

**United States Sentencing Commission Public Meeting Minutes
December 13, 2018**

Acting Chair William H. Pryor Jr., called the meeting to order at 10:30 a.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- William H. Pryor Jr., Acting Chair
- Rachel E. Barkow, Commissioner
- Charles R. Breyer, Commissioner
- Danny C. Reeves, Commissioner
- David Rybicki, Commissioner Ex Officio

The following Commissioner was not present:

- Patricia Cushwa, Commissioner Ex Officio

The following staff participated in the meeting:

- Kenneth P. Cohen, Staff Director
- Kathleen Grilli, General Counsel

Acting Chair Pryor welcomed the public attending the Commission's meeting, whether they were in-person or watching via the Commission's livestream broadcast. He expressed the commissioners' appreciation for the public's significant public interest in federal sentencing issues and the work of the Commission.

Acting Chair Pryor introduced his fellow commissioners.

Commissioner Rachel Barkow is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law and is also the faculty director of the Center on the Administration of Criminal Law at the law school.

Judge Charles Breyer is a Senior District Judge for the Northern District of California and has served as a United States District Judge since 1998.

Judge Danny Reeves is a District Court Judge for the Eastern District of Kentucky and has served as a United States District Judge since 2001.

David Rybicki is the Commissioner Ex Officio representing the Department of Justice. Commissioner Rybicki was appointed Deputy Assistant Attorney General for the Department of Justice's Criminal Division in 2017.

Commissioner Patricia Cushwa, who represents the United States Parole Commission as the

designated Ex Officio member of the Commission, is not able to attend the meeting.

Acting Chair Pryor announced that this public meeting marked Commissioner Barkow's last meeting with the Commission and will end her five-year tenure as a commissioner. He recounted how he and Commissioner Barkow have worked alongside each other since they were both confirmed by the Senate in 2013. Among the Commission's accomplishments during her tenure were the Commission's vote to reduce drug guideline penalties by two levels ("Drugs Minus Two") and its retroactivity that reduced sentences for eligible offenders by about 17 percent; the comprehensive rewrite of the illegal reentry guideline that has proved very popular with district judges; last year's synthetic drug amendment that responded to the urgent problem of synthetic cathinones, synthetic cannabinoids, and fentanyl; the Commission's Report to the Congress: Career Offender Enhancements (July 2016); the series of reports on the impact of federal mandatory minimum penalties, and several research publications on recidivism.

Acting Chair Pryor stated that Commissioner Barkow's commitment to fair sentencing and her quick ability to process sentencing data served the Commission and the public well and he thanked her for her service.

Acting Chair Pryor called for a motion to adopt the August 23, 2018, public meeting minutes. Commissioner Barkow moved to adopt the minutes, with Commissioner Reeves seconding. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted, with Acting Chair Pryor and Commissioners Barkow, Breyer, and Reeves voting in favor of adopting the motion.

Acting Chair Pryor updated the public on the Commission's recent work. He noted that the 2018 Guidelines Manual, which incorporates guideline amendments effective November 1, 2018, had been published and is being distributed to judges, probation officers, members of the bar, and other practitioners. He also noted that the Sentencing Manual now features a list and short description of each new amendment and that the cover is crimson. In addition to hardcopies, the 2018 Guideline Manual is available as a web-based app with additional tools to assist in understanding and applying the federal sentencing guidelines.

Acting Chair Pryor announced the publication of a new Commission's report, Mandatory Minimum Penalties for Identity Theft Offenses in the Federal Criminal Justice System (Sept. 2018). This is the fifth in the Commission's series on the impact of mandatory minimum penalties on federal offenders and examines recent trends in the charging of general identity theft and aggravated identity theft offenses.

Key findings from this report include that 1.6 percent of all federal offenders were convicted under 18 U.S.C. § 1028A, the aggravated identity theft statute, which carries a mandatory consecutive two-year penalty. These offenders, however, comprised slightly more than half of all federal identity theft offenders and have more than doubled in number over the last decade.

The Commission will publish the final report in its current series on mandatory minimum penalties in January, which will study the impact of mandatory minimum penalties on federal sex

offenders.

In November, the Commission updated its publication titled, Federal Sentencing: The Basics. This publication is a resource for understanding basic application of the sentencing guidelines, related federal statutes, and rules of procedure. This publication also discusses the landmark passage of the Sentencing Reform Act of 1984, key Supreme Court decisions concerning the guidelines, and the current sentencing process.

The Commission will publish additional reports in 2019. In January, the Commission will release another report in its series of reports on recidivism, this one focusing on violent offenders. Among its findings are that violent federal offenders recidivate much more often than non-violent federal offenders, with a recidivism rate of 64 percent compared to 40 percent for non-violent offenders. Violent offenders recidivate more quickly and commit more serious offenses than non-violent offenders, and violent offenders do not age out of committing crime nearly to the degree as non-violent offenders. Over one-third, 36 percent, of violent offenders older than 50 at the time of release reoffend, more than double the rate for non-violent offenders, 15 percent. The Commission also plans to release a report on recidivism and firearms offenders in 2019.

The Commission plans to publish a report examining the overall structure and operation of the guidelines post-Booker. As part of that examination, in November 2017, the Commission updated the analysis of demographic differences in federal sentencing in the Report on the Continuing Impact of United States v. Booker on Federal Sentencing (December 2012) (2012 Booker Report). Much like the 2012 Booker Report, the updated analysis found that sentence length continues to be associated with some demographic factors, including race.

In January 2019, the Commission will release a report that updates the portion of the 2012 Booker Report discussion on different sentencing practices among judges in the same federal district; that is, intra-district differences. For this upcoming report, the Commission refined its methodology to focus on judges who sit in the same city. It analyzes the sentencing practices of judges located in 30 large metropolitan areas nationwide and finds that, even within individual cities, sentencing practices vary significantly.

Acting Chair Pryor noted that since March 2017, the Commission has operated with four voting Commissioners. Although only three affirmative votes are required to publish proposed amendments, by statute, four affirmative votes are required to promulgate amendments. As mentioned at the outset, Commissioner Barkow's term will end when Congress adjourns sine die, as will the Acting Chair's term.

Four nominations are currently pending in the United States Senate, including Acting Chair Pryor's renomination to serve as a second term and a separate nomination to serve as Chair. Therefore, Acting Chair Pryor explained, unless the Senate confirms at least two Commissioners, the Commission will lose its voting quorum and not be able to vote to promulgate the proposed amendments it may publish today until a voting quorum is restored.

Acting Chair Pryor called on the General Counsel, Kathleen Grilli, to advise the Commission on a possible vote to publish in the Federal Register proposed guideline amendments and issues for public comment.

Ms. Grilli stated that the first proposed amendment, attached hereto as Exhibit A, makes various technical changes to the Guidelines Manual. Part A of the proposed amendment makes technical changes to reflect editorial reclassification of certain sections in the United States Code. Part B makes certain technical changes to the Commentary of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Part C makes technical changes to the Commentary of §§2A4.2 (Demanding or Receiving Ransom Money), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and to Appendix A (Statutory Index). Part D makes clerical changes to various parts of the commentary in the Guidelines Manual.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on February 19, 2019, and a reply comment period closing on March 15, 2019, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Breyer moved to publish the proposed amendment, with Commissioner Barkow seconding. The Acting Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted, with Acting Chair Pryor and Commissioners Barkow, Breyer, and Reeves voting in favor of adopting the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit B, makes changes to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)). The proposed amendment contains two parts. The Commission may promulgate either or both parts as they are not mutually exclusive.

Part A of the proposed amendment is the result of the Commission's consideration of miscellaneous amendment issues, including possible amendments to §1B1.10 in light of Koons v. United States, 138 S. Ct. 1783 (2018). Part A would revise §1B1.10 in various ways and includes three options for responding to United States v. Koons.

Part B of the proposed amendment would resolve a circuit conflict concerning application of §1B1.10, pursuant to the Commission's authority under 28 U.S.C. § 991(b) in Braxton v. United States, 500 U.S. 344 (1991). A circuit conflict has arisen concerning whether the court is permitted under §1B1.10 to reduce a sentence below the amended guideline range to reflect departures other than substantial assistance that the defendant received at his original sentencing.

The Seventh and the Ninth Circuits have held that, if a defendant received a substantial assistance departure, a court may reduce a defendant's sentence further below the amended guideline minimum to reflect those other departures, in addition to substantial assistance. The Sixth and Eleventh Circuits have held that they may not.

Part B of the proposed amendment would revise Application Note 3 of the Commentary to resolve this circuit conflict and providing two options for resolving that conflict. One, which would adopt the approach of the Sixth and the Eleventh Circuits, the other which would adopt the approach of the Seventh and the Ninth Circuits.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on February 19, 2019, and a reply comment period closing on March 15, 2019, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Reeves moved to publish the proposed amendment, with Commissioner Breyer seconding. The Acting Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted, with Acting Chair Pryor and Commissioners Barkow, Breyer, and Reeves voting in favor of adopting the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit C, responds to new laws and miscellaneous guideline issues. The proposed amendment contains five parts. The Commission may promulgate any or all parts as they are not mutually exclusive.

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

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

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

Part D responds to a guideline application issue concerning the interaction of §§2G1.3 and 3D1.2 (Grouping of Closely Related Counts).

Part E revises the guidelines to address the fact that the Bureau of Prisons no longer operates a

shock incarceration program, as described in §5F1.7 (Shock Incarceration Program (Policy Statement)) of the Guidelines Manual.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on February 19, 2019, and a reply comment period closing on March 15, 2019, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Barkow moved to publish the proposed amendment, with Commissioner Breyer seconding. The Acting Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted, with Acting Chair Pryor and Commissioners Barkow, Breyer, and Reeves voting in favor of adopting the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit D, makes changes to the career offender guidelines. The proposed amendment contains four parts. The Commission may promulgate any or all parts as they are not mutually exclusive.

Part A of the proposed amendment is discussed below. Parts B through D address various issues that came to the Commission's attention during the prior public comment period. Part B would address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a crime of violence under §4B1.2 (Definitions of Terms Used in Section 4B1.1 [(Career Offender)]), as amended in 2016. Three options to address this issue are presented.

Part C would amend §4B1.2 to address certain issues regarding the Commentary stating that the terms "crimes of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring to commit, and attempting to commit those crimes. Three options are presented to resolve this issue.

Part D would amend the definition of "controlled substance defense" in §4B1.2(b) to include offenses involving an offer to sell a controlled substance and offenses described in 46 United States Code §§ 70503(a) and 70506(b).

Ms. Grilli advised that a motion to publish Parts B through D of the proposed amendment with an original comment period closing on February 19, 2019, and a reply comment period closing on March 15, 2019, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Breyer moved to publish the proposed amendment, with Commissioner Reeves seconding. The Acting Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called for a vote. The motion was adopted, with Acting Chair Pryor and Commissioners Barkow, Breyer, and Reeves voting in favor of adopting the motion.

Ms. Grilli stated that Part A of the proposed amendment would amend §4B1.2 to establish that the categorical approach and modified categorical approach do not apply in determining whether

a conviction is a crime violence or controlled substance offense. Specifically, it would provide that, in making that determination, a court shall consider any element or alternative means for meeting an element of the offense committed by the defendant as well as the conduct that formed the basis of the offense of conviction.

Part A would also allow courts to look at sources from the judicial record beyond the statute of conviction in determining the conduct that formed the basis of the conviction, and would make similar revision to §2L1.2 (Unlawfully Entering or Remaining in the United States) as well as additional conforming changes to the guidelines that use the terms “crime of violence” and “controlled substance offense.”

Ms. Grilli advised that a motion to publish Part A of the proposed amendment with an original comment period closing on February 19, 2019, and a reply comment period closing on March 15, 2019, and granting staff technical and conforming amendment authority, would be in order.

Acting Chair Pryor called for a motion as suggested by Ms. Grilli. Commissioner Reeves moved to publish the proposed amendment, with Commissioner Breyer seconding. The Acting Chair called for discussion on the motion. Hearing no discussion, the Acting Chair called on Ms. Grilli for a roll call vote on the motion. The motion was adopted, with Acting Chair Pryor and Commissioners Breyer and Reeves voting in favor of adopting the motion and Commissioner Barkow voting against adopting the motion.

Acting Chair Pryor asked if there was any further business before the Commission.

Commissioner Rybicki thanked the Commission on behalf of the Department of Justice (DOJ) for taking up the DOJ’s top priority for this amendment cycle, the categorical approach. As the DOJ explained in its annual report to the Commission, the DOJ believes the categorical approach often results in arbitrary, inconsistent, and unjust sentencing outcomes and has severely impaired the proper functioning of sentencing enhancements under the Armed Career Criminal Act, the career offender guidelines, and §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

Commissioner Rybicki stated the DOJ appreciated that the proposed amendment the Commission voted to publish today addresses many of the problems created by the categorical approach, which the DOJ highlighted in its annual report. Commissioner Rybicki identified three specific issues the DOJ believes are problems.

First, state robbery offenses often do not qualify as crimes of violence at all. In the Ninth Circuit, California and Nevada state robbery is not a crime of violence, even when, as in one case, the defendant put a gun to a victim’s head and shot a second victim. This occurs in other federal circuits as well. Second, conspiracy to commit murder and aid of racketeering under 19 U.S.C. § 1959 (Violent Crimes in Aid of Racketeering Activity) is not a crime of violence in some federal circuits. And third, as has been mentioned, Hobbs Act robbery does not constitute a crime of violence in the Tenth Circuit.

Commissioner Rybicki observed that the proposed amendment suggests making additional documents available to federal judges when they determine whether a previous conviction constitutes a crime of violence and also simplifies the procedure for inchoate offenses.

Commissioner Rybicki also noted that the Commission invited comment on the threshold issue, as to whether Part A of the proposed amendment is consistent with Commission authority under 28 U.S.C. § 994. He stated that the DOJ does not think this is a close question and that the DOJ will further explain its reasoning in a letter in response to the proposed amendments.

Commissioner Rybicki expressed the DOJ's position that the proposed amendment represents a positive first step in resolving the systemic problems created by the categorical approach. However, while the DOJ commends the Commission for the guideline amendment language under consideration today, he expressed the DOJ's disappointment that the Commission is not publishing language that more forcefully suggests that courts should consider the actual conduct of defendants in determining whether a prior conviction for purposes of the advisory guideline calculation is, in fact, a violent crime.

Allowing judges to consider the facts of a previous conviction, Commissioner Rybicki asserted, would help to ensure that violent conduct is not overlooked and that recidivist defendants receive sentences sufficient to protect the public. Publishing amendment language that allows courts to consider actual conduct would have given future commissioners the benefit of thoughtful submissions from law professors, defenders, victims' groups, and other stakeholders on this important issue.

Commissioner Rybicki stated that many federal courts have noted the "absurd" results that the categorical approach has produced. In November 2018, Judge Jerry Smith, writing for the en banc Fifth Circuit in a decision involving a defendant who beat the victim to death with a baseball bat, stated:

It is high time for this court to take a mulligan on [crimes of violence]. The well-intentioned experiment that launched fifteen years ago has crashed and burned.³⁷ By requiring sentencing courts and this court to ignore the specifics of prior convictions well beyond what the categorical approach and Supreme Court precedent instruct, our jurisprudence has proven unworkable and unwise. By employing the term "crime of violence," Congress and the U.S. Sentencing Commission obviously meant to implement a policy of penalizing felons for past crimes that are, by any reasonable reckoning, "violent," hence the term.¹

Commissioner Rybicki expressed the DOJ's hope that, when the Commission regains its voting quorum, it will promulgate amendments allowing federal courts to consider conduct at sentencing. He stated that the Commission has a statutory duty to ensure that federal sentencing accurately reflects the seriousness of offenses committed by criminal defendants and, in the DOJ's view, the Commission cannot satisfy this duty by leaving unaddressed the serious and

¹ United States v. Reyes-Contreras, 910 F.3d 169, 186 (5th Cir. 2018).

unjust inconsistencies that the categorical approach creates.

Commissioner Barkow thanked Acting Chair Pryor, former Chair Patti B. Saris, her fellow Commissioners, current and past, and staff for making her service on the Commission a wonderful experience. She noted that everyone at the Commission worked hard, were the best public servants imaginable, and were a joy to work with.

Commissioner Barkow also expressed her gratitude to the various stakeholders and citizens who take the time to comment on the Commission's proposals, offer policy priorities, and keep the Commission informed about what is happening on the ground. She noted that there are many committed advocates, and she was thankful to have had their input during her service.

Commissioner Barkow stated that she was proud of what the Commission accomplished, almost always with unanimous and bipartisan agreement, during her service, which she thought was too infrequently happening in other parts of government. She believed it happened at the Commission because it let the facts and data guide it to the right policy outcomes that are consistent with the law.

Commissioner Barkow believed that the Commission could achieve even better results that would improve public safety and produce more proportional sentences if some laws were changed. But, within the bounds of what the Commission is authorized to do, she believed the many amendments promulgated during her tenure improved sentencing. She highlighted the Commission's Drugs Minus Two amendment and making it retroactive as well. That vote allowed more than 31,000 people to obtain more proportionate sentences, saved prison resources, and did not compromise public safety.

Commissioner Barkow stated she would never forget the Commission's public hearing on retroactivity. That hearing was very crowded and there were a lot of family members there that day who knew what the decision could mean for them. She recalled vividly many tearful, happy responses, when the Commission voted to make that amendment retroactive. And for her, this put a personal face on the very important work that this Commission does every day, and it vividly demonstrated why proportional sentencing must be at the core of everything that the Commission does.

Commissioner Barkow expressed her gratitude former President Obama for giving her the opportunity to serve on the Commission. She suggested that it may not be the dream government job of many to serve on the Sentencing Commission, but it was hers, and it was even more wonderful than she hoped it would be. Commissioner Barkow thanked everyone for being such wonderful colleagues during her service on the Commission.

Commissioner Breyer thanked Commissioner Barkow for her service and expressed his appreciation for the way she performed her duties. He noted that Commissioner Barkow's priorities, goals, thoughtfulness, experience, and everything she brought to the Commission's work should serve as examples of how a commissioner should perform their work. He noted that her views were never ideological, but instead she looked to the evidence, facts, and experience as

guides when considering sentencing policies. When Commission staff gathered and analyzed data from thousands of federal sentencings, Commissioner Barkow always asked, “what does the evidence show?”.

Commissioner Breyer mused that he was in a ticklish position regarding whether to urge the Republican-controlled Senate to confirm Acting Chair Pryor to be the permanent Chair of the Commission. He explained that, as a Democrat on the nonpartisan Commission, he was not sure his urging would help or hurt the Acting Chair’s confirmation.

Commissioner Breyer stated that Acting Chair Pryor brought a strong desire to work together and sought to accommodate the different views of the commissioners. Understanding that the perfect is the enemy of the good, he continued, the Acting Chair tirelessly tried to achieve consensus on the proposals put forward.

Commissioner Breyer expressed his pleasure working with Acting Chair Pryor and noted he was always polite, deferential, focused on the right issues, and brought a sense of intellect and commitment and effort to achieve a workable solution to the problems that the Commission confronted.

Commissioner Breyer observed that pending before Congress is a bill for criminal justice reform. He noted that if the legislation is enacted it is testimony to the fact that there can be bipartisan solutions to problems and criminal justice reform is a very high priority for the public. Criminal justice is not just people who are confined in prison, but it is also for the protection of the public, he added, and it is essential that criminal justice reflects the circumstances that surround each of us.

Commissioner Breyer expressed his hope that the Senate will act on the Commission’s nominees as it is important that it continues its work. The Commission serves the public and, if the proposed criminal justice legislation is enacted, it will become even more crucial that the Commission be given a quorum in order to try to implement the will of Congress as demonstrated by any statute that is enacted.

Acting Chair Pryor thanked Commissioner Breyer for his kind words, expressed his pleasure at serving with him, and hoped to return to continue their working relationship. He also thanked Commissioner Barkow for her service to the Commission.

Acting Chair Pryor extended the Commission’s thanks, and his personal appreciation, for the important service and contributions made by the Commission’s Victims Advisory Group. Several members of the group were departing, including the Chair of the Victims Advisory Group, T. Michael Andrews, Elizabeth Cronin, Kimberley Garth-James, Keli Luther, James Marsh, and Virginia Swisher. Additionally, the Acting Chair expressed the Commission’s appreciation for the service of Ronald Levine, whose term as Chair of the Commission’s Practitioners Advisory Group has expired, and the other departing members, including James Boren, Pamela Mackey, Gordon Armstrong, and Steve Nolder. Finally, the Acting Chair thanked Wendy Bremner, a member of the Tribal Issues Advisory Group, for her service.

Acting Chair Pryor asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Reeves moved to adjourn, with Commissioner Barkow seconding. The Chair called for a vote on the motion. The motion was adopted, with Acting Chair Pryor and Commissioners Barkow, Breyer, and Reeves voting in favor of adopting the motion. The meeting was adjourned at 11:09 a.m.

EXHIBIT A

PROPOSED AMENDMENT: TECHNICAL

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

Part A of the proposed amendment makes technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective December 1, 2015, the Office of Law Revision Counsel eliminated the Appendix to Title 50 of the United States Code and transferred the non-obsolete provisions to new chapters 49 to 57 of Title 50 and to other titles of the Code. To reflect the new section numbers of the reclassified provisions, Part A of the proposed amendment makes changes to §2M4.1 (Failure to Register and Evasion of Military Service), §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism), and Appendix A (Statutory Index). Similarly, effective September 1, 2016, the Office of Law Revision Counsel also transferred certain provisions from Chapter 14 of Title 25 to four new chapters in Title 25 in order to improve the organization of the title. To reflect these changes, Part A of the proposed amendment makes further changes to Appendix A.

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

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

Part D of the proposed amendment makes clerical changes to—

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

- (2) the Background Commentary to §3D1.1 (Procedure for Determining Offense Level on Multiple Counts), to correct references to certain chapters of the *Guidelines Manual*; and
- (3) the Background Commentary to §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment), to update the citation of a Supreme Court case.

Proposed Amendment:

(A) Reclassification of Sections of United States Code

§2M4.1. Failure to Register and Evasion of Military Service

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Commentary

Statutory Provision: ~~50 U.S.C. App. § 462~~ 50 U.S.C. § 3811.

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§2M5.1. Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism

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Commentary

Statutory Provisions: 18 U.S.C. § 2332d; 22 U.S.C. § 8512; 50 U.S.C. § 1705; ~~50 U.S.C. App. §§ 2401–2420~~ 50 U.S.C. §§ 4601–4623. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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- 3. In addition to the provisions for imprisonment, ~~50 U.S.C. App. § 2410~~ 50 U.S.C. § 4610 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is \$250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or \$1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.

4. For purposes of subsection (a)(1)(B), “*a country supporting international terrorism*” means a country designated under section 6(j) of the Export Administration Act (~~50 U.S.C. App. 2405~~ **50 U.S.C. § 4605**).

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APPENDIX A

STATUTORY INDEX

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22 U.S.C. § 8512 2M5.1, 2M5.2, 2M5.3

25 U.S.C. ~~§ 450a~~ **§ 5306** 2B1.1

26 U.S.C. § 5148(1) 2T2.1

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50 U.S.C. § 3121 2M3.9

~~50 U.S.C. App. § 462~~ **50 U.S.C. § 3811** 2M4.1

~~50 U.S.C. App. § 527(e)~~ **50 U.S.C. § 3937** 2X5.2

~~50 U.S.C. App. § 2410~~ **50 U.S.C. § 4610** 2M5.1

52 U.S.C. § 10307(c) 2H2.1

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

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

Commentary

* * *

Application Notes:

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8. **Use of Drug Conversion Tables.—**

(A) **Controlled Substances Not Referenced in Drug Quantity Table.**—The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), ~~as~~ **as** the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, *i.e.*, heroin, cocaine, PCP, methamphetamine, fentanyl, ~~LSD~~ **LSD**, and marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:

- (i) Use the Drug Conversion Tables to find the converted drug weight of the controlled substance involved in the offense.
- (ii) Find the corresponding converted drug weight in the Drug Quantity Table.
- (iii) Use the offense level that corresponds to the converted drug weight determined above as the base offense level for the controlled substance involved in the offense.

(See also Application Note 6.) For example, in the Drug Conversion Tables set forth in this Note, 1 gram of a substance containing oxymorphone, a Schedule I opiate, converts to 5 kilograms of converted drug weight. In a case involving 100 grams of oxymorphone, the converted drug weight would be 500 kilograms, which corresponds to a base offense level of 26 in the Drug Quantity Table.

* * *

(D) **Drug Conversion Tables.—**

SCHEDULE I OR II OPIATES*	CONVERTED DRUG WEIGHT
1 gm of Heroin =	1 kg
1 gm of Dextromoramide =	670 gm
1 gm of Dipipanone =	250 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	700 gm
1 gm of Alphaprodine =	100 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg
1 gm of a Fentanyl Analogue =	10 kg
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg
1 gm of Levorphanol =	2.5 kg
1 gm of Meperidine/Pethidine =	50 gm
1 gm of Methadone =	500 gm
1 gm of 6-Monoacetylmorphine =	1 kg
1 gm of Morphine =	500 gm
1 gm of Oxycodone (actual) =	6700 gm
1 gm of Oxymorphone =	5 kg
1 gm of Racemorphan =	800 gm
1 gm of Codeine =	80 gm
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm
1 gm of Ethylmorphine =	165 gm
1 gm of Hydrocodone (actual) =	6700 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm
1 gm of Opium =	50 gm
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine (PEPAP) =	700 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine (MPPP) =	700 gm
1 gm of 6-Monoacetylmorphine =	1 kg
1 gm of Alphaprodine =	100 gm
1 gm of Codeine =	80 gm
1 gm of Dextromoramide =	670 gm

1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm
1 gm of Dipipanone =	250 gm
1 gm of Ethylmorphine =	165 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg
1 gm of a Fentanyl Analogue =	10 kg
1 gm of Heroin =	1 kg
1 gm of Hydrocodone (actual) =	6,700 gm
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg
1 gm of Levorphanol =	2.5 kg
1 gm of Meperidine/Pethidine =	50 gm
1 gm of Methadone =	500 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm
1 gm of Morphine =	500 gm
1 gm of Opium =	50 gm
1 gm of Oxycodone (actual) =	6,700 gm
1 gm of Oxymorphone =	5 kg
1 gm of Racemorphan =	800 gm

*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

COCAINE AND OTHER SCHEDULE I AND II STIMULANTS (AND THEIR IMMEDIATE PRECURSORS)*	CONVERTED DRUG WEIGHT
1 gm of Cocaine =	200 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of Fenethylamine =	40 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (Actual) =	20 kg
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (Actual) =	20 kg
1 gm of "Ice" =	20 kg
1 gm of Khat =	.01 gm
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of Phenmetrazine =	80 gm
1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm Phenylacetone/P ₂ P (in any other case) =	75 gm
1 gm Cocaine Base ("Crack") =	3,571 gm
1 gm of Aminorex =	100 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of N-Benzylpiperazine =	100 gm
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm
1 gm of Aminorex =	100 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (actual) =	20 kg
1 gm of Cocaine =	200 gm
1 gm of Cocaine Base ("Crack") =	3,571 gm
1 gm of Fenethylamine =	40 gm
1 gm of "Ice" =	20 kg
1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (actual) =	20 kg
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of N-Benzylpiperazine =	100 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of Phenmetrazine =	80 gm
1 gm of Phenylacetone (P ₂ P) (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm of Phenylacetone (P ₂ P) (in any other case) =	75 gm

*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

SYNTHETIC CATHINONES (EXCEPT SCHEDULE III, IV, AND V SUBSTANCES)*	CONVERTED DRUG WEIGHT
1 gm of a synthetic cathinone (except a Schedule III, IV, or V substance) =	380 gm

**Provided, that the minimum offense level from the Drug Quantity Table for any synthetic cathinone (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.*

LSD, PCP, AND OTHER SCHEDULE I AND II HALLUCINOGENS (AND THEIR IMMEDIATE PRECURSORS)*	CONVERTED DRUG WEIGHT
1 gm of Bufotenine =	70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg
1 gm of Diethyltryptamine/DET =	80 gm
1 gm of Dimethyltryptamine/DM =	100 gm
1 gm of Mescaline =	10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm
1 gm of Peyote (Dry) =	0.5 gm
1 gm of Peyote (Wet) =	0.05 gm
1 gm of Phencyclidine/PCP =	1 kg
1 gm of Phencyclidine (actual)/PCP (actual) =	10 kg
1 gm of Psilocin =	500 gm
1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA =	500 gm
1 gm of Paramethoxymethamphetamine/PMA =	500 gm
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg
1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) =	680 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =	2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) =	500 gm
1 gm of Bufotenine =	70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide (LSD) =	100 kg
1 gm of Diethyltryptamine (DET) =	80 gm
1 gm of Dimethyltryptamine (DM) =	100 gm
1 gm of Mescaline =	10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (dry) =	1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (wet) =	0.1 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg
1 gm of Paramethoxymethamphetamine (PMA) =	500 gm
1 gm of Peyote (dry) =	0.5 gm
1 gm of Peyote (wet) =	0.05 gm
1 gm of Phencyclidine (PCP) =	1 kg
1 gm of Phencyclidine (PCP) (actual) =	10 kg
1 gm of Psilocin =	500 gm
1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine (PHP) =	1 kg
1 gm of Thiophene Analog of Phencyclidine (TCP) =	1 kg

*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

SCHEDULE I MARIHUANA	CONVERTED DRUG WEIGHT
1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm
1 gm of Hashish Oil =	50 gm
1 gm of Cannabis Resin or Hashish =	5 gm
1 gm of Hashish Oil =	50 gm
1 gm of Marihuana/Cannabis (granulated, powdered, etc.) =	1 gm
1 gm of Tetrahydrocannabinol, Organic (organic) =	167 gm
1 gm of Tetrahydrocannabinol, Synthetic (synthetic) =	167 gm

SYNTHETIC CANNABINOIDS (EXCEPT SCHEDULE III, IV, AND V SUBSTANCES)*	CONVERTED DRUG WEIGHT
1 gm of a synthetic cannabinoid (except a Schedule III, IV, or V substance) =	167 gm

*Provided, that the minimum offense level from the Drug Quantity Table for any synthetic cannabinoid (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.

“Synthetic cannabinoid,” for purposes of this guideline, means any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB₁ receptors).

FLUNITRAZEPAM **	CONVERTED DRUG WEIGHT
1 unit of Flunitrazepam =	16 gm

**Provided, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

SCHEDULE I OR II DEPRESSANTS (EXCEPT GAMMA-HYDROXYBUTYRIC ACID)	CONVERTED DRUG WEIGHT
1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) =	1 gm

GAMMA-HYDROXYBUTYRIC ACID	CONVERTED DRUG WEIGHT
1 ml of gamma-hydroxybutyric acid =	8.8 gm

SCHEDULE III SUBSTANCES (EXCEPT KETAMINE)***	CONVERTED DRUG WEIGHT
1 unit of a Schedule III Substance =	1 gm

***Provided, that the combined converted weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of converted drug weight.

KETAMINE	CONVERTED DRUG WEIGHT
1 unit of ketamine =	1 gm

SCHEDULE IV SUBSTANCES (EXCEPT F FLUNITRAZEPAM)*****	CONVERTED DRUG WEIGHT
1 unit of a Schedule IV Substance (except Flunitrazepam) =	0.0625 gm
***** <i>Provided</i> , that the combined converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of converted drug weight.	

SCHEDULE V SUBSTANCES*****	CONVERTED DRUG WEIGHT
1 unit of a Schedule V Substance =	0.00625 gm
***** <i>Provided</i> , that the combined converted weight of Schedule V substances shall not exceed 2.49 kilograms of converted drug weight.	

LIST I CHEMICALS (RELATING TO THE MANUFACTURE OF A AMPHETAMINE OR M METHAMPHETAMINE)*****	CONVERTED DRUG WEIGHT
1 gm of Ephedrine =	10 kg
1 gm of Phenylpropanolamine =	10 kg
1 gm of Pseudoephedrine =	10 kg
***** <i>Provided</i> , that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.	

DATE RAPE DRUGS (EXCEPT F FLUNITRAZEPAM, GHB, OR K KETAMINE)	CONVERTED DRUG WEIGHT
1 ml of 1,4- b Butanediol =	8.8 gm
1 ml of g Gamma b Butyrolactone =	8.8 gm

To facilitate conversions to converted drug weight, the following table is provided:

MEASUREMENT CONVERSION TABLE
1 oz = 28.35 gm
1 lb = 453.6 gm
1 lb = 0.4536 kg
1 gal = 3.785 liters
1 qt = 0.946 liters
1 gm = 1 ml (liquid)
1 liter = 1,000 ml
1 kg = 1,000 gm
1 gm = 1,000 mg
1 grain = 64.8 mg.

9. **Determining Quantity Based on Doses, Pills, or Capsules.**—If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 milligrams per dose = 50 grams of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

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

MARIHUANA	
1 marihuana cigarette	0.5 gm

STIMULANTS	
Amphetamine*	10 mg
Methamphetamine*	5 mg
Phenmetrazine (Preludin)*	75 mg

*For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

* * *

21. **Applicability of Subsection (b)(18).**—The applicability of subsection (b)(18) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section ~~§5C1.2(b)~~ **5C1.2(b)**, which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(18) applies.

* * *

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant’s criminal history, and whether death or serious bodily injury resulted from the offense.

* * *

Subsection (b)(14)(A) implements the instruction to the Commission in section 303 of Public Law ~~103104~~ **104**–237.

* * *

The Drug Conversion Tables set forth in Application Note 8 were previously called the Drug Equivalency Tables. In the original 1987 *Guidelines Manual*, the Drug Equivalency Tables provided four conversion factors (or “equivalents”) for determining the base offense level in cases involving either a controlled substance not referenced in the Drug Quantity Table or multiple controlled substances: heroin, cocaine, PCP, and marihuana. In 1991, the Commission amended the Drug Equivalency Tables to provide for one substance, marihuana, as the single conversion factor in §2D1.1. See USSG App. C, Amendment 396 (effective November 1, 1991). In 2018, the Commission amended §2D1.1 to replace marihuana as the conversion factor with the new term “converted drug weight” and to change the title of the Drug Equivalency Tables to the “Drug Conversion Tables.” See USSG App. C, Amendment 808 (effective November 1, 2018).

(C) References to 18 U.S.C. § 876

§2A4.2. Demanding or Receiving Ransom Money

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 876(a), 877, 1202. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A6.1. Threatening or Harassing Communications; Hoaxes; False Liens

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(c), 35(b), 871, 876(c), 877, 878(a), 879, 1038, 1521, 1992(a)(9), (a)(10), 2291(a)(8), 2291(e), 2292, 2332b(a)(2); 47 U.S.C. § 223(a)(1)(C)–(E); 49 U.S.C. § 46507. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2B3.2. Extortion by Force or Threat of Injury or Serious Damage

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 875(b), (d), 876(b), (d), 877, 1030(a)(7), 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

APPENDIX A

STATUTORY INDEX

	* * *
18 U.S.C. § 875(a)	2A4.2, 2B3.2
18 U.S.C. § 875(b)	2B3.2
18 U.S.C. § 875(c)	2A6.1
18 U.S.C. § 875(d)	2B3.2, 2B3.3
18 U.S.C. § 876	2A4.2, 2A6.1, 2B3.2, 2B3.3
18 U.S.C. § 876(a)	2A4.2, 2B3.2
18 U.S.C. § 876(b)	2B3.2
18 U.S.C. § 876(c)	2A6.1
18 U.S.C. § 876(d)	2B3.2, 2B3.3
18 U.S.C. § 877	2A4.2, 2A6.1, 2B3.2, 2B3.3
	* * *

(D) Clerical Changes

§1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

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Commentary

* * *

Background: Subsections (a) and (b)(1) provide that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the *ex post facto* clause in Article I, § 9 of the United States Constitution. Under 18 U.S.C. § 3553, the court is to apply the guidelines and policy statements in effect at the time of sentencing. However, the Supreme Court has held that the *ex post facto* clause applies to sentencing guideline amendments that subject the defendant to increased punishment. See *Peugh v. United States*, ~~133 S. Ct. 2072,~~ ~~2078~~ 569 U.S. 530, 533 (2013) (holding that “there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense”).

* * *

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

* * *

Commentary

* * *

Background: This section outlines the procedure to be used for determining the combined offense level. After any adjustments from Chapter ~~Three~~ **Three**, Part E (Acceptance of Responsibility) and Chapter ~~Four~~ **Four**, Part B (Career Offenders and Criminal Livelihood) are made, this combined offense level is used to determine the guideline sentence range. Chapter Five (Determining the Sentence) discusses how to determine the sentence from the (combined) offense level; §5G1.2 deals specifically with determining the sentence of imprisonment when convictions on multiple counts are involved. References in Chapter Five (Determining the Sentence) to the “offense level” should be treated as referring to the combined offense level after all subsequent adjustments have been made.

* * *

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment

* * *

Commentary

* * *

Background: Federal courts generally “have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings.” *See Setser v. United States*, ~~132 S. Ct. 1463~~, ~~1468~~ **566 U.S. 231, 236** (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. *See Setser*, ~~132 S. Ct. at 1468~~ **566 U.S. at 236**. Exercise of that discretion, however, is predicated on the court’s consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

* * *

EXHIBIT B

PROPOSED AMENDMENT: §1B1.10

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

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

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

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

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

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

18 U.S.C. § 3582(c)(2).

A provision of the Sentencing Reform Act, 28 U.S.C. § 994(u), in turn, directs the Commission to determine when and to what extent such modifications are appropriate. Section 994(a)(2)(C) of Title 28 also directs the Commission to promulgate “general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation . . . including the appropriate use of . . . the sentence modification provisions set forth in section . . . 3582(c) of title 18.”

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

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

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

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

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

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

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

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

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

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

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

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

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

Proposed Amendment:

**§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range
(Policy Statement)**

(a) AUTHORITY.—

- (1) IN GENERAL.—In a case in which a defendant is serving ~~was sentenced to~~ a term of imprisonment, ~~and the guideline range applicable to that defendant~~ based on a guideline range that has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by

18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

- (2) ~~EXCLUSIONS~~ **ELIGIBILITY**.—A defendant is eligible for a reduction in the defendant's term of imprisonment is not consistent with under 18 U.S.C. § 3582(c) and this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) only if—
- (A) the defendant was sentenced based on a guideline range;
 - (B) none of the amendments an amendment listed in subsection (d) is applicable to the defendant; ~~or and~~
 - (B)(C) an that amendment listed in subsection (d) does not have has the effect of lowering the defendant's applicable guideline range.
- (3) **LIMITATION**.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

[Option 1 (which also includes changes to commentary)

No Change for Above and Straddle Defendants/No Trumping at Resentencing:

- (b) **DETERMINATION OF REDUCTION IN TERM OF IMPRISONMENT**.—
- (1) **IN GENERAL**.—~~In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted,~~ To determine whether the defendant is eligible under subsection (a)(2)(C) and the extent of any permissible reduction in the defendant's term of imprisonment, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected, except as provided in subsection (c) below.
 - (2) **LIMITATION AND PROHIBITION ON EXTENT OF REDUCTION**.—
 - (A) **LIMITATION**.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is

less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) EXCEPTION FOR SUBSTANTIAL ASSISTANCE.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) PROHIBITION.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) CASES INVOLVING MANDATORY MINIMUM SENTENCES AND SUBSTANTIAL ASSISTANCE.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).]

**[Option 2 (which also includes changes to commentary)
Above and Straddle Defendants Subject to Trumping at Resentencing:**

(b) DETERMINATION OF REDUCTION IN TERM OF IMPRISONMENT.—

(1) IN GENERAL.—~~In determining whether, and to what extent, a reduction in the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted,~~ To determine whether the defendant is eligible under subsection (a)(2)(C) and the extent of any permissible reduction in the defendant’s term of imprisonment, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected, except as provided in subsection (c) below.

(2) LIMITATION AND PROHIBITION ON EXTENT OF REDUCTION.—

(A) LIMITATION.—Except as provided in subdivision (B), the court shall not reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) EXCEPTION FOR SUBSTANTIAL ASSISTANCE.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) PROHIBITION.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) CASES INVOLVING MANDATORY MINIMUM SENTENCES AND SUBSTANTIAL ASSISTANCE.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the after operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).]

[Option 3 (which also includes changes to commentary)

Straddle (But Not Above) Defendants Subject to Trumping at Resentencing:

(b) DETERMINATION OF REDUCTION IN TERM OF IMPRISONMENT.—

(1) IN GENERAL.—~~In determining whether, and to what extent, a reduction in the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted,~~ To determine whether the defendant is eligible under subsection (a)(2)(C) and the extent of any permissible reduction in the defendant’s term of imprisonment, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the

defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) LIMITATION AND PROHIBITION ON EXTENT OF REDUCTION.—

(A) LIMITATION.—Except as provided in subdivision (B), the court shall not reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) EXCEPTION FOR SUBSTANTIAL ASSISTANCE.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) PROHIBITION.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) CASES INVOLVING MANDATORY MINIMUM SENTENCES AND SUBSTANTIAL ASSISTANCE.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, then for purposes of this policy statement the ~~amended guideline range shall be determined without regard to the operation of~~ court shall not apply §5G1.1 (Sentencing on a Single Count of Conviction) and/or §5G1.2 (Sentencing on Multiple Counts of Conviction) to replace or restrict the amended guideline range unless §5G1.1 or §5G1.2 operated to restrict the guideline range at the time the defendant was sentenced.]

(d) COVERED AMENDMENTS.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).

(e) SPECIAL INSTRUCTION.—

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court’s order is November 1, 2015, or later.

Commentary

Application Notes:

1. Application of Subsection (a).—

- (A) **Eligibility.**—~~Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (i.e.,~~ Under 18 U.S.C. § 3582(c)(2), a defendant may obtain a reduction in his term of imprisonment only if the defendant was originally sentenced “based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” Subsection (a)(2)(A) therefore provides that a defendant is eligible for a reduction under the statute and this policy statement only if “the defendant was sentenced based on a guideline range.” For purposes of 18 U.S.C. § 3582(c)(2), a defendant was sentenced “**based on a guideline range**” only if that range played a relevant part in the framework that the sentencing court used in imposing the sentence. *See Hughes v. United States*, 138 S. Ct. 1765 (2018). Accordingly, a defendant is not sentenced “based on a guideline range” if, pursuant to §5G1.1(b), the guideline range that would otherwise have applied was superseded, and the statutorily required minimum sentence became the defendant’s guideline sentence. *See Koons v. United States*, 138 S. Ct. 1783 (2018). If a defendant is ineligible for a reduction under subsection (a)(2)(A), the court shall not apply any other provisions of this policy statement and may not order a reduction in the defendant’s term of imprisonment.

Subsection (a)(2)(C) further provides that a defendant is eligible for a reduction in his term of imprisonment only if an amendment listed in subsection (d) has the effect of lowering the defendant’s applicable guideline range. The “**applicable guideline range**” is the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, ~~a defendant is not eligible for a reduction in the defendant’s term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) if an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant’s applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment). To determine whether a defendant is eligible for a reduction under subsection (a)(2)(C), and the permissible amount of the reduction, if any, the court must first determine the defendant’s amended guideline range, as provided in subsection (b)(1).~~

(B) Factors for Consideration.—

- (i) **In General.**—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant’s term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).
- (ii) **Public Safety Consideration.**—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant’s term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).
- (iii) **Post-Sentencing Conduct.**—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining:

- (I) whether a reduction in the defendant’s term of imprisonment is warranted; and
- (II) the extent of such reduction, but only within the limits described in subsection (b).

[Option 1 (No Change for Above and Straddle Defendants/No Trumping at Resentencing) and Option 2 (Above and Straddle Defendants Subject to Trumping at Resentencing) would also include the following changes to Note 2:

2. **Application of Subsection (b)(1).**—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected, **except as provided in subsection (c).]**
3. **Application of Subsection (b)(2).**—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce **the an otherwise eligible** defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant’s term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant’s term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant’s term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant’s substantial assistance to authorities. In such a case, the court may reduce the defendant’s term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant’s substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

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

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

[Option 1 (No Change for Above and Straddle Defendants/No Trumping at Resentencing) continued:

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

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

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

- (B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. See §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant’s substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, §5G1.1 would operate to ~~restrict~~ **replace the amended guideline range with a guideline sentence of** the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. See §5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (*i.e.*, ~~unrestricted~~ **not replaced** by operation of §5G1.1 ~~and~~ **with** the statutory minimum of 120 months).

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

guideline range of 87 months) would amount to a comparable reduction and may be appropriate.]

[Option 2 (Above and Straddle Defendants Subject to Trumping at Resentencing) continued:

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

- (A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant’s substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. ~~Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.~~ **For purposes of this policy statement, the amended guideline range is considered to be 120 to 135 months (i.e., restricted by operation of §5G1.1(c)(2) to reflect the statutory minimum of 120 months).**

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A’s original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of ~~81~~**90** months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of ~~108~~**120** months) would amount to a comparable reduction and may be appropriate.

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

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

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

[Option 3 (Straddle (But Not Above) Defendants Subject to Trumping at Resentencing) continued:

4. **Application of Subsection (c).**—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, then for purposes of this policy statement ~~amended guideline range shall be determined without regard to the operation of the court shall not apply~~ §5G1.1 (Sentencing on a Single Count of Conviction) ~~and~~ §5G1.2 (Sentencing on Multiple Counts of Conviction) to replace or restrict the amended guideline range unless §5G1.1 or §5G1.2 operated to restrict the guideline range at the time the defendant was sentenced. For example:

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

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

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

court should apply §5G1.1 to the amended guideline range because §5G1.1 was applied when the defendant was originally sentenced.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. ~~Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.~~ However, subsection (b)(2)(B) precludes this defendant from receiving any further reduction, because the point from which any comparable reduction would be determined has not changed; the minimum of the original guideline range (120 months) and the minimum of the amended range (120 months) are the same, so any comparable reduction that may be appropriate under subsection (b)(2)(B) would be equivalent to the reduction Defendant B already received in the original sentence of 90 months.]

5. **Application to Amendment 750 (Parts A and C Only).**—As specified in subsection (d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in §2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables (currently called Drug Conversion Tables) in the Commentary to §2D1.1 (*see* §2D1.1, comment. (n.8)). Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.
6. **Application to Amendment 782.**—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

7. **Supervised Release.**—

- (A) **Exclusion Relating to Revocation.**—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.
- (B) **Modification Relating to Early Termination.**—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised

release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

8. **Use of Policy Statement in Effect on Date of Reduction.**—Consistent with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant’s term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: “[I]n 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.”

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: “If 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 Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. *See Dillon v. United States*, 560 U.S. 817 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were 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 subsection (b)(1).

The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: “It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines* or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases.” S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

*So in original. Probably should be “to fall above the amended guidelines”.

(B) Resolution of Circuit Conflict

Synopsis of Proposed Amendment: In addition to the issues raised by *Koons v. United States*, 138 S. Ct. 1783 (June 4, 2018), a circuit conflict has emerged regarding the application of §1B1.10(b)(2)(B). Section 1B1.10(b)(2)(A) instructs that, in acting on a motion under 18 U.S.C. § 3582(c)(2), a court cannot reduce a defendant’s term of imprisonment to a term that is less than the amended guideline minimum, as calculated under §1B1.10(b)(1). However, §1B1.10(b)(2)(B) provides an exception to this limitation: if the term of imprisonment originally imposed was less than the applicable guideline range at the time of sentencing “pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under [§1B1.10(b)(1)] may be appropriate.”

Circuit courts have disagreed about whether §1B1.10(b)(2)(B) allows a court to reduce a sentence below the amended guideline range to reflect departures other than substantial assistance that the defendant received at his original sentencing or whether any sentence reduction may reflect only the departure amount attributable to substantial assistance. The Sixth and Eleventh Circuits have held that a court may reduce a sentence below the amended guideline range by an amount attributable only to the substantial assistance departure. *See United States v. Taylor*, 815 F.3d 248 (6th Cir. 2016); *United States v. Marroquin-Medina*, 817 F.3d 1285 (11th Cir. 2016); *see also United States v. Wright*, 562 F. App’x 885 (11th Cir. 2014). The Seventh and Ninth Circuits have held that, if a defendant received a substantial assistance departure, a court may reduce the defendant’s sentence further below the amended guideline minimum to reflect other departures or variances the defendant received, in addition to the substantial assistance departure. *See United States v. Phelps*, 823 F.3d 1084 (7th Cir. 2016); *United States v. D.M.*, 869 F.3d 1133 (9th Cir. 2017).

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

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

Option 2 would adopt the approach of the Seventh and Ninth Circuits. It would revise Application Note 3 to state that in a case in which the exception provided by subsection (b)(2)(B) applies and the defendant received both a substantial assistance departure and at least one other departure or variance, a reduction “comparably less” than the amended guideline range may take into account all the departures and variances that the defendant received.

An issue for comment is also provided.

Proposed Amendment:

**§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range
(Policy Statement)**

* * *

(b) DETERMINATION OF REDUCTION IN TERM OF IMPRISONMENT.—

(1) IN GENERAL.—In determining whether, and to what extent, a reduction in the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) LIMITATION AND PROHIBITION ON EXTENT OF REDUCTION.—

(A) LIMITATION.—Except as provided in subdivision (B), the court shall not reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) EXCEPTION FOR SUBSTANTIAL ASSISTANCE.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

* * *

Commentary

Application Notes:

* * *

3. **Application of Subsection (b)(2).**—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant’s term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant’s term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant’s term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant’s substantial assistance to authorities. ~~In such a case, the court may reduce the defendant’s term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant’s substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.~~

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

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

[Option 1:

If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to one or more departures or variances in addition to a substantial assistance departure, the reduction under subsection (b)(2)(B) may take into account only the substantial assistance departure. Thus, if the term of imprisonment imposed in the example above was 56 months (representing a downward

departure of 20 percent below the minimum of the guideline range applicable to the defendant at the time of sentencing), and that departure was solely pursuant to a government motion to reflect the defendant's substantial assistance, then a reduction of approximately 20 percent below the minimum of the amended guideline range, to a term of imprisonment of 41 months, would be a comparable reduction and may be appropriate. If, however, the 56-month term of imprisonment reflected both a departure of 10 percent below the minimum of the applicable guideline range pursuant to a substantial-assistance motion and a variance of an additional 10 percent below the applicable range because of the history and characteristics of the defendant, then only a reduction of approximately 10 percent (representing solely the departure for substantial assistance), to a term of imprisonment of 46 months, would be a comparable reduction and may be appropriate.]

[Option 2:

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

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

* * *

Issue for Comment:

1. Option 2 of Part B of the proposed amendment would revise Application Note 3 of the Commentary to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) to state that where the exception provided by §1B1.10(b)(2)(B) applies and the defendant received both a substantial assistance departure and at least one other departure or variance, a reduction "comparably less" than the defendant's amended guideline range may take into account not only the substantial assistance departure but also any other departure or variance that the defendant received. If the Commission adopts this approach, should the Commission limit the departures and variances that may be considered? For example, should the Commission provide that a comparable reduction may take into account only departures and not variances? Should the Commission provide that a comparable reduction may take into account only certain, specified types of departures or variances? If so, which ones? Or should the Commission provide that a comparable reduction generally may take into account departures and variances other than substantial assistance, but one or more particular types of departures or variances may not be considered? If so, which ones?

EXHIBIT C

PROPOSED AMENDMENT:

MISCELLANEOUS

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

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

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

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

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

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

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

(A) FDA Reauthorization Act of 2017

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

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

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

21 U.S.C. § 333(b)(8). Section 331(i)(3) prohibits any action which causes a drug to be a counterfeit drug, or the sale or dispensing, or the holding for sale or dispensing, of a counterfeit drug.

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

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

An issue for comment is also provided.

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

* * *

21 U.S.C. § 333(b)(1)-(6)	2N2.1
21 U.S.C. § 333(b)(7)	2N1.1
21 U.S.C. § 333(b)(8)	2N2.1

§2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristic
 - (1) If the defendant was convicted under 21 U.S.C. § 331 after sustaining a prior conviction under 21 U.S.C. § 331, increase by 4 levels.
- (c) Cross References
 - (1) If the offense involved fraud, apply §2B1.1 (Theft, Property Destruction, and Fraud).
 - (2) If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 7 U.S.C. §§ 150bb, 150gg, 6810, 7734, 8313; 21 U.S.C. §§ 115, 117, 122, 134–134e, 151–158, 331, 333(a)(1), (a)(2), (b)(1)-(6), (b)(8), 458–461, 463, 466, 610, 611, 614, 617, 619, 620, 642–644, 676; 42 U.S.C. § 262. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

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).
2. The cross reference at subsection (c)(1) addresses cases in which the offense involved fraud. The cross reference at subsection (c)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (*e.g.*, bribery).
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.

4. The Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving human growth hormones). Offenses involving anabolic steroids are covered by Chapter Two, Part D (Offenses Involving Drugs and Narco-Terrorism). In the case of an offense involving a substance purported to be an anabolic steroid, but not containing any active ingredient, apply §2B1.1 (Theft, Property Destruction, and Fraud) with “loss” measured by the amount paid, or to be paid, by the victim for such substance.

* * *

§2N1.1. Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury

* * *

Commentary

Statutory Provisions: 18 U.S.C. § 1365(a), (e); 21 U.S.C. § 333(b)(7). For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

Issue for Comment:

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

(B) FAA Reauthorization Act of 2018

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

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

The second new criminal offense, codified at 18 U.S.C. § 40A (Operation of unauthorized unmanned aircraft over wildfires), generally prohibits any individual from operating an unmanned aircraft and knowingly or recklessly interfering with a wildfire suppression or with law enforcement or emergency response efforts related to a wildfire suppression. A violation of this offense is punishable by a fine, imprisonment for not more than two years, or both.

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

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

In addition, Part B would amend Appendix A to reference 18 U.S.C. § 40A to §2A2.4 (Obstructing or Impeding Officers). Part B would also make conforming changes to the Commentary to §2A2.4.

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

An issue for comment is also provided.

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

* * *

18 U.S.C. § 39A	2A5.2
18 U.S.C. § 39B	2A5.2, 2X5.2
18 U.S.C. § 40A	2A2.4
18 U.S.C. § 43	2B1.1

* * *

§2A5.2. Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle; Unsafe Operation of Unmanned Aircraft

- (a) Base Offense Level (Apply the greatest):
- (1) **30**, if the offense involved intentionally endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility or a mass transportation vehicle;
 - (2) **18**, if the offense involved recklessly endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility or a mass transportation vehicle;

- (3) if an assault occurred, the offense level from the most analogous assault guideline, §§2A2.1–2A2.4; or
- (4) **9**.

(b) Specific Offense Characteristic

- (1) If (A) subsection (a)(1) or (a)(2) applies; and (B)(i) a firearm was discharged, increase by **5** levels; (ii) a dangerous weapon was otherwise used, increase by **4** levels; or (iii) a dangerous weapon was brandished or its use was threatened, increase by **3** levels. If the resulting offense level is less than level **24**, increase to level **24**.

(c) Cross References

- (1) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.
- (2) If the offense involved possession of, or a threat to use (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ **39B**, 1992(a)(1), (a)(4), (a)(5), (a)(6); 49 U.S.C. §§ 46308, 46503, 46504 (formerly 49 U.S.C. § 1472(c), (j)). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

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

“Biological agent”, *“chemical weapon”*, *“nuclear byproduct material”*, *“nuclear material”*, *“toxin”*, and *“weapon of mass destruction”* have the meaning given those terms in Application Note 1 of the Commentary to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).

“Brandished”, *“dangerous weapon”*, *“firearm”*, and *“otherwise used”* have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

“Mass transportation” has the meaning given that term in 18 U.S.C. § 1992(d)(7).

* * *

§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

(a) Base Offense Level: **6**

Commentary

Statutory Provisions: 18 U.S.C. §§ 39B, 1365(f), 1801; 34 U.S.C. § 12593; 49 U.S.C. § 31310. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. **In General.**—This guideline applies to Class A misdemeanor offenses that are specifically referenced in Appendix A (Statutory Index) to this guideline. This guideline also applies to Class A misdemeanor offenses that have not been referenced in Appendix A. Do not apply this guideline to a Class A misdemeanor that has been specifically referenced in Appendix A to another Chapter Two guideline.

* * *

§2A2.4. Obstructing or Impeding Officers

(a) Base Offense Level: **10**

(b) Specific Offense Characteristics

- (1) If (A) the offense involved physical contact; or (B) a dangerous weapon (including a firearm) was possessed and its use was threatened, increase by **3** levels.
- (2) If the victim sustained bodily injury, increase by **2** levels.

(c) Cross Reference

- (1) If the conduct constituted aggravated assault, apply §2A2.2 (Aggravated Assault).

Commentary

Statutory Provisions: 18 U.S.C. §§ 40A, 111, 1501, 1502, 2237(a)(1), (a)(2)(A), 3056(d). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline, “*bodily injury*”, “*dangerous weapon*”, and “*firearm*” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. **Application of Certain Chapter Three Adjustments.**—The base offense level incorporates the fact that the victim was a governmental officer performing official duties. Therefore, do not apply §3A1.2 (Official Victim) unless, pursuant to subsection (c), the offense level is determined under §2A2.2 (Aggravated Assault). Conversely, the base offense level does not incorporate the possibility that the defendant may create a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement official (although an offense under 18 U.S.C. § 758 for fleeing or evading a law enforcement checkpoint at high speed will often, but not always, involve the creation of that risk). If the defendant creates that risk and no higher guideline adjustment is applicable for the conduct creating the risk, apply §3C1.2 (Reckless Endangerment During Flight).
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).

* * *

Issue for Comment:

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

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

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

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

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

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

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

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

If the offense involved a minor, §2G1.3 would be the applicable guideline. For a defendant convicted under 18 U.S.C. § 2421A, subsection (a)(4) would apply, and the defendant’s base offense level would be level 24. Part C would amend §2G1.3(b)(4) to renumber the existing specific offense characteristic as §2G1.3(b)(4)(A) and to add a new §2G1.3(b)(4)(B), which provides for a [4]-level increase in the defendant’s offense level if (i) subsection (a)(4)

applies; and (ii) [the offense of conviction is][the offense involved conduct described in] 18 U.S.C. § 2421A(b)(2). Only the greater of §2G1.3(b)(4)(A) or §2G1.3(b)(4)(B) would apply.

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

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

Issues for comment are also provided.

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

		* * *
18 U.S.C. § 2421	2G1.1, 2G1.3	
18 U.S.C. § 2421A	2G1.1, 2G1.3	
18 U.S.C. § 2422	2G1.1, 2G1.3	
		* * *

§2G1.1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor

(a) Base Offense Level:

- (1) **34**, if the offense of conviction is 18 U.S.C. § 1591(b)(1); or
- (2) **14**, otherwise.

(b) Specific Offense Characteristic

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

(c) Cross Reference

- (1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(d) Special Instruction

- (1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a victim other than a minor); 18 U.S.C. §§ 1591 (only if the offense involved a victim other than a minor), 2421 (only if the offense involved a victim other than a minor), 2421A (only if the offense involved a victim other than a minor), 2422(a) (only if the offense involved a victim other than a minor). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

“**Commercial sex act**” has the meaning given that term in 18 U.S.C. § 1591(e)(3).

“**Prohibited sexual conduct**” has the meaning given that term in Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

“**Promoting a commercial sex act**” means persuading, inducing, enticing, or coercing a person to engage in a commercial sex act, or to travel to engage in, a commercial sex act.

“**Victim**” means a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, whether or not the person consented to the commercial sex act or prohibited sexual conduct. Accordingly, “victim” may include an undercover law enforcement officer.

2. **Application of Subsection (b)(1).**—Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures). For purposes of subsection (b)(1), “**coercion**” includes any form of conduct that negates the voluntariness of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken.

3. **Application of Chapter Three Adjustment.**—For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.
4. **Application of Subsection (c)(1).**—
 - (A) **Conduct Described in 18 U.S.C. § 2241(a) or (b).**—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.
 - (B) **Conduct Described in 18 U.S.C. § 2242.**—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2242 is: (i) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (ii) engaging in, or causing another person to engage in, a sexual act with a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.
5. **Special Instruction at Subsection (d)(1).**—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.
6. **Upward Departure Provision.**—If the offense involved more than ten victims, an upward departure may be warranted.

* * *

§2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

(a) Base Offense Level:

- (1) 34, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);

- (2) **30**, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);
- (3) **28**, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or
- (4) **24**, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.
- (2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by **2** levels.
- (3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by **2** levels.
- (4) **(Apply the greater):**
 - (A)** If **(Ai)** the offense involved the commission of a sex act or sexual contact; or **(Bii)** subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by **2** levels.
 - (B)** If (i) subsection (a)(4) applies; and (ii) [the offense of conviction is][the offense involved conduct described in] 18 U.S.C. § 2421A(b)(2), increase by **[4]** levels.
- (5) If (A) subsection (a)(3) or (a)(4) applies; and (B) the offense involved a minor who had not attained the age of 12 years, increase by **8** levels.

(c) Cross References

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for

Minors to Engage in Production), if the resulting offense level is greater than that determined above.

- (2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.
- (3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the “consent” of the minor.

(d) Special Instruction

- (1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a minor); 18 U.S.C. §§ 1591 (only if the offense involved a minor), 2421 (only if the offense involved a minor), 2421A (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2423, 2425. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

“**Commercial sex act**” has the meaning given that term in 18 U.S.C. § 1591(e)(3).

“**Computer**” has the meaning given that term in 18 U.S.C. § 1030(e)(1).

“**Illicit sexual conduct**” has the meaning given that term in 18 U.S.C. § 2423(f).

“**Interactive computer service**” has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

“**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.

“**Participant**” has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

“**Prohibited sexual conduct**” has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

“**Sexual act**” has the meaning given that term in 18 U.S.C. § 2246(2).

“**Sexual contact**” has the meaning given that term in 18 U.S.C. § 2246(3).

2. **Application of Subsection (b)(1).—**

(A) **Custody, Care, or Supervisory Control.**—Subsection (b)(1) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) **Inapplicability of Chapter Three Adjustment.**—If the enhancement under subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. **Application of Subsection (b)(2).—**

(A) **Misrepresentation of Participant’s Identity.**—The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant’s identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(2)(A) may apply includes misrepresentation of a participant’s name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) **Undue Influence.**—In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant’s influence over the minor compromised the voluntariness of the minor’s behavior. The voluntariness of the minor’s behavior may be compromised without prohibited sexual conduct occurring.

However, subsection (b)(2)(B) does not apply in a case in which the only “minor” (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption that subsection (b)(2)(B) applies. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

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

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

56. **Application of Subsection (c).**—

- (A) **Application of Subsection (c)(1).**—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice, advertisement or other method, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), “*sexually explicit conduct*” has the meaning given that term in 18 U.S.C. § 2256(2).

- (B) **Application of Subsection (c)(3).**—For purposes of subsection (c)(3), conduct described in 18 U.S.C. § 2241 means conduct described in 18 U.S.C. § 2241(a), (b), or (c). Accordingly, for purposes of subsection (c)(3):

- (i) Conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person: (I) using force against the minor; (II) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (III) rendering the minor unconscious; or (IV) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.
- (ii) Conduct described in 18 U.S.C. § 2241(c) is: (I) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12 years; (II) knowingly engaging in a sexual act with a minor who has not attained the age of 12 years; or (III) knowingly engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) and (b) with a minor who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging).
- (iii) Conduct described in 18 U.S.C. § 2242 is: (I) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the minor in fear (other than by threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (II) engaging in, or causing another person to engage in, a sexual act with a minor who is incapable of appraising

the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

- 67. Special Instruction at Subsection (d)(1).**—For the purposes of Chapter Three, Part D (Multiple Counts), each minor transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate minor. Consequently, multiple counts involving more than one minor are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one minor, whether specifically cited in the count of conviction, each such minor shall be treated as if contained in a separate count of conviction.
- 78. Upward Departure Provision.**—If the offense involved more than ten victims, an upward departure may be warranted.

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Issues for Comment:

1. Part C of the proposed amendment would reference newly-enacted 18 U.S.C. § 2421A to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), and would make various revisions to those guidelines to account for the new statute's offense conduct. The Commission seeks comment on whether the proposed revisions are appropriate and on whether the Commission should make other changes to the guidelines to account for section 2421A's offense conduct.

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

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

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

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

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

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

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

Section 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) is included in the list of guidelines for which the covered offenses are excluded from grouping under §3D1.2(d). Section 2G1.3 is, however, not included on that list, even though several offenses that are referenced to §2G1.3 when the offense involves a minor are referenced to §2G1.1 when the offense involves an individual other than a minor. In addition, several offenses that were referenced to §2G1.1 before §2G1.3 was promulgated are now referenced to §2G1.3. *See* USSG App. C, Amendment 664 (effective Nov. 1, 2004). Furthermore, Application Note 6 of the Commentary to §2G1.3 states that multiple counts under §2G1.3 are not to be grouped.

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

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

Proposed Amendment:

§3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

- (a) When counts involve the same victim and the same act or transaction.
- (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
- (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
- (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;
§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.8;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2G2.2, 2G3.1;
§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;

§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, 2G1.3, 2G2.1;
§§2H1.1, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3;
§2X6.1.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

* * *

(E) Policy Statement on Shock Incarceration Programs

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

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

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

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

Proposed Amendment:

§5F1.7. Shock Incarceration Program (Policy Statement)

The court, pursuant to 18 U.S.C. §§ 3582(a) and 3621(b)(4), may recommend that a defendant who meets the criteria set forth in 18 U.S.C. § 4046 participate in a shock incarceration program.

Commentary

Background: Section 4046 of title 18, United States Code, provides—

- “(a) the Bureau of Prisons may place in a shock incarceration program any person who is sentenced to a term of more than 12, but not more than 30 months, if such person consents to that placement.
- (b) For such initial portion of the term of imprisonment as the Bureau of Prisons may determine, not to exceed ~~six~~6 months, an inmate in the shock incarceration program shall be required to—
 - (1) adhere to a highly regimented schedule that provides the strict discipline, physical training, hard labor, drill, and ceremony characteristic of military basic training; and

- (2) participate in appropriate job training and educational programs (including literacy programs) and drug, alcohol, and other counseling programs.

- (c) An inmate who in the judgment of the Director of the Bureau of Prisons has successfully completed the required period of shock incarceration shall remain in the custody of the Bureau for such period (not to exceed the remainder of the prison term otherwise required by law to be served by that inmate), and under such conditions, as the Bureau deems appropriate.” 18 U.S.C. § 4046.”

In 1990, the Bureau of Prisons (“BOP”) has issued an operations memorandum (174-90 (5390), November 20, 1990) that outlines eligibility criteria and procedures for the implementation of this shock incarceration program (which the Bureau of Prisons has titled the “intensive confinement program”). Under these procedures, the Bureau will not place a defendant in an intensive confinement program unless the sentencing court has approved, either at the time of sentencing or upon consultation after the Bureau has determined that the defendant is otherwise eligible. In return for the successful completion of the “intensive confinement” portion of the program, the defendant is eligible to serve the remainder of his term of imprisonment in a graduated release program comprised of community corrections center and home confinement phases. In 2008, however, BOP terminated the program and removed the rules governing its operation. See 73 Fed. Reg. 39863 (July 11, 2008).

* * *

EXHIBIT D

PROPOSED AMENDMENT: CAREER OFFENDER

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of possible amendments to §4B1.2 (Definitions of Terms Used in Section 4B1.1) to (A) allow courts to consider the actual conduct of the defendant, rather than only the elements of the offense (*i.e.*, "categorical approach"), in determining whether an offense is a crime of violence or a controlled substance offense; and (B) address various application issues, including the meaning of "robbery" and "extortion," and the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance. See U.S. Sentencing Comm'n, "Notice of Final Priorities," 83 FR 43956 (Aug. 28, 2018). The proposed amendment contains four parts (Parts A through D). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

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

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

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

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

(A) Categorical Approach

Synopsis of Proposed Amendment: A number of statutes and guidelines provide enhanced penalties for defendants convicted of offenses that fit within a particular category of crimes. Courts typically determine whether a conviction fits within a particular category of crimes through the application of the “categorical approach” set forth by the Supreme Court. The Supreme Court cases adopting and applying the categorical approach have involved statutory provisions (*e.g.*, 18 U.S.C. § 924(e)) rather than guidelines. However, courts have applied the categorical approach to guideline provisions, even though the guidelines do not expressly require such an analysis. Specifically, courts have used the categorical approach to determine if a conviction is a “crime of violence” or a “controlled substance offense” for purposes of applying the career offender guideline at §4B1.1 (Career Offender). This form of analysis limits the range of information a sentencing court may consider in making such determination to the statute under which the defendant sustained the conviction (and, in certain cases, judicial documents surrounding that conviction).

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

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

More recent cases make clear that a court may use the modified categorical approach described in *Shepard* only when the statute that the defendant was convicted of violating is “divisible.” The Supreme Court held in *Descamps v. United States*, 570 U.S. 254 (2013), that a statute is “divisible” only when it contains multiple crimes defined by multiple alternative elements. If the statute is not divisible (*i.e.*, it describes a single crime defined by a single set of elements, even if it may also list alternative means of satisfying one or more elements), then the modified categorical approach is not permitted. When a statute is divisible, and the modified categorical approach is applied, only the documents approved in *Taylor* and *Shepard* may be used to determine which of the alternative specified ways of committing the offense formed the basis of conviction. The modified categorical approach acts in such cases not as an exception to the categorical approach, but as a tool of that approach, while retaining its central feature: “a focus on the elements, rather than the facts of a crime.” *Id.* at 263. Consequently, courts cannot use the documents to investigate the underlying conduct of the prior offense.

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

The Commission has received significant comment over the years regarding the categorical approach, most of which has been negative. Courts and stakeholders have criticized the categorical approach as being an overly complex, time consuming, resource-intensive analysis that often leads to litigation and uncertainty. Commenters have also indicated that the categorical approach creates serious and unjust inconsistencies that make the guidelines more cumbersome, complex, and less effective at addressing dangerous repeat offenders. As a result, commenters argue, some federal and state offenses that would otherwise qualify as a “crime of violence” or a “controlled substance offense” no longer qualify as such in several federal circuits.

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

In addition, Part A would allow courts to look at a wider range of sources from the judicial record, beyond the statute of conviction, in determining the conduct that formed the basis of the offense of conviction. Specifically, it would permit courts to look to the types of sources identified in *Taylor* and *Shepard*: (1) the charging document; (2) the jury instructions, in a

case tried to a jury; the judge’s formal rulings of law or findings of fact, in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the plea was confirmed by the defendant; (3) any explicit factual finding by the trial judge to which the defendant assented; and (4) any comparable judicial record of the information described above.

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

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

Issues for comment are also provided.

Proposed Amendment:

§4B1.2. Definitions of Terms Used in Section 4B1.1

- (a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
 - (1) has as an element **or alternative means for meeting an element** the use, attempted use, or threatened use of physical force against the person of another, or
 - (2) **is constituted** murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).
- (b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that **prohibits** **has as an element or alternative means for meeting an element**

the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

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

Commentary

Application Notes:

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

“**Crime of violence**” and “**controlled substance offense**” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

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

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

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

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

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

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

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

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

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

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

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

- (i) The charging document.
- (ii) The jury instructions, in a case tried to a jury; the judge’s formal rulings of law or findings of fact, in a case tried to a judge alone; or, in a case resolved by a guilty plea, the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.
- (iii) Any explicit factual finding by the trial judge to which the defendant assented.
- (iv) Any comparable judicial record of the information described in subparagraphs (i) through (iii).

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

3. **Applicability of §4A1.2.**—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.
4. **Upward Departure for Burglary Involving Violence.**—There may be cases in which a burglary involves violence, but does not qualify as a “crime of violence” as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a “crime of violence.” In such a case, an upward departure may be appropriate.

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

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§2L1.2. Unlawfully Entering or Remaining in the United States

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Commentary

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Application Notes:

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2. **Definitions.**—For purposes of this guideline:

“**Crime of violence**” means ~~any of the following offenses~~ an offense under federal, state, or local law: ~~that constituted~~ murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c); or any other offense under federal, state, or local law that has as an element ~~or alternative means for meeting an element~~ the use, attempted use, or threatened use of physical force against the person of another. “Forcible sex offense” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. “Extortion” is

obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

“Drug trafficking offense” means an offense under federal, state, or local law that prohibits as an element or alternative means for meeting an element the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

* * *

5. **Cases in Which the Criminal Conduct Underlying a Prior Conviction Occurred Both Before and After the Defendant Was First Ordered Deported or Ordered Removed.**—There may be cases in which the criminal conduct underlying a prior conviction occurred both before and after the defendant was ordered deported or ordered removed from the United States for the first time. For purposes of subsections (b)(2) and (b)(3), count such a conviction only under subsection (b)(2).

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

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

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

(i) The charging document.

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

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

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

(C) **Definitions of Enumerated Offenses.**—In determining whether the conduct that formed the basis of the conviction constituted one of the enumerated offenses in the definition of “crime of violence,” use the definition of the enumerated offense provided. If no definition is provided, use the contemporary, generic definition of the enumerated offense.

67. **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.

- 78. 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.

- 89. 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.

* * *

**§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials;
Prohibited Transactions Involving Explosive Materials**

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

- (1) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (2) **20**, if the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;
- (3) **18**, if the defendant was convicted under 18 U.S.C. § 842(p)(2);
- (4) **16**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) knowingly distributed explosive materials to a prohibited person; or
- (5) **12**, otherwise.

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Commentary

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Application Notes:

* * *

2. For purposes of this guideline:

“Controlled substance offense” has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1) means a “controlled substance offense” as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1).

“Crime of violence” has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2 means a “crime of violence” as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1).

* * *

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

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

- (1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

- (2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;
- (4) **20**, if—
 - (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or
 - (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) 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;
- (5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);
- (6) **14**, 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); 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;
- (7) **12**, except as provided below; or
- (8) **6**, if the defendant is convicted under 18 U.S.C. § 922(e), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

* * *

(b) Specific Offense Characteristics

* * *

- (5) If the defendant engaged in the trafficking of firearms, increase by 4 levels.

* * *

Commentary

* * *

Application Notes:

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

“**Ammunition**” has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).

“**Controlled substance offense**” ~~has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1)~~ means a “controlled substance offense” as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1).

“**Crime of violence**” ~~has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2~~ means a “crime of violence” as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1).

* * *

13. **Application of Subsection (b)(5).**—

(A) **In General.**—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—

- (i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and
- (ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—
 - (I) whose possession or receipt of the firearm would be unlawful; or
 - (II) who intended to use or dispose of the firearm unlawfully.

(B) **Definitions.**—For purposes of this subsection:

“**Individual whose possession or receipt of the firearm would be unlawful**” means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. “Crime of violence” and “controlled substance

offense” ~~have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1)~~ mean a “crime of violence” and a “controlled substance offense” as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1). “Misdemeanor crime of domestic violence” has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

* * *

§2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

* * *

(b) Specific Offense Characteristics

- (1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, or the sexual exploitation of a minor, increase by **6** levels.

* * *

Commentary

* * *

Application Notes:

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

“Crime of violence” ~~has the meaning given that term in subsection (a)(1) of §4B1.2 (Definitions of Terms Used in Section 4B1.1)~~ means a “crime of violence” as defined in subsection (a)(1) of §4B1.2 (Definitions of Terms Used in Section 4B1.1), regardless of whether such offense resulted in a conviction.

* * *

§4A1.1. Criminal History Category

* * *

- (e) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.

* * *

Commentary

* * *

Application Notes:

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5. **§4A1.1(e).** In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (*see* §4A1.2(a)(2)), one point is added under §4A1.1(e) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(e). For purposes of this guideline, “*crime of violence*” ~~has the meaning given that term in §4B1.2(a)~~ means a “crime of violence” as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* §4A1.2(p).

* * *

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

* * *

(p) CRIME OF VIOLENCE DEFINED

For the purposes of §4A1.1(e), ~~the definition of “crime of violence” is that set forth in §4B1.2(a)~~ means a “crime of violence” as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1).

* * *

§4B1.4. Armed Career Criminal

- (a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.
- (b) The offense level for an armed career criminal is the greatest of:
- (1) the offense level applicable from Chapters Two and Three; or
 - (2) the offense level from §4B1.1 (Career Offender) if applicable; or
 - (3) (A) **34**, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in §4B1.2(a) (regardless of whether such offense resulted in a conviction), or a controlled substance offense, as defined in §4B1.2(b) (regardless of whether such offense resulted in a conviction), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(B) **33**, otherwise.*

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

- (c) The criminal history category for an armed career criminal is the greatest of:
- (1) the criminal history category from Chapter Four, Part A (Criminal History), or §4B1.1 (Career Offender) if applicable; or
 - (2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in §4B1.2(a) (regardless of whether such offense resulted in a conviction), or a controlled substance offense, as defined in §4B1.2(b) (regardless of whether such offense resulted in a conviction), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or
 - (3) Category IV.

* * *

§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) mean a “crime of violence” and a “controlled substance offense” as defined in subsections (a) and (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1), regardless of whether such offense resulted in a conviction.

* * *

§7B1.1. Classification of Violations (Policy Statement)

(a) There are three grades of probation and 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;

* * *

Commentary

Application Notes:

* * *

2. ~~“Crime of violence” is defined in~~ means a “crime of violence” as defined in subsection (a) of §4B1.2 (Definitions of Terms Used in Section 4B1.1), regardless of whether such conduct resulted in a conviction. ~~See §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.~~
3. ~~“Controlled substance offense” is defined in~~ means a “controlled substance offense” as defined in subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1), regardless of whether such conduct resulted in a conviction. ~~See §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2.~~

* * *

Issues for Comment:

1. Part A of the proposed amendment would amend §4B1.2 (Definitions of Terms Used in Section 4B1.1) to provide that the “categorical approach” and “modified categorical approach,” as set forth in Supreme Court jurisprudence for certain statutory provisions, do not apply in determining whether a conviction is a “crime of violence” or a “controlled substance offense” for purposes of the guidelines. As indicated above, courts have applied the categorical approach and the modified categorical approach to guideline provisions, even though the guidelines do not expressly require such an analysis. The Commission invites comment on whether Part A of the proposed amendment is consistent with the Commission’s authority under 28 U.S.C. § 994(a)–(f), (h).
2. Part A of the proposed amendment would allow courts to look to the documents expressly approved in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v.*

United States, 544 U.S. 13 (2005), in determining the conduct that formed the basis of the offense of conviction.

The Commission seeks comment on whether additional or different guidance should be provided. If so, what additional or different guidance should the Commission provide? For example, should the Commission provide a specific set of factors to assess the reliability of a source of information, such as whether the document came out of the adversarial process, was accepted by both parties, or was made by an impartial third party? If so, what factors should the Commission provide? Should the Commission list specific sources or types of sources that courts may consider, in addition to the sources expressly approved in *Taylor* and *Shepard* (*i.e.*, the *Shepard* documents)? If so, what documents or types of information should be included in this list? Are there any documents or types of information that should be expressly excluded? If so, what documents or types of information should be excluded? Should the Commission broaden the range of sources courts may look at, in addition to the *Shepard* documents, by providing that courts may also consider any uncontradicted, internally consistent parts of the judicial record from the prior conviction?

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

(B) Meaning of “Robbery”

Synopsis of Proposed Amendment: In 2016, the Commission amended §4B1.2 (Definitions of Terms Used in Section 4B1.1) to, among other things, delete the “residual clause” and revise the “enumerated offenses clause” by moving enumerated offenses that were previously listed in the commentary to the guideline itself. *See* USSG, App. C, Amendment 798 (effective Aug. 1, 2016). The “enumerated offenses clause” identifies specific offenses that qualify as crimes of violence. Although the guideline relies on existing case law for purposes of defining most enumerated offenses, the amendment added to the Commentary to §4B1.2 definitions for two of the enumerated offenses: “forcible sex offense” and “extortion.”

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

In its annual letter to the Commission, the Department of Justice expressed concern that courts have held that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a “crime of violence” under the guideline as amended in 2016 because the statute of conviction does not fit either the generic definition of “robbery” or the new guideline definition of “extortion.” *See* Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf>. The Hobbs Act defines the term “robbery” as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person *or property*” 18 U.S.C. §1951(b)(1) (emphasis added). At least two circuits — the Ninth and Tenth Circuits — have found ambiguity as to whether the guideline definition of extortion includes injury to property, and (under the rule of lenity) both circuits have interpreted the new definition as excluding prior convictions where the statute encompasses injury to property offenses, such as Hobbs Act robbery. *See, e.g., United States v. O’Connor*, 874 F.3d 1147 (10th Cir. 2017) (Hobbs Act robbery); *United States v. Edling*, 895 F.3d 1153 (9th Cir. 2018) (Nevada robbery).

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

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

Option 2 would amend the Commentary to §4B1.2 to add a definition of “robbery” for purposes of the career offender guideline. The definition would mirror the “robbery” definition at 18 U.S.C. § 1951(b)(1). Specifically, it would provide that “robbery” is “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.” Option 2 also brackets a provision defining the phrase “actual or threatened force,” for purposes of the “robbery” definition, as “minimal force that is sufficient to compel a person to part with personal property.”

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

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

Issues for comment are also provided.

Proposed Amendment:

§4B1.2. Definitions of Terms Used in Section 4B1.1

- (a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

[Option 1:

- (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery (as described in 18 U.S.C. § 1951(b)(1)), arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).]

* * *

Commentary

Application Notes:

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

“*Crime of violence*” and “*controlled substance offense*” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

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

[Option 2:

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

[Option 3:

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

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

* * *

§2L1.2. Unlawfully Entering or Remaining in the United States

* * *

Commentary

* * *

Application Notes:

* * *

2. **Definitions.**—For purposes of this guideline:

[Option 1:

“*Crime of violence*” means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery (as described in 18 U.S.C. § 1951(b)(1)), arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. “Forcible sex offense” includes where consent to the conduct is not given or is not legally valid, such as where

consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. “Extortion” is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.]

[Option 2:

“*Crime of violence*” means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. “Forcible sex offense” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. “Robbery” is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. [The phrase “actual or threatened force” refers to minimal force that is sufficient to compel a person to part with personal property.] “Extortion” is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.]

[Option 3:

“*Crime of violence*” means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. “Forcible sex offense” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. “Robbery” is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. [The phrase “actual or threatened force” refers to force that is sufficient to overcome a person’s physical resistance or physical power of resistance.] “Extortion” is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.]

* * *

Issues for Comment:

1. Options 1, 2, and 3 in Part B of the proposed amendment would have “robbery,” as listed in subsection (a)(2) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) and §2L1.2 (Unlawfully Entering or Remaining in the United States), either reference or mirror the Hobbs Act definition of “robbery” at 18 U.S.C. § 1951(b)(1). The Commission seeks comment generally on whether the proposed definition of “robbery” is appropriate. Are there robbery offenses that are covered by the proposed definition but should not be? Are there robbery offenses that are not covered by the proposed definition but should be?
2. The Hobbs Act definition of “robbery” at 18 U.S.C. § 1951(b)(1) includes the phrase “actual or threatened force” as part of the elements of the offense. The Commission seeks comment on how the phrase “actual or threatened force” has been defined by case law for purposes of the Hobbs Act definition of “robbery” at 18 U.S.C. § 1951(b)(1). What level of force have courts determined is required for purposes of Hobbs Act robbery cases? Have courts interpreted the level of force required in such cases to be “violent force,” as defined in *Johnson v. United States*, 559 U.S. 133, 140 (2010)? Have courts determined that Hobbs Act robbery could encompass conduct that falls below the level of “violent force”? If so, what level of force have courts specified?

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

(C) Inchoate Offenses

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

In its annual letter to the Commission, the Department of Justice has suggested that application issues have arisen regarding whether certain conspiracy offenses qualify under the career offender guideline as a “crime of violence” or a “controlled substance offense.” See Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at <https://www.uscg.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf>. In making this determination, some courts have employed a two-step analysis, first comparing the substantive offense to its generic definition, and then separately comparing the inchoate offense involving that substantive offense to the generic definition of the specific inchoate offense. In comparing conspiracy to commit an offense to the generic definition of “conspiracy,” some courts have concluded that because the generic definition of conspiracy requires an overt act, federal and state conspiracy statutes that do not require an overt act categorically do not qualify as a “crime of violence” or a “controlled substance offense.” See, e.g., *United States v. McCollum*, 885 F.3d 300, 303 (4th Cir. 2018).

In addition, another issue has been brought to the Commission’s attention. Case law has long held that “commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” *Stinson v. United States*, 508 U.S. 36, 38 (1993); see also USSG §1B1.7. Most circuits have held that the definitions of “crime of violence” and “controlled substance offense” at §4B1.2 include the offenses of aiding and abetting, conspiracy to commit, and attempt to commit such crimes, in accordance with the commentary to the guideline. See, e.g., *United States v. Nieves-Borrero*, 856 F.3d 5 (1st Cir. 2017); *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995); *United States v. Dozier*, 848 F.3d 180 (4th Cir. 2017); *United States v. Guerra*, 962 F.2d 484 (5th Cir. 1992); *United States v. Evans*, 699 F.3d 858 (6th Cir. 2012); *United States v. Tate*, 822 F.3d 370 (7th Cir. 2016); *United States v. Mendoza-Figueroa*, 65 F.3d 691 (8th Cir. 1995); *United States v. Sarbia*, 367 F.3d 1079 (9th Cir. 2004); *United States v. McKibbin*, 878 F.3d 967 (10th Cir. 2017); *United States v. Lange*, 862 F.3d 1290 (11th Cir. 2017). However, a recent decision from the D.C. Circuit concluded otherwise for purposes of the “controlled substance offense” definition. See *United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. May 25, 2018) (“Section 4B1.2(b) presents a very detailed ‘definition’ of controlled substance offense that clearly excludes inchoate offenses.”).

Part C of the proposed amendment would address these issues by amending §4B1.2 (Definitions of Terms Used in Section 4B1.1) and its commentary. As indicated above, the

commentary that accompanies the guidelines is authoritative and failure to follow the commentary would constitute an incorrect application of the guidelines, subjecting the sentence imposed to possible reversal on appeal. *See* 18 U.S.C. § 3742. However, the Commission proposes to move the inchoate offenses provision from the Commentary to §4B1.2 to the guideline itself as a new subsection (c) to alleviate any confusion and uncertainty resulting from the D.C. Circuit's decision.

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

Option 1 would address the conspiracy issue in a comprehensive manner that would be applicable to all other inchoate offenses and offenses arising from accomplice liability. It would eliminate the need for the two-step analysis discussed above by adding the following to the new subsection (c): “To determine whether any offense described above qualifies as a ‘crime of violence’ or ‘controlled substance offense,’ the court shall only determine whether the underlying substantive offense is a ‘crime of violence’ or a ‘controlled substance offense,’ and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.”

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

Option 3 would take a narrower approach, addressing only the conspiracy issue, and not adding language to subsection (c) eliminating the two-step analysis described above. Option 3 would amend the commentary to add an application note relating to offenses of conspiring to commit a “crime of violence” or a “controlled substance offense.” It sets forth two suboptions. Suboption 3A treats offenses of conspiring to commit a “crime of violence” or a “controlled substance offense” the same way but brackets two possible alternatives for

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

Issues for comment are also provided.

Proposed Amendment:

§4B1.2. Definitions of Terms Used in Section 4B1.1

- (a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
 - (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
 - (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).
- (b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

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

- (c) The terms “crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a “crime of violence” or a “controlled substance offense.” To determine whether any offense described above qualifies as a “crime of violence” or “controlled substance offense,” the court shall only determine whether the underlying substantive offense is a “crime of violence” or a “controlled substance

offense,” and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.]

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

[Suboption 2A:

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

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

[Suboption 2B:

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

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

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

(c) The terms “crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit any such offense, or any other inchoate

offense or offense arising from accomplice liability involving a “crime of violence” or a “controlled substance offense.”]

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

Commentary

Application Notes:

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

[Options 1, 2, and 3 would also delete the following provision:

~~“*Crime of violence*” and “*controlled substance offense*” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.]~~

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

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

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

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

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

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

~~A violation of 18 U.S.C. § 924(c) or § 929(a) is a “crime of violence” or a “controlled substance offense” if the offense of conviction established that the underlying offense was a “crime of~~

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

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

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

[Option 3 would add the following application note:

3. **Application of Subsection (c).**—

[Suboption 3A:

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

[Suboption 3B:

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

34. **Applicability of §4A1.2.**—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.
45. **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.

* * *

Issues for Comment:

1. As indicated above, in determining whether an inchoate offense is a “crime of violence” or a “controlled substance offense,” some courts have employed a two-step analysis. First, courts compare the substantive offense to its generic definition to determine whether it is “crime of violence” or a “controlled substance offense.” Then, these courts

make a second and separate analysis comparing the inchoate offense involving that substantive offense to the generic definition of the specific inchoate offense. To promote clarity and consistency in the application of the career offender guideline, Option 1 of Part C of the proposed amendment would amend §4B1.2 (Definitions of Terms Used in Section 4B1.1) to clarify that the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit a “crime of violence” or a “controlled substance offense,” or any other inchoate offense or offense arising from accomplice liability involving a “crime of violence” or a “controlled substance offense” are a “crime of violence” or a “controlled substance offense” if the substantive offense is a “crime of violence” or a “controlled substance offense.”

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

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

(D) Definition of “Controlled Substance Offense”

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

In its annual letter to the Commission, the Department of Justice has raised a concern that courts have held that state drug statutes that include an offense involving an “offer to sell” a controlled substance do not qualify as a “controlled substance offense” under §4B1.2(b) because such statutes encompass conduct that is broader than §4B1.2(b)’s definition of a “controlled substance offense.” *See* Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf>. The Commission previously addressed a similar issue regarding the definition of a “drug trafficking offense” in the illegal reentry guideline at §2L1.2 (Unlawfully Entering or Remaining in the United States). In 2008, the Commission amended the Commentary to §2L1.2 to clarify that an offer to sell a controlled substance is a “drug trafficking offense” for purposes of that guideline, by adding “offer to sell” to the conduct listed in the definition of “drug trafficking offense.” *See* USSG App. C, Amendment 722 (effective Nov. 1, 2008). In 2016, the Commission comprehensively revised §2L1.2. Among the changes made, the Commission amended the definition of “crime of violence” in the Commentary to §2L1.2 to conform it to the definition in §4B1.2, but the Commission did not make changes to the “drug trafficking offense” definition in the Commentary to §2L1.2.

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

An individual may not knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board—

- (1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or
- (2) any vessel if the individual is a citizen of the United States or a resident alien of the United States.

46 U.S.C. § 70503(a) (2012). Section 70506(b) provided that a person attempting or conspiring to violate section 70503 was subject to the same penalties as provided for violating section 70503.

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

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

46 U.S.C. § 70503(a). Section 70506(b) remained unchanged. The Act added two new offenses to section 70503(a), in subparagraphs (2) and (3). Accordingly, “chapter 705 of title 46,” as referenced in 28 U.S.C. § 994(h), was also amended. However, these two new offenses may not be covered by the current definition of “controlled substance offense” in §4B1.2.

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

An issue for comment is also provided.

Proposed Amendment:

§4B1.2. Definitions of Terms Used in Section 4B1.1

* * *

- (b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
 - (1) prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or

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

* * *

Issue for Comment:

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

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