances.

To better align the guidelines to practices under current sentencing law and to acknowledge the growing shift away from the use of departures, the amendment revises the guidelines in multiple ways. First, the amendment moves the "Original Introduction to the Guidelines Manual" from Chapter One, Part A to an Appendix

of the *Guidelines Manual* as historical background. Second, the amendment revises the application instructions provided in §1B1.1 to reflect the simplification of the three-step process into two steps. At Step One, courts are to calculate the guideline range and determine the sentencing requirements and options under the *Guidelines Manual*. *See* §1B1.1(a). At Step Two, courts are to consider the section 3553(a) factors. *See* §1B1.1(b). Section 1B1.1(b) expressly lists the section 3553(a) factors the court must consider. Other conforming changes are made throughout Chapter One. For example, §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) is amended to reflect the removal of departures. The Commission does not intend this conforming amendment to substantively change the operation of the calculation of the amended guideline range in §1B1.10.

In addition, the 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, the amendment revises §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 explains how the Commission has complied with the requirements placed on it by Congress, noting what is not considered by the Commission in formulating the guidelines. This ensures that the Commission has addressed the provisions of sections 994(c), (d), and (e).

A new background commentary to this section explains that the requirements and limitations imposed upon the Commission by 28 U.S.C. § 994 do not apply to sentencing courts. Instead, the factors set forth by Congress in 18 U.S.C. § 3553(a) "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). The new background commentary concludes by noting that the application instructions set forth in §1B1.1 are structured to reflect a 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).

Consistent with the revised approach, the amendment deletes most departures previously provided throughout the *Guidelines Manual*. Changes are made throughout the *Guidelines Manual* by deleting the departure provisions contained

in commentary to various guidelines. However, some provisions, originally promulgated in response to congressional directives, are retained in another form. First, Application Note 1 of §2X7.2 (Submersible and Semi-Submersible Vessels) is revised to remove the language pertaining to a departure and instead indicates that the listed factors, which were identified by Congress in section 103 of Public Law 110–407, may warrant consideration in imposing a sentence. Similarly, Application Note 2 of §1B1.9 (Class B or C Misdemeanors and Infractions), which addresses Class B and C misdemeanors and infractions, is revised to add a reference to the aggravating nature of committing an offense while wearing or displaying insignia and uniform in violation of 18 U.S.C. § 716 (a class B misdemeanor). This guidance was previously set forth in a departure provision at §5K2.24 (Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform).

The amendment also makes several changes to Chapter Five. The chapter is retitled "Determining the Sentencing Range and Options Under the Guidelines" to focus on the rules pertaining to the calculation of the guideline range, and the introductory commentary is revised to better reflect the chapter's purpose by noting that "a sentence is within the guidelines if it complies with each applicable section of this chapter." All provisions previously contained in Chapter Five, Part H (Specific Offender Characteristics), and most of the provisions in Chapter Five, Part K (Departures), are deleted. Only the provisions pertaining to substantial assistance

are retained under §5K1.1, and the provision pertaining to early disposition programs is moved from §5K3.1 to Chapter Three, Part F.

Chapter Five is also amended at §5B1.1 (Imposition of a Term of Probation), §5D1.1 (Imposition of a Term of Supervised Release), and §5D1.3 (Conditions of Supervised Release) to emphasize the factors courts are statutorily required to consider in determining the conditions of probation and supervised release. The commentary is further revised to retain factors that 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).

Changes are also made to §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment) in response to comment urging the Commission to retain the guidance regarding certain undischarged or discharged terms of imprisonment currently contained in §5G1.3, Application Note 4(E), and §5K2.23 (Discharged Terms of Imprisonment (Policy Statement)). These procedural aspects of imposing a sentence are particularly complex and at times confusing for courts given the intersection of a court's authority to sentence and the Bureau of Prisons' authority to execute that sentence. The amendment thus makes several changes to the commentary in §5G1.3 to ensure courts continue to receive guidance on the treatment of undischarged and discharged sentences not otherwise addressed in the guideline. First, a new application note is added at Application Note 4(E), which

would provide that where the court accounts for an undischarged term of imprisonment covered by subsection (d), the court should clearly state that the sentence was imposed pursuant to 18 U.S.C. § 3553(a), rather than as a credit for time served, to avoid confusion with the Federal Bureau of Prisons' exclusive authority under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances. Similarly, a new Application Note 5 would provide similar guidance on the court's authority to consider an already discharged term of imprisonment that would, if undischarged, qualify for consideration under §5G1.3(b). This new Application Note would preserve the concept previously addressed in §5K2.23.

