



Office of the Deputy Attorney General
Washington, D.C. 20530

October 17, 2022

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

Please accept my personal congratulations to you and your fellow commissioners on your confirmation to the U.S. Sentencing Commission and the commencement of this new amendment year. The work of the Commission is critical to both improving public safety and ensuring that our federal criminal justice system is fair and just to all. We are eager to work with the Commission over the coming months to address the many issues it faces, and we pledge our full support for your work.

I write to reinforce and supplement the priority areas that we identified in our September 12th annual report to the Commission. We were gratified that the Notice of Proposed 2022-23 Priorities issued by the Commission at the end of September included many of those pressing issues. The policy agenda the Commission has identified is substantial and reflects the range of the Commission's statutory responsibilities, including implementing critical legislation, overseeing the systemic health of the federal sentencing system and its structural elements, resolving circuit conflicts, addressing individual guidelines in need of reform, studying sentencing practices, and more. We recognize that this amendment year is abbreviated and that the Commission cannot address every important issue this year. Nonetheless, I write to emphasize the importance of two pressing areas that the Commission is well-situated to address immediately.

A. Sexual Abuse by Federal Corrections Employees and the Need to Strengthen Section 2A3.3

The Department believes that it is critically important for the Commission this year to review – and strengthen – the guideline provisions for sexual abuse committed by federal corrections employees against those in their custody, and to implement guideline provisions for new sexual misconduct statutes that were recently enacted under the 2022 Reauthorization of the Violence Against Women Act (VAWA) and took effect on October 1, 2022.¹

¹ See 18 U.S.C. § 2242(3) (Sexual Abuse via Lack of Consent or Coercion); 18 U.S.C. § 2243(c) (Sexual Abuse of An Individual in Federal Custody); and 18 U.S.C. § 250 (Civil Rights Offenses Involving Sexual Misconduct).

Over the last eighteen months, at my direction, the Department has engaged in an in-depth review of the operations of the Federal Bureau of Prisons (BOP), including the appointment of a new BOP Director, Colette Peters. We have identified troubling instances of horrific sexual abuse by BOP staff. We shared examples in our September 12th report to the Commission, and we will provide more information to you if it would be helpful.

Our responsibility to those in federal custody demands that we take every action we can to eliminate sexual abuse. Individuals in custody deserve to be safe and secure, particularly from abuse and harm at the hands of BOP's own employees. Director Peters and I are working to implement an array of policy and operational changes to address the problem. But Director Peters and I strongly believe that accountability and deterrence are key elements of any effective strategy to eliminate sexual abuse, including accountability and deterrence through criminal prosecution and proportionate sentencing where warranted.

In that vein, I have instructed United States Attorneys to make prosecution of sexual abuse by federal correctional employees a top priority. And I am asking the Commission to take up the issue of sentencing policy for these offenses this year, as the current guidelines dramatically understate the severity of the sexual abuse conduct at issue.

As we stated in our annual report, the current guideline provisions applicable to sexual abuse of a ward, in violation of 18 U.S.C. § 2243(b), are insufficiently punitive in light of the egregious conduct at issue and are at odds with the statutory maximum penalties provided by Congress and the far more onerous guidelines that apply to other comparable sex offenses. Under Section 2A3.3, the base offense level for such offenses is level 14, which corresponds to a sentencing range of only 15 to 21 months imprisonment for a defendant in the lowest criminal history category.² The absence of enhancements or upward adjustments in Section 2A3.3 to address egregious offenses in the prison setting leaves applicable guideline ranges inadequate. As we stated in our annual report, the large gap between the default sentence under the applicable guideline and the maximum penalty provided by Congress lays bare the failure of this guideline to achieve the sentencing objectives set forth in 18 U.S.C. § 3553(a). Our annual report provides more detail about our request, as well as our recommendation that the Commission consider several new statutes enacted as part of the 2022 VAWA Reauthorization Act to determine the appropriate and necessary updates to the guidelines for those provisions. We can provide further information as you need it.

I am writing and asking you to take up this issue because it is a vitally important element of the Department's work to overhaul the BOP so that it meets its dual responsibility to provide a safe, secure, and humane prison environment and to assist offenders in returning to their communities as productive and law-abiding members. We hope you will consider this request and include this issue in your notice of final priorities.

² Most, if not all, defendants prosecuted under this statute are federal employees, who by nature of their occupation and conditions of employment, will not have a criminal history.

B. The Bipartisan Safer Communities Act and the Need to Amend Section 2K2.1

We were gratified that the Commission identified as a priority for this amendment year not only implementation of the recently enacted Bipartisan Safer Communities Act (BSCA) but also making “any other changes that may be warranted to appropriately address firearms offenses.” As you know, during the pandemic, the country has seen a rise in homicides, aggravated assaults, and firearms offenses more generally, and the Attorney General and I have instituted a number of initiatives to address violent crime. The BSCA is an element of the solution, and a full review of the sentencing guidelines for firearms offenses and the reform of Section 2K2.1 are necessary.

The Department therefore asks the Commission to undertake a broader review of Section 2K2.1 at the same time it reviews the guideline to implement the BSCA, rather than wait to consider other important revisions. As described more fully in the materials attached as Appendix A and Appendix B, the Department encourages the Commission to simplify this oft-confusing guideline, by converting several factors that affect the base offense level (including the type of weapon and recidivism enhancements) into specific offense characteristics. The Department also encourages the Commission to address several pressing national problems, including firearms without serial numbers known as ghost guns, transfers of firearms to minors, and the dangers posed by domestic abusers who possess guns and those who repeatedly engage in firearm offenses. Finally, we encourage the Commission to eliminate the categorical approach from this particular guideline (while continuing to encourage the Commission to eliminate the categorical approach from the guidelines entirely).

We look forward to working with the Commission during the remainder of the amendment year to craft amendments to Section 2K2.1 that will adequately and fully address the problem the country is facing and the significant flaws in current sentencing policy concerning firearms offenses.

Thank you for considering these comments. We look forward to working with you and the entire Commission – in this amendment year and beyond – to address the issues we raise here and to improve federal sentencing policy more generally. Together, we think we can make the federal criminal justice system more just and our fellow citizens more safe.

Sincerely,



Lisa O. Monaco
Deputy Attorney General

Attachments

cc: Commissioners
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel

Appendix A

The Bipartisan Safer Communities Act and the Need to Amend Section 2K2.1

In the BSCA, Congress created several new crimes to prohibit straw purchasing, trafficking, and certain transfers of weapons and assigned each at least a 15-year maximum sentence. *See* 18 U.S.C. §§ 924(h), 924(k), 932, 933. Congress also increased the statutory maximum term of imprisonment from 10 to 15 years for the possession of weapons by prohibited persons and the transfer of weapons to prohibited persons. Bipartisan Safer Communities Act, Pub. L. No. 117-159, tit. II, § 12004, 136 Stat. 1313, 1327 (2022). And Congress provided for an increased 25-year statutory maximum sentence for defendants who engage in straw purchasing, knowing or with reasonable cause to believe that any firearm involved will be used to commit a felony. *Id.*

Of particular relevance to the Commission, Congress provided direction as to how to reflect these changes in the Sentencing Guidelines, instructing the Commission to increase penalties for straw purchasing and trafficking offenses, including both new offenses in the BSCA and other related offenses, in order to deter such conduct. Congress also instructed the Commission to consider appropriate sentences for individuals who engage in such conduct under duress, as well as those who transfer weapons to criminal organizations. The Department's proposed language addresses both the various statutory changes and the Congressional directives contained in the BSCA. As the Commission reviews Section 2K2.1 to implement those changes, the Department also asks that it consider a broader range of reforms to the guideline.

A draft of the Department's proposed Guideline, as amended, is set forth in Appendix B. An explanation of the proposed changes follows below.

Increasing the Guidelines Range for Straw Purchasing and Firearms Trafficking. Pursuant to the Congressional directive in the BSCA, we recommend that the base offense level for straw purchases and trafficking of firearms be increased to 18.

As noted above, in the BSCA, Congress instructed the Commission to increase the applicable Guidelines range for straw purchasing and trafficking of firearms offenses. Congress also expressly stated its "intent . . . that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant's role and culpability." Prior to the BSCA, individuals who purchased guns on behalf of prohibited persons were generally prosecuted under Section 922(d), which prohibits transferring a firearm to a person with knowledge or having reasonable cause to believe that person is prohibited from possessing a firearm, and Sections 922(a)(6) and 924(a)(1)(A), which prohibit false statements in connection with purchasing a gun and required record-keeping, respectively. The current version of Section 2K2.1 assigns a base offense level of 14 to Section 922(d) offenses and to Section 922(a)(6) and 924(a)(1)(A) offenses when committed with knowledge or reason to believe that the offense would result in the transfer of the firearm to a prohibited person. Absent any enhancements, a defendant without a significant criminal history (that is, in Criminal History category I) who pleads guilty and receives acceptance of responsibility points faces an advisory Guidelines range of only 10-16 months. The Guidelines

expressly permit a split sentence of, for example, 5 months of imprisonment and 5 months of home confinement, for this Zone C Guidelines range. In the BSCA, Congress determined that such a sentence is not “sufficient to deter participation in such activities.”

As a result, we recommend that these offenses, and the other straw purchasing and trafficking offenses created by the BSCA, receive a base offense level of 18. This base offense level results in an advisory range of 18-24 months for defendants with no significant criminal history who receive the full three-level reduction for acceptance of responsibility. Such a penalty is more likely to deter straw purchasing and trafficking by individuals without significant criminal histories and reflects the enhanced 15-year statutory maximum penalties that Congress deemed appropriate for straw purchasing and trafficking offenses.

In addition, because Congress provided an even greater, 25-year maximum penalty for Section 932(c)(2) offenses (where defendants must know or have reasonable cause to believe that straw-purchased firearms will be used to commit a felony), we recommend a higher base offense level—24—for defendants convicted under that provision. A defendant with no significant criminal history and no specific-offense enhancements, who violates Section 932(c)(2) and receives the full three-level reduction for acceptance of responsibility, would face an advisory Guidelines range of 37-46 months.

Increasing the Guidelines Range for Possession of Weapons by Prohibited Persons.

We also recommend increasing the base offense level for prohibited persons convicted under Section 922(g) to 18. Current Section 2K2.1 treats prohibited persons similarly to those who straw purchase weapons on behalf of, or transfer weapons to, prohibited persons. Likewise, the BSCA treats possession of weapons by prohibited persons as equally serious as straw purchasing for, or transfer of weapons to, prohibited persons—Congress increased the statutory maximum penalties for both Section 922(d) and (g) offenses to 15 years, and provided a 15-year maximum penalty for the new straw purchasing offenses. In order to account for the increased maximum penalty and avoid unwarranted sentencing disparities between prohibited persons who possess or receive guns, and the individuals who straw purchase for, or transfer guns to, prohibited persons, we suggest a parallel increase in the base offense level for prohibited persons to match that of the various straw purchasing offenses discussed.¹ Absent such a base offense level increase for prohibited persons, a felon who asks a confederate to purchase a gun on their behalf would face a lower Guidelines range than the confederate who purchased the gun. Congress cannot have intended such anomalous results when it instructed the Sentencing Commission to increase the applicable guidelines range for straw purchasing offenses and to also raise the maximum penalty for possession of weapons by prohibited persons.

¹ In light of our proposed changes to the base offense level for certain offenses, our proposed language makes conforming changes in other parts of the Guideline as well. For example, Section 2K2.1 currently provides a maximum offense level of 29 after application of certain specific offense characteristics—placing the guidelines range for defendants with a criminal history category III at 108-35 months, spanning the current 10-year statutory maximum that applies to most firearms offenses. Our proposal increases that maximum offense level to 33—placing the guidelines range for defendants with a criminal history category III at 168-210 months, spanning the now applicable 15-year statutory maximum for straw purchasers, prohibited persons, and those who transfer weapons to prohibited persons. Likewise, our proposal increases the minimum offense level applicable after application of current Section 2K2.1(b)(6) from a level 18 to a level 22.

Taking Account of Coercion or Duress. The BSCA also instructed the Commission to ensure that, for “straw purchasers without significant criminal histories,” the Guidelines reflect “the defendant’s role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors.” We therefore suggest a 4-level reduction for any defendant who engages in straw purchasing but does so under serious duress or coercion from a domestic relation, where such duress does not rise to the level of a legal defense (in which case, the defendant would not have been convicted). We suggest borrowing language from the Guidelines’ policy statement on duress, U.S.S.G. § 5K2.12, which permits a downward departure where a defendant shows duress under circumstances amounting to less than a complete defense. In order to accomplish Congress’s directive, we suggest a 4-level reduction specific to Section 2K2.1, rather than a permissive departure.² In recognition of the fact that domestic violence survivors may be more easily coerced by their abusers, we suggest adding language that evidence of such abuse may constitute significant evidence of coercion by that abuser. The domestic-violence provision borrows its definition of a domestic relation from the federal definition of a misdemeanor crime of domestic violence, although it additionally recognizes that defendants may also be coerced by their children, such as when elders are abused and coerced by adult children.

Enhancing Penalties for Transferring Weapons to a Gang, Cartel, Organized Crime Ring, or Similar Enterprise. Congress also instructed the Commission to “review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.”

Because felons are prohibited from purchasing weapons from licensed dealers, criminal organizations often utilize individuals without criminal histories to purchase weapons from licensed dealers on their behalf.³ Section 2K2.1 already contains a 4-level enhancement for trafficking in firearms. The Department proposes adding an alternative 4-level enhancement for individuals convicted under a straw purchasing provision who knew that the firearm would be transferred to someone who is part of a criminal organization, or for straw purchasers who purchase multiple weapons on behalf of prohibited persons, but who would not be viewed as “trafficking” under the Guidelines definition of that term.

Combatting Youth Violence. The Department also proposes adding a 2-level increase for offenders who transfer firearms to minors. Gun violence among youths has increased dramatically in recent years. In particular, in 2020, firearms were, for the first time, the leading cause of death among children.⁴ Federal and state laws already restrict the ability of minors to

² Application Note 15 to Section 2K2.1 already references the potential applicability of a downward departure for straw-purchaser defendants “motivated by an intimate or familial relationship or by threats or fear to commit the offense,” where other mitigating facts are present. That Application Note may still apply in certain cases for which the 4-level reduction is not applicable.

³ See, e.g., [Man Sentenced for Straw-Purchasing Firearms for Gang Members and Felons | USAO-EDVA | Department of Justice](#)

⁴ See <https://www.nejm.org/doi/full/10.1056/NEJMc2201761>

obtain and possess many types of firearms.⁵ And in the BSCA, Congress took further action to curb youth violence, providing for an enhanced review process for firearm purchases by individuals under the age of 21, and authorizing grants supporting mental health services for children. The Commission should similarly act to curb youth violence by deterring offenders from transferring firearms connected to illegal activity to juveniles. The Department therefore proposes a 2-level increase for offenses that involve such transfers, taking care not to capture certain lawful activity by providing that the enhancement will not apply if the transfer is solely for a lawful sporting purpose or collection.

Addressing Firearms Without Serial Numbers: Section 2K2.1 currently provides for a 2-level enhancement for stolen firearms and a 4-level enhancement for firearms with an altered or obliterated serial number. In 2006, when increasing the enhancement for firearms with altered or obliterated serial numbers from 2 to 4 levels, the Commission explained that “[t]his increase reflects both the difficulty in tracing firearms with altered or obliterated serial numbers, and the increased market for these types of weapons.” U.S.S.G., App. C, Amendment 691 (effective Nov. 1, 2006). In recent years, there has been a proliferation of crimes using so-called ghost guns—guns that are often untraceable because they lack a serial number.⁶ In part to address the problem of ghost guns, and to ensure the proper marking, recordkeeping, and traceability of all firearms manufactured, imported, acquired, and disposed by federal firearms licensees, ATF recently adopted a new rule⁷ modernizing the definitions of the terms “frame” and “receiver.” That rule took effect in August 2022. The Commission should likewise act to reduce the proliferation of these firearms. Indeed, given that it is even harder to trace ghost guns than it is to trace a firearm with an altered serial number, it seems appropriate to apply at least the same 4-level enhancement for ghost guns as currently applies to firearms with altered serial numbers. At the same time, we suggest exempting antique guns, which do not pose the same danger and concerns as ghost guns.

Enhancing Penalties for Burglaries or Robberies of Federal Firearms Licensees.

Section 2K2.1 applies to violations of Section 922(u), which prohibits the unlawful taking of any firearm from a Federal firearms licensee. Although Section 922(u) covers offenses of varying severity (including simple theft, burglary, and robbery), Section 2K2.1 treats all thefts from licensees in the same manner. Burglaries and robberies—especially of firearms from a licensee—are particularly dangerous crimes, as they endanger both the licensees who are legally selling firearms, and individuals who face gun violence by persons using stolen firearms. Burglaries of federal firearm licensees often involve the theft of multiple weapons that are

⁵ See, e.g., 18 U.S.C. § 922(x)(1) (prohibiting the sale or transfer of a handgun or handgun ammunition to a juvenile); 18 U.S.C. § 922(x)(2) (prohibiting a juvenile from knowingly possessing a handgun or handgun ammunition); see generally <https://www.kff.org/other/state-indicator/firearms-and-children-legislation/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>

⁶ See <https://www.justice.gov/opa/pr/frame-and-receiver-rule-goes-effect> (describing the proliferation of ghost guns).

⁷ U.S. Dept. of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Definition of “Frame or Receiver” and Identification of Firearms, 87 FR 24652-01, see <https://www.atf.gov/rules-and-regulations/definition-frame-or-receiver>.

destined for the black market.⁸ And burglaries are a chronic problem, with federal firearms licensees reporting thousands of firearms stolen during burglaries every year.⁹ We therefore recommend a 6-level enhancement for offenses involving the burglary or robbery of a federal firearm licensee. To ensure that this enhancement does not apply at the same time as the 2-level stolen-weapon enhancement, thereby effectively applying two separate enhancements for the same theft, we recommend that the Commission amend Application Note 8 to state that a court may not apply both the 2-level stolen weapon enhancement and the 6-level burglary or robbery enhancement. We also recommend amending Application Note 8 to make clear that the 6-level burglary or robbery enhancement applies even if the only relevant offense is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition).

Simplifying the Structure of Section 2K2.1. We recommend simplifying Section 2K2.1 by treating base offense level enhancements for prior crimes and for offenses involving particularly dangerous weapons as specific offense characteristics. Importantly, the goal of such a change is not to increase or decrease a defendant's advisory guideline range of imprisonment. Instead, the purpose of this proposed change is to reduce uncertainty and focus the parties on the nature of the offense and the defendant's relevant conduct.

As currently drafted, Section 2K2.1 provides for 8 different base offense levels that depend on a variety of factors, including not only the type of offense, but also the defendant's prior criminal history and the type of weapon. This complicated base offense level system creates significant litigation difficulties. In many cases subject to other Guidelines, the government and the defendant are able to agree on the applicable base offense level and the parties need only litigate the applicability of certain specific offense characteristics. But for offenses subject to Section 2K2.1, the parties are often unable to agree upon the applicable base offense level—complicating plea agreements and sentencing proceedings. Moreover, in our efforts to introduce the new BSCA substantive offenses into the Guidelines, we found that adding straw purchasing and firearm trafficking as additional factors affecting base offense levels further complicates the Guideline structure. This complicated base offense structure is not necessary—although the defendant's criminal history and the firearm characteristics apply to more than one type of offense, they generally raise the defendant's base offense level in the same way, regardless of the type of offense. For example, Section 2K2.1 increases the base offense level by 6 levels for the first prior crime of violence or controlled substance offense, and 4 additional levels for the second. Similarly, Section 2K2.1 increases the base offense level for offenses involving particularly dangerous firearms by 6 levels if the defendant has no prior conviction enhancements, and by 2 levels if such prior conviction enhancements apply.

Transferring the base offense level enhancements for particularly dangerous firearms and prior serious crimes to make them specific offense characteristics will greatly reducing the complexity of the base offense level calculation without changing the applicable Guidelines

⁸ See, e.g., <https://www.atf.gov/news/pr/mid-state-trio-charged-conspiracy-steal-firearms-licensed-federal-firearms-dealers>

⁹ In 2020, for example, almost 6,000 firearms were stolen in burglaries of federal firearm licensees. See <https://www.atf.gov/firearms/docs/undefined/federalfirearmslicenseeffthetlossreportjan2020-dec2020508pdf/download>.

level. With such a change, the base offense level portion of the Guideline would primarily depend, as it should, on the type of offense involved. Parties will be able to agree on base offense levels, leaving only the application of specific offense characteristics for courts to adjudicate. This will also have the added collateral benefit of making it easier for the Commission to move certain commentary language regarding the application of these enhancements to the text of the Guidelines. Our suggested changes will also make it significantly easier to study Section 2K2.1 sentences—the Commission will be able to report on, for example, how many defendants were subject to recidivism enhancements by assessing the application of specific offense characteristics (rather than only having a base offense level, which could have been triggered by more than one factor under the existing Guideline).

Ensuring Dangerous Recidivist Offenders Face Appropriate Penalties. As noted above, the BSCA increased the statutory maximum penalty for prohibited persons who illegally possess firearms from 10 to 15 years. Notably, this 15-year maximum penalty for Section 922(g) offenses coincides with the minimum sentence applicable under the Armed Career Criminal Act (ACCA) to those who possess firearms after three prior convictions for a “violent felony” or “serious drug offense.” 18 U.S.C. § 924(e). As we highlighted in our Annual Report, this increase provides an opportunity for the Commission to create a more workable guideline structure for repeat and dangerous firearms offenders, something that has become increasingly elusive under the ACCA.

To be clear, our primary goal is to ensure that prior dangerous crimes trigger a corresponding and proportional recidivism enhancement. Under our proposal, more defendants will face recidivism enhancements based on past violent, gun, and drug crimes, while the size of the maximum recidivism enhancement is ticked upward. Specifically, Section 2K2.1 currently provides for up to a maximum 10-level enhancement for recidivist firearms offenders; under our proposal, Section 2K2.1 would provide for up to a 12-level recidivism enhancement.

1. Making Recidivism Enhancements a Specific Offense Characteristic

Currently, Section 2K2.1 provides for enhanced penalties for violent and drug-trafficking recidivists who later possess a weapon. In particular, the base offense level for Section 2K2.1 increases by 6 and 10 levels, respectively, if the offender had one or two prior convictions for a crime of violence or controlled substance offense. As noted above, we recommend removing the recidivism enhancements for prior violent and drug crimes from the base offense levels and making them specific offense characteristics. Whether a prior offense qualifies for a recidivism enhancement is often the subject of vigorous litigation. Moving this enhancement to a specific offense characteristic will enable agreement on base offense levels, making it more efficient for courts and the parties to apply the Guideline.

2. Reducing Disparities Between ACCA-Eligible and Non-ACCA-Eligible Defendants

Under the current guidelines, Section 4B1.4 applies to any ACCA-eligible defendant. Like the ACCA, Section 2K2.1 provides for enhanced penalties for violent and drug-trafficking recidivists who later possess a weapon—but only for one or two such convictions. Section 2K2.1 does not account for any additional violent or drug convictions.

This absence of any enhancement for more than two violent or drug convictions likely reflects the Commission’s original understanding that defendants with three prior violent or drug offenses would be subject to the ACCA. But the ACCA is applicable in fewer and fewer cases, in large part due to judicial application of the categorical approach.¹⁰ Although the number of offenders convicted under Section 922(g) has increased over the past ten years (from 5,761 convictions in the 2011 Fiscal Year to 7,454 convictions in the 2021 Fiscal Year), the number of ACCA-eligible defendants decreased by half between 2011 and 2021 (decreasing from 551 defendants during the 2011 Fiscal Year to 261 ACCA-eligible defendants during the 2021 Fiscal Year). Moreover, the definitions of “controlled substance offense” and “crime of violence” in the Guidelines are different from the definitions of “serious drug offense” and “violent felony” in the ACCA.¹¹ Indeed, even though only 261 defendants were ACCA-eligible in 2021, more than 60% of firearms offenders (over 4600 offenders) had a prior violent conviction, and more than 20% of firearms offenders (over 1500 offenders) were assigned to criminal history category VI.¹² There are, therefore, a significant number of defendants with three or more prior violent or drug crimes who are not ACCA eligible.

In addition, there is a disproportionate gap between the sentences imposed on ACCA defendants and those who are not subject to the ACCA but who have multiple prior “crimes of violence” or “controlled substances offenses.” In Fiscal Year 2019, for example, the average sentence for an ACCA-eligible defendant was 188 months.¹³ By contrast, the average sentence for a defendant who had prior convictions for at least one drug trafficking offense and one violent offense was only 57 months.¹⁴ Even accounting for the previous 10-year maximum for Section 922(g) offenses, and the 15-year minimum for ACCA offenses, this disparity is far too great.¹⁵

¹⁰ Department of Justice analysis of U.S. Sentencing Commission data files (data files available at <https://www.ussc.gov/research/datafiles/commission-datafiles>); see U.S. Sentencing Comm’n, Federal Armed Career Criminal: Prevalence, Patterns, and Pathway (2021), at 20. As lower court judges have widely recognized, the categorical approach, which prohibits consideration of an offender’s actual conduct, results in exclusion of many statutory offenses that are traditionally applied to violent and serious drug offenders, particularly when those offenses are drafted broadly. See, e.g., *United States v. Scott*, 14 F.4th 190, 200-02 & nn.6-24 (3d Cir. 2021) (Phipps, J., dissenting) (providing a compendium of judicial criticism of the doctrine). The categorical approach produces inconsistent results across jurisdictions, with a defendant’s ACCA eligibility depending largely on how state laws are drafted, as opposed to the prior criminal conduct of the defendant.

The definition of “crimes of violence” and “controlled substance offenses” in Section 4B1.2 (and thus Section 2K2.1) is plagued by the same problem, given the judicial consensus (never expressly mandated by the Commission) that the categorical approach applies to these terms. Accordingly, as addressed later in this letter, we strongly encourage the Commission to permit consideration of actual conduct, based upon reliable evidence, where the categorical approach does not establish that a prior offense warrants a sentence enhancement.

¹¹ See U.S.S.G. §4B1.4, comment. (n.1); see also U.S. Sentencing Comm’n, Federal Armed Career Criminal: Prevalence, Patterns, and Pathway (2021), at n.27.

¹² U.S. Sentencing Comm’n, What Do Federal Firearms Offenses Really Look Like (2022), at 19.

¹³ *Id.* at 20.

¹⁴ U.S. Sentencing Comm’n, What Do Federal Firearms Offenses Really Look Like (2022), at 23.

¹⁵ Congress likely intended that there would be a less significant sentencing disparity between ACCA-eligible defendants and those with one or two prior violent or drug crimes. Indeed, in 1994, it instructed the Commission to enhance penalties for defendants with one and two prior ACCA-qualifying convictions.

By increasing the maximum penalty for prohibited persons to 15 years of imprisonment, Congress demonstrated its intent to close the gap between ACCA-eligible and non-ACCA-eligible defendants. The BSCA thus provides an opportunity to reduce unwarranted sentencing disparities by providing for appropriate guidelines ranges for those defendants with a long history of violent crimes and drug offenses who, because of the vagaries of the categorical approach, are nonetheless not subject to the ACCA.

We thus recommend adding a third increase (of 2 levels) for those defendants who possess a weapon after three prior violent or drug offenses. Assuming that Section 922(g) defendants face a base offense level of 18, as we propose, a defendant with three prior violent or drug crimes would thus face an offense level 30 (without any other enhancements). A defendant with a Criminal History Category of IV who received the full three-level reduction for acceptance of responsibility would face a guidelines range of 100-125 months—still significantly less than the applicable 15-year maximum (and the 15-year minimum under the ACCA). If the Commission does not agree with our proposal to increase base offense levels for prohibited persons (in order to effectuate Congress’s statutory directive for straw purchasing offenses, while also avoiding unwarranted sentencing disparities), we recommend in the alternative a larger specific offense level increase for defendants with three or more prior qualifying convictions, in order to ensure that the most dangerous, repeat offenders are appropriately deterred from possessing firearms.

3. Providing for Enhancements for Misdemeanor Crimes of Domestic Violence

In addition to adding an enhancement for three prior qualifying offenses, the Commission should also consider amending the offenses that trigger recidivism enhancements under Section 2K2.1. As noted above, the Commission has observed that “[a] majority (60.6%) of firearms offenders had at least one prior conviction for a violent offense, which is more than twice the rate of violent prior convictions for other offenders.”¹⁶ In determining how many firearms offenders had a violent prior conviction, the Commission identified offenses “that are generally accepted as having some level of violence,” including aggravated and simple assault.¹⁷ Indeed, the most common violent predicate was assault—almost half (49.4%) of all Section 2K2.1 offenders had a prior assault conviction.¹⁸

Certain assault convictions, however, do not trigger a recidivism enhancement under Section 2K2.1. Misdemeanor assault of a family member, for example, is not a “crime of violence,” even though Section 922(g)(9) prohibits gun possession by individuals with prior misdemeanor crimes of domestic violence (just like individuals with prior felony convictions). Congress enacted Section 922(g)(9) in 1994 because “existing felon-in-possession laws were not keeping firearms out of the hands of domestic abusers, because ‘many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.’” *United States v. Hayes*, 555 U.S. 415, 426 (2009) (quoting 142 Cong. Rec. S10377-01 (1996) (Statement of Sen. Lautenberg)). As Senator Lautenberg explained when introducing Section 922(g)(9), “most of those who commit family violence are never even prosecuted. But when they

¹⁶ U.S. Sentencing Comm’n, *What Do Federal Firearms Offenses Really Look Like* (2022), at 19.

¹⁷ *Id.* at n.40.

¹⁸ *See id.* at 20.

are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors.” 142 Cong. Rec. S10377-78; *see also id.* at S10378 (“In all too many cases unfortunately, if you beat up or batter your neighbor’s wife it is a felony. If you beat up or batter, brutalize your own wife or your own child, it is a misdemeanor.”) (statement of Sen. Wellstone). Moreover, as Senator Lautenberg explained, “all too often, the only difference between a battered woman and a dead woman is the presence of a gun.” 142 Cong. Rec. S10377.

Unfortunately, the situation has not improved. Research published in the American Journal of Public Health found that the presence of a gun in domestic violence situations significantly increases the risk of homicide.¹⁹ Abusers with access to a gun are five times more likely to murder a domestic relation.²⁰ Moreover, intimate partner homicide counts for nearly half of murders of women, and the large majority of intimate partner homicides involve prior physical abuse.²¹ Indeed, more than three quarters of women who experience domestic violence were previously victimized by the same offender.²² Nonetheless, defendants with multiple convictions for misdemeanor crimes of domestic violence currently face the same offense level, under the Guidelines, as a defendant with only a single non-violent felony offense.

In the BSCA, Congress closed the so-called “boyfriend loophole” in the misdemeanor crime of domestic violence definition.²³ In doing so, Congress demonstrated its ongoing commitment to protecting victims of domestic abuse from gun violence. The Sentencing Guidelines should likewise be reviewed and amended to protect victims of domestic violence and to appropriately punish those who possess weapons after domestic abuse convictions. Domestic abusers should not face the same Guidelines ranges as, for example, individuals with only prior convictions for non-violent or property offenses. Section 922 treats misdemeanor crimes of domestic violence as seriously as it treats other violent crimes. The Guidelines should do the same. We urge the Commission to treat misdemeanor crimes of domestic violence, as defined by statute, as equivalent in seriousness to other violent crimes.²⁴

Application of the categorical approach likewise excludes many assault convictions from the Guidelines definition of “crime of violence.” Many felony assault statutes prohibit (among other conduct), the reckless causation of injury, which is generally considered not to satisfy either the “elements clause” of Section 4B1.2(a)(1)²⁵, or the generic definition of “aggravated assault.”²⁶ Thus, a defendant who repeatedly assaults others and then illegally possessed a weapon may face no Section 2K2.1 recidivism enhancements at all, even if his or her conduct in

¹⁹ <https://www.justice.gov/archives/ovw/blog/firearms-and-domestic-violence-intersections>

²⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/>

²¹ *Id.*

²² https://nicic.gov/sites/default/files/031384_0.pdf

²³ Sec. 12005, “Misdemeanor Crime of Domestic Violence,” Bipartisan Safer Communities Act, PL 117-159, June 25, 2022, 136 Stat 1313 (defining dating relationship).

²⁴ The incorporation of the statutory definition of misdemeanor crime of domestic violence is important, as it ensures that appropriate procedural protections remain in place. An offense counts only if the defendant received (or intelligently waived) the Sixth Amendment right to counsel and, if required, the Sixth Amendment right to trial, and does not count if the offense has been expunged.

²⁵ *See United States v. Bates*, 24 F.4th 1017, 1019 (5th Cir. 2022).

²⁶ *See United States v. Schneider*, 905 F.3d 1088, 1095 (8th Cir. 2018); *but see United States v. Shepherd*, 848 F.3d 425, 427-428 (5th Cir. 2017).

fact involved extremely violent behavior. This problem can be addressed, as discussed further below, by eliminating the categorical approach from Section 2K2.1's recidivism enhancements.

4. Providing for Enhancements for Prior Firearm Offenses

We also recommend an enhancement for prior offenses that involved a firearm, including prior felon-in-possession offenses. As the Commission has observed, “firearms offenders recidivate[] at a higher rate than all other offenders.”²⁷ In a recently published report, the Commission observed that “[o]ver two-thirds (69.0%) of firearms offenders were rearrested for a new crime during the eight-year follow up period compared to less than half of all other offenders (45.1%).”²⁸ Indeed, almost half (44.2%) of defendants sentenced under Section 2K2.1 were previously convicted of a weapons offense.²⁹ But because the Guidelines do not include felon-in-possession offenses (or other offenses involving a firearm) as “crimes of violence,” a defendant with multiple firearm convictions may face the same offense level as a defendant with a single non-violent felony, such as a fraud conviction. The current recidivism enhancements do not sufficiently reflect the danger posed by those who repeatedly engage in weapons offenses. We therefore propose a recidivism enhancement for firearm offenses that do not otherwise qualify as a “crime of violence.” At the same time, we recommend that the enhancement be lower than the currently applicable enhancement for prior crimes of violence, to reflect that the prior offense involved a dangerous weapon but did not involve the use, attempted use, or threatened use of force.

We suggest, however, limiting all of the recidivism enhancements under Section 2K2.1 to 12 levels. By comparison, Section 2K2.1 currently provides for a 10-level enhancement for defendants with two prior crimes of violence or controlled substance offenses. Taken as a whole, our proposal ensures that more recidivist offenders with violent criminal histories face appropriate enhancements but provides for only a small increase in the overall applicable enhancement structure.

5. Eliminating the Categorical Approach

Finally, we also recommend eliminating the categorical approach from Section 2K2.1's recidivism enhancements. Under Section 994 of Title 28, Congress has imposed on the Commission an obligation to promulgate guidelines “providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.” Yet, as we noted in our Annual Report, the categorical approach leads to odd and widely disparate guideline ranges for defendants depending on both the jurisdiction of their prior convictions and the jurisdiction in which the Guidelines are being calculated. As but one of many examples, Texas aggravated assault is a Guidelines crime of violence in the Fifth Circuit, but not the Fourth Circuit. *Compare United States v. Guillen-Alvarez*, 489 F.3d 197, 199-201 (5th Cir. 2007) and *United States v. Barcenas-Yanez*, 826 F.3d 752, 756-757 (4th Cir. 2016). Thus, under current Section 2K2.1, a defendant with a prior Texas aggravated assault conviction who illegally possesses a firearm in Texas faces a base offense level of 20, whereas the same defendant would face a base offense

²⁷ U.S. Sentencing Comm'n, *Recidivism of Federal Firearms Offenders* (2021), at 6.

²⁸ *Id.*

²⁹ U.S. Sentencing Comm'n, *What Do Federal Firearms Offenses Really Look Like* (2022), at 23.

level of 14 if he illegally possessed that firearm in Virginia. That result makes no sense, and it is only one example of the strange anomalies routinely produced by application of the categorical approach.

This would not be the first time that the Commission has dealt with the categorical approach by amending an offense-specific guideline. When amending neighboring Section 2L1.2, the guideline for illegal reentry, the Commission noted that it has “received significant comment over several years from courts and stakeholders that the ‘categorical approach’ used to determine the particular level of enhancement under the existing guideline is overly complex and resource-intensive and often leads to litigation and uncertainty.”³⁰ The same is true for the categorical approach as it applies to Section 2K2.1.

In order to take advantage of well-developed caselaw regarding the definitions of “crime of violence” and “controlled substance offense,” we suggest language that permits courts to rely upon an elements-based approach to determine whether an offense triggers a recidivism enhancement. But our proposed language also permits courts to consider reliable evidence (such as documents of conviction) in determining whether the defendant’s conduct in fact triggered a recidivism enhancement. This would reduce sentencing disparities by ensuring that recidivism enhancements are based on the actual past conduct of a defendant, and not on vagaries of state law. We also recommend moving important language currently under the “Application Notes” to the Guidelines text, to ensure that there is no dispute as to the application of these enhancements.

Addressing Particularly Dangerous Weapons: Finally, as noted above, the base offenses levels in current Section 2K2.1 increase by 6 levels for offenses involving a semi-automatic weapon or a weapon described in 18 U.S.C. § 5845(a), unless a defendant has an enhanced base offense level because of a prior crime of violence or controlled substances offenses, in which case the weapon results in an additional 2-level base offense level increase. The proposed language adopts exactly these enhancements, but as a specific offense characteristic (as opposed to increased base offense levels). If the Commission agrees with our proposal to include recidivism enhancements for prior convictions that involved a gun (but do not qualify as a crime of violence), we recommend a 4-level increase for defendants with such convictions (but no other recidivism enhancements). A 4-level increase is midway between the 2- and 6-level dangerous-weapon enhancements that currently apply for, respectively, defendants who do and do not have prior crimes of violence or controlled substance offenses.

³⁰ U.S.S.G., App. C, Amendment 802 (effective Nov. 1, 2016). Section 2L1.2 eliminated the categorical approach by tying recidivism enhancements to the sentence imposed for the previous conviction, as opposed to the nature of the offense. Although the Department would not object to amending Section 2K2.1 in a similar manner, our recommendation focuses on the prior offenses that most demonstrate the danger of a felon possessing a weapon—those prior offenses that involve firearms, violence, and drugs.

Appendix B
Proposed Guideline Section 2K2.1

(a) Base Offense Level (Apply the Greatest):

- (1) **24**, if the defendant is convicted under 18 U.S.C. § 932(b) and (c)(2);
- (2) **18**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d), § 924(h), § 924(k), § 932(b) and (c)(1), or § 933(a); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;
- (3) **12**, except as provided below; or
- (4) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

(b) Specific Offense Characteristics

(1) (A) If the defendant committed any part of the instant offense subsequent to sustaining a conviction for (i) a crime of violence; (ii) a controlled substance offense; or (iii) a misdemeanor crime of domestic violence, as defined by 18 U.S.C. § 921(a)(33), increase by **6** levels. If the defendant has two such convictions, increase by **10** levels, and if the defendant has three or more such convictions, increase by **12** levels.

(B) If the defendant committed any part of the instant offense subsequent to sustaining a felony conviction that is not subject to subsection (A), but that involved the possession or use of a firearm, including a conviction for possession of a firearm by a prohibited person, increase by **2** levels. If the defendant has two or more such convictions, increase by **4** levels.

The cumulative enhancement determined from the application of subsection (b)(1) may not exceed **12** levels.

For purposes of (b)(1), the definitions of “crime of violence” and “controlled substance offense” are those in §4B1.2 and include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses. For purposes of (b)(1), use only those convictions that receive criminal history points and are counted separately under § 4A1.1(a), (b), or (c). When determining whether a person has incurred a conviction satisfying (b)(1) the court may examine the elements of the offense of conviction. If those elements include, and are no broader than, the conduct described in (b)(1), the court should conclude that the enhancement applies. The court may also consider any reliable evidence, as set forth in § 6A1.3(a), in determining by a preponderance of the evidence whether the conduct leading to the prior conviction satisfies (b)(1).

(2) If the offense involved a firearm as described in 26 U.S.C. § 5845(a) or a semiautomatic firearm that is capable of accepting a large capacity magazine, and the defendant (A) does not

qualify for any enhancement in subsection (b)(1), increase by **6** levels; or (B) qualifies for an enhancement in subsection (b)(1)(B), but not (b)(1)(A), increase by **4** levels; or (C) qualifies for an enhancement in subsection (b)(1)(A), increase by **2** levels.

(3) If the offense involved three or more firearms, increase as follows:

	<u>Number of Firearms</u>	<u>Increase in Level</u>
(A)	3-7	add 2
(B)	8-24	add 4
(C)	25-99	add 6
(D)	100-199	add 8
(E)	200 or more	add 10 .

(4) If the defendant, other than a defendant subject to subsection (b)(1) or (b)(2), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.

(5) If the offense involved—

(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.

(6) If (A) any firearm was stolen, increase by **2** levels; or (B) any firearm had no serial number (other than an antique gun) or an altered or obliterated serial number, increase by **4** levels; or (C) the offense involved the burglary or robbery of a federal firearm licensee, increase by **6** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(6) may not exceed level **33**, except if subsection (b)(5)(A) applies.

(7) If the defendant (A) engaged in the trafficking of firearms, but was not convicted under 18 U.S.C. § 933(a); or (B) is convicted under 18 U.S.C. § 932(b) or 933(a) and (i) knew that the firearm would be transferred to a person who is part of a drug trafficking organization, “criminal street gang” (defined in 18 U.S.C. § 521(a)), “continuing criminal enterprise” (defined in 21 U.S.C. § 848(c)), “enterprise” engaged in “racketeering activity” (defined in 18 U.S.C. § 1961), an entity engaged in “domestic terrorism” (defined in 18 U.S.C. § 2331(5)), or a “foreign

terrorist organization” (defined in 8 U.S.C. § 1189(a)), or (ii) transferred two or more firearms to an individual or individuals whose possession or receipt of the firearm would be illegal, increase by 4 levels.

(8) If the offense involved the defendant transferring a firearm to an individual under the age of 18 years, increase by 2 levels, unless the transfer was solely for lawful sporting purposes or collection.

(9) If the defendant—

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

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 22, increase to level 22.

(10) If the defendant committed an offense pursuant to 18 U.S.C. § 932(c)(1), § 932(c)(2), § 922(a)(6) or (d), or § 924(a)(1)(A), and did so because of serious coercion or duress from a domestic relation, under circumstances not amounting to a complete defense, decrease by 4 levels. For the purposes of this provision, a domestic relation is a current or former spouse, parent, guardian, or child; a person with whom the defendant shares a child in common; a person who is cohabiting with or has cohabited with the defendant as a spouse, parent, guardian, or child; a person similarly situated to a spouse, parent, guardian, or child; or a person who has a current or recent former dating relationship with the defendant. Evidence that the defendant previously suffered from violence by a domestic relation will constitute significant evidence that the defendant was coerced by that domestic relation.

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

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.