Finally, in conjunction with the amendment, the Commission plans to compile the deleted departure provisions, as they were last provided in the 2024 edition of the *Guidelines Manual*, in a new Part III of Appendix B. At the time these departure provisions were promulgated, they represented grounds that the Commission expressly authorized in the *Guidelines Manual* as a basis for a sentence outside of the otherwise applicable guideline range. These provisions, which were based on various circumstances of the offense, specific personal characteristics, and certain procedural history of the case, reflected the Commission's determination that such circumstances were outside of the heartland of offenses addressed by the guidelines and warranted the court's consideration in imposing sentence. Because the Commission envisions this amendment to be outcome neutral, the introduction to the compilation of deleted departure provisions explains that the removal of

departures from the *Guidelines Manual* does not reflect a determination by the Commission that the rationale underlying the deleted departure provisions is no longer informative and does not serve as a limit to the information courts may consider in imposing a sentence. It is the Commission's intent that judges who would have relied upon facts previously identified as a basis for a departure will continue to have the authority to rely upon such facts, or any other relevant factors, to impose a sentence outside of the applicable guideline range as a variance under 18 U.S.C. § 3553(a).

(2) REQUEST FOR COMMENT ON POSSIBLE RETROACTIVE APPLICATION OF PARTS A AND B OF AMENDMENT 1, AND SUBPARTS 1 AND 2 OF PART A OF AMENDMENT 2

On April 30, 2025, the Commission submitted to the Congress amendments to the sentencing guidelines, policy statements, and official commentary, which become effective on November 1, 2025, unless Congress acts to the contrary. Such amendments and the reason for each amendment are included in this notice.

Section 3582(c)(2) of title 18, United States Code, provides that "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Pursuant to 28 U.S.C. § 994(u), "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Commission lists in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2).

The following amendments may have the effect of lowering guidelines ranges: Part A (Circuit Conflict Concerning "Physically Restrained" Enhancements) and Part B (Circuit Conflict Concerning the Meaning of "Intervening Arrest" in §4A1.2(a)(2)) of Amendment 1; and Subpart 1 (Mitigating Role Provisions at §2D1.1(a)(5)) and Subpart 2 (Special Instruction Relating to §3B1.2) of Amendment 2. The Commission intends to consider whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), any or all of these amendments should be included in §1B1.10(d) as an amendment that may be applied retroactively to previously sentenced defendants. In considering whether to do so, the Commission will consider, among other things, a retroactivity impact analysis and public comment. Accordingly, the Commission seeks public comment on whether it should make any or all the subparts or parts of the amendments listed above available for retroactive application. To help inform public comment, the retroactivity impact analyses of these amendments will be made available to the public as soon as practicable.

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 Commission seeks comment on whether it should list in §1B1.10(d) as changes that may be applied retroactively to previously sentenced defendants any or all of the following subparts and parts of these amendments: Part A (Circuit Conflict Concerning "Physically Restrained" Enhancements) and Part B (Circuit Conflict Concerning the Meaning of "Intervening Arrest" in §4A1.2(a)(2)) of Amendment 1; and Subpart 1 (Mitigating Role Provisions at §2D1.1(a)(5)) and Subpart 2 (Special Instruction Relating to §3B1.2) of Part A of Amendment 2. For each subpart and part of the amendments listed above, the Commission requests comment on whether any such subpart or part should be listed in §1B1.10(d) as an amendment that may be applied retroactively.

If the Commission does list any or all the subparts or parts of the amendments listed above in §1B1.10(d) as an amendment that may be applied retroactively to previously sentenced defendants, should the Commission provide further guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced?