U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 22, 2024

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

Dear Judge Reeves:

This letter responds to the United States Sentencing Commission's request for comment on its proposed amendments to the Federal Sentencing Guidelines and issues for comment published in the Federal Register on December 26, 2023.[1] We thank you, the other Commissioners, and the Commission staff for being responsive to the Justice Department's sentencing priorities and to the needs and responsibilities, more generally, of the Executive Branch.

While the published amendments address important issues of federal sentencing policy, we note two critical issues of national importance they do not address: the epidemics of fentanyl poisoning and firearms violence. We continue to believe the Commission has a role to play in dealing with these pressing public safety matters, and we think they demand the Commission's attention. And we echo the sentiments expressed in the Deputy Attorney General's letter, submitted separately in response to the Commission's request for comment.

We look forward to working with you during the remainder of the amendment year on all the published amendment proposals and to continued collaboration in the years to come to improve public safety and further the cause of justice for all.

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[1] U.S. SENT'G COMM'N, *Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary*, 88 Fed. Reg. 89142, 89143 (Dec. 26, 2023), available at Federal Register : Sentencing Guidelines for United States Courts.

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IV. Rules for Calculating Loss (§2B1.1)

The Department supports the Commission's proposal to move the definition of "loss" from the commentary to the substantive text of §2B1.1. Doing so will resolve a circuit conflict over whether the commentary's inclusion of intended loss is authoritative and will ensure consistency when determining the culpability of fraud offenders, both across federal courts and within the Guidelines themselves. The Department also does not oppose the Commission's proposal to "conduct[ ] a comprehensive examination of §2B1.1 during an upcoming amendment

[46] U.S. SENT'G COMM'N, Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 184 (proposed Note 1 of §2A1.2).
[47] *See, e.g.*, U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 187 - 256 (proposed §§2A2.2, 2A2.4, 2A3.2, 2A5.3, 2A6.1, 2B1.5, 2B3.2).
[48] *See, e.g.*, *id.* at p.185, 217, 242, 279, 393 (proposed §§2A1.4, 2B1.1, 2B1.5, 2D1.1, 2K2.1).
[49] *See, e.g.*, *id.* at 187, 191, 197, 211, 213, 254, 389 (proposed §§2A2.2, 2A2.4, 2A3.2, 2A5.3, 2A6.1, 2B3.2, 2K1.4).

cycle."[50] The Commission should ensure, however, that §2B1.1 operates consistently and uniformly while any such examination is pending.

a. *Background*

Recent appellate decisions have called into question the validity of guideline commentary.[51] Several circuits have held that, under the Supreme Court's decision in *Kisor v. Wilkie*,[52] guideline commentary is entitled to deference only if, "[a]fter applying our traditional tools of statutory interpretation," the guideline is ambiguous and the commentary resolves that ambiguity.[53] Other circuits have rejected that approach and have relied on pre-*Kisor* precedent to hold that "the guidelines commentary is 'authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'"[54] The Commission has proposed legislation that would resolve that conflict by putting guidelines, policy statements, and commentary on the same authoritative footing. The Department supports the basic outlines of that legislative proposal.[55]

Meanwhile, the circuits' underlying disagreement over whether and in what circumstances guideline commentary is entitled to deference has spawned related circuit conflicts over the validity and application of particular commentary provisions. One recent example involves the definition of "loss" in §2B1.1. That section provides an escalating series of offense-level enhancements for fraud and theft offenses based on the amount of loss attributable to the offense.[56] The commentary to §2B1.1 defines "loss" as "the greater of actual loss or intended loss."[57] The commentary further defines "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense," and defines "intended loss" as "the pecuniary harm that the defendant purposely sought to inflict, . . . includ[ing] intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)."[58]

In *United States v. Banks*,[59] the Third Circuit held that the commentary's definition of "loss" in §2B1.1 is not entitled to deference because it includes intended loss, whereas the guideline itself is limited to actual loss.[60] The court acknowledged that §2B1.1 refers only to "loss" and that, "in context, 'loss' could mean pecuniary or non-pecuniary loss and could mean actual or intended loss."[61] The court determined, however, that "in the context of a sentence

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[50] U.S. SENT'G COMM'N, Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 12.
[51] *See id.* at 3.
[52] 139 S. Ct. 2400 (2019).
[53] *United States v. Dupree*, 57 F.4th 1269, 1277-78 (11th Cir. 2023) (en banc) (citing cases).
[54] *United States v. Vargas*, 74 F.4th 673, 677 (5th Cir. 2023) (en banc) (quoting *Stinson v. United States*, 508 U.S. 36, 38 (1993)); *see id.* at 678 & n.3 (citing cases).
[55] *See* Letter from Jonathan J. Wroblewski, Director, Off. of Pol'y and Legis., Crim. Div., U.S. DEPT. OF JUST., to the Hon. Carlton W. Reeves, Chair, U.S. SENT'G COMM'N (Mar. 21, 2023).
[56] USSG §2B1.1(b)(1).
[57] *Id.* §2B1.1 comment. (n.3(A)).
[58] *Id.* §2B1.1 comment. (n.3(A)(i), (ii)).
[59] 55 F.4th 246 (3d Cir. 2022).
[60] *Id.* at 257-58.
[61] *Id.* at 258.

enhancement for basic economic offenses, the ordinary meaning of the word 'loss' is the loss the victim actually suffered."[62] Accordingly, the court held that the loss-related enhancements in §2B1.1 apply only where defendants' schemes resulted in actual loss.

Every other court of appeals to have considered the question after *Banks* – including courts that otherwise agree with the Third Circuit's restrictive approach to determining whether guideline commentary is entitled to deference – has determined that intended loss remains a valid form of "loss" under §2B1.1.[63] As those courts have explained, the reasoning in *Banks* suffers from two flaws. First, it fails to take account of the fact that §2B1.1 uses the term "loss" as a proxy for the defendant's culpability, not the harm suffered by the victim.[64] "Literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, legal language."[65] Because the ability of fraudsters and thieves to inflict actual harm on their victims may be thwarted by factors beyond their control – a sting operation, a change in the location or value of assets, the fortuitous intervention of a vigilant police officer, or a victim who unexpectedly fights back – "intended loss is frequently a better measure of culpability than actual loss."[66]

Second, defining "loss" in §2B1.1 to mean only actual loss would create unnecessary tension with other Guidelines provisions. In determining the Guidelines offense level, courts must apply the relevant conduct guideline (§1B1.3) in addition to the guideline applicable to the substantive offense.[67] The relevant conduct guideline directs courts to consider, among other things, "all harm that resulted from the acts and omissions [of the defendant], *and all harm that*

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[62] *Id.* at 257-58 (citing dictionary definitions of "loss" that refer to actual destruction, diminishment, or failure).
[63] *See United States v. Smith*, 79 F.4th 790, 797-98 (6th Cir. 2023) (holding that "loss" in § 2B1.1 is ambiguous and that commentary appropriately defines that term to include intended loss); *United States v. You*, 74 F.4th 378, 397-98 (6th Cir. 2023) (same); *see also, e.g.*, *United States v. Gadson*, 77 F.4th 16, 19-22 (1st Cir. 2023) (same on review for plain error); *United States v. Verdeza*, 69 F.4th 780, 793-94 (11th Cir. 2023) (same); *United States v. Limbaugh*, No. 21-4449, 2023 WL 119577, at *3-4 (4th Cir. Jan. 6, 2023) (unpublished) (same); *cf. United States v. Ekene*, No. 22-20570, 2023 WL 4932110, at *1 (5th Cir. Aug. 2, 2023) (unpublished) (rejecting challenge to loss commentary in light of circuit precedent applying *Stinson* deference to commentary generally).
[64] *See, e.g.*, *Gadson*, 77 F.4th at 21; *You*, 74 F.4th at 397-98; *see also* USSG § 2B1.1, comment. (background) (explaining that Guidelines use loss to assess "the seriousness of the offense and the defendant's relative culpability"); *id.* App. C Supp., at 104-05 (Amend. 793) (noting "the Commission's belief that intended loss is an important factor in economic fraud offenses" because it focuses "specifically on the defendant's culpability"); *id.* App. C, Vol. II, at 177 (Amend. 617) (same).
[65] *You*, 74 F.4th at 397 (brackets and quotation marks omitted).
[66] *Gadson*, 77 F.4th at 21 (quotation marks omitted). Indeed, in *Banks* itself, the defendant's scheme almost succeeded: he managed to execute several fraudulent wire transfers into bank accounts he controlled, which were clawed back at the last moment when his intended victim realized what was happening. Other cases similarly involve circumstances where actual losses were avoided due solely to fortuitous intervention by others. *See, e.g.*, *United States v. Walker*, 89 F.4th 173, 178 (1st Cir. 2023) (police intervened at last moment to prevent a robbery); *United States v. Tellez*, 86 F.4th 1148, 1150, 1154 (6th Cir. 2023) (police unexpectedly discovered fraudulent gift cards during traffic stop); *United States v. Kennert*, No. 22-1998, 2023 WL 4977456, at *1-3 (6th Cir. Aug. 3, 2023) (unpublished) (police investigating defendant's sale of counterfeit sports trading cards discovered "a fake 1916 Babe Ruth card" during a search of his home); *United States v. Corker*, No. 22-10192, 2023 WL 1777195, at *1, *4 (11th Cir. Feb. 6, 2023) (defendant received loan check as part of scheme to defraud bank, but alert bank employee canceled loan before defendant could cash the check).
[67] *See* USSG §1B1.2(b) ("After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct).").

was the object of such acts and omissions," in determining the appropriate offense level.[68] As the Sixth Circuit has explained, "[i]f the fraud guideline does not include intended loss, then the court cannot meaningfully apply the relevant-conduct guideline, which is applicable to all sentencings and contemplates intended harm as conduct for which a defendant should be held accountable."[69] Interpreting §2B1.1 to exclude intended loss also creates tension with other guidelines applicable to fraud offenses. A defendant convicted of attempt or conspiracy to commit fraud, for example, is subject to "the base offense level from the guideline for the substantive offense, *plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty*."[70] And in the context of tax crimes – for which the offense level is similarly tied to the amount of "loss" – the relevant guideline provides that loss "is the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)."[71] The possibility of "vastly different sentences for similarly culpable defendants" provides a further reason not to interpret the loss table in §2B1.1 as applying only to actual loss, as defendants who engaged in conduct of equal complexity and/or severity are otherwise subject to different guideline ranges based only on the fortuity of whether their misconduct was detected in time.[72]

b. *We Support Resolving the Circuit Conflict by Moving the Commentary's Existing Definition into the Guideline Text*

The Department supports the Commission's proposal to resolve the circuit conflict over the meaning of "loss" in §2B1.1 by moving the commentary's existing loss definition into the text of the guideline, thus resolving any uncertainty over whether that definition is binding. As the Commission notes in its proposed amendment, "approximately one-fifth of individuals sentenced under §2B1.1 in fiscal year 2022 were sentenced using intended loss," representing about 750 defendants.[73] Consistent application of such a commonly used guideline is critically important. The Commission's proposed amendment will ensure uniform application of §2B1.1 throughout the country; it will resolve the internal inconsistencies within the Guidelines that the Third Circuit's interpretation of that provision creates; and it will ensure that the fraud guideline continues to function as the Commission has intended, including by maintaining consistency in the treatment of similarly culpable defendants and avoiding unwarranted sentencing windfalls for fraudsters and thieves who fully intended to cause significant losses to their victims but were thwarted by circumstances outside their control. The Commission's proposal also appropriately resolves this particular conflict while deferring to Congress on broader questions related to the deference due to guidelines commentary generally.

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[68] *Id.* §1B1.3(a)(3) (emphasis added).
[69] *Smith*, 79 F.4th at 798.
[70] USSG §2X1.1(a) (emphasis added); *see Walker*, 89 F.4th at 181 ("[U]nlike the intended loss language in [§2B1.1], the textual hook for intended conduct in [§2X1.1] is contained in the Guideline itself."); *Smith*, 79 F.4th at 798 (same).
[71] USSG §2T1.1(c)(1); *see United States v. Upshur*, 67 F.4th 178, 181-82 (3d Cir. 2023) (distinguishing *Banks* on the ground that §2T1.1 "uses a definition of 'loss' that unambiguously includes both actual and intended losses").
[72] *You*, 74 F.4th at 398.
[73] U.S. SENT'G COMM'N, Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 3.

c. *The Importance of Resolving this Narrow Issue Now*

The Commission has additionally sought comment on "whether it should defer making changes to §2B1.1 and its commentary until a future amendment cycle that may include a comprehensive examination of §2B1.1."[74] Although the Department does not oppose a future reexamination of §2B1.1, the Commission should not perpetuate the existing circuit conflict over the meaning of "loss" in the meantime. For one thing, the timing of any comprehensive examination is uncertain: as the Commission's proposal notes, no decision has yet been made about whether to undertake such a project in the first place, or to do so in any particular future cycle. Meanwhile, for the reasons we have already stated, consistent application of the loss table in §2B1.1 will be critically important. Thousands of defendants receive offense-level enhancements under that provision each year, hundreds of which are based on intended loss. Resolving the narrow circuit conflict on that issue now will ensure consistency across the circuits, among similarly culpable offenders, and within the Guidelines themselves while any potential future reexamination of §2B1.1 is pending. The Commission's action would therefore ensure that §2B1.1 continues to function uniformly and in the manner the Commission has historically intended, just like any other guideline the Commission might one day choose to reexamine. Under those circumstances – and in light of Congress's expectation that the Commission will resolve circuit conflicts over the meaning and application of the Guidelines without the need for Supreme Court intervention[75] – the Department urges the Commission to resolve the existing circuit conflict over the meaning of "loss" in §2B1.1 by moving that section's commentary into the guideline text. The Commission could then consider whether to conduct a broader reexamination of that guideline in a future amendment cycle.[76]

V. Circuit Conflicts

a. *Definition of "Altered or Obliterated Serial Number"*

The Department supports Option Two, which would retain the Commission's existing four-level enhancement for an offense involving a firearm that "had an altered or obliterated serial number" under §2K2.1(b)(4)(B). These offenses are often intended to evade accountability and thwart law enforcement. But we recognize the view that a four-level enhancement may be inappropriate where law enforcement can still determine the serial number with an unaided eye regardless of alterations. If the Commission adopts Option One's definition, we also recommend that it consider a lower, two-level enhancement for those cases where an alteration would be considered "altered or obliterated" under the view of the Fourth, Fifth, and Eleventh Circuits, but would not meet the new definition because the altered serial number is still legible.

When the Commission increased this enhancement from two to four levels in 2006, it considered the full range of activity that this enhancement was expected to cover and elected to

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[74] *Id.* at 14.

[75] *See, e.g.*, *Braxton v. United States*, 500 U.S. 344, 347-39 (1991); *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari).

[76] Indeed, if the legislation proposed by the Commission to address the validity of commentary is not soon advanced, the Department would further support a comprehensive effort by the Commission to incorporate current commentary into text throughout the Guidelines manual, in order to restore in all Circuits without endless litigation the validity of all of the Commission's carefully considered commentary.

include instances where a serial number was altered in such a manner that did not prevent traceability. It did so because an altered serial number is evidence of an intent to evade detection.

Neither the Guidelines nor the criminal statute on which this particular guideline is based, 18 U.S.C. § 922(k), define "altered or obliterated."[77] Circuits are split regarding whether a defendant must make a serial number "illegible" or "less accessible" in order to receive the four-level enhancement under §2K2.1(b)(4)(B). The Second and Sixth Circuits have held that a serial number is not "altered or obliterated" unless it is no longer visible to the "naked eye" and thus illegible.[78] In contrast, the Fourth, Fifth, and Eleventh Circuits have held that a serial number is "altered or obliterated" if it has been "changed," "modif[ied]," "defaced," or "scratched" so as to make the serial number "less accessible," even if it is still legible.[79]

The Commission has proposed two options to amend §2K2.1(b)(4)(B) to define what constitutes an "altered or obliterated serial number." Option One would adopt the Second and Sixth Circuit's view.[80] Doing so would reduce the current applicability of the enhancement. Option Two would adopt the Fourth, Fifth, and Eleventh Circuit's view.[81]

Recognizing the effects of altered firearm serial numbers on public safety, the Commission has twice voted to increase that enhancement. In 1989, the Commission increased the enhancement from one level to two levels to "better reflect the seriousness of this conduct."[82] And, in 2006,[83] the Commission determined – notwithstanding concerns that §2K2.1(b)(4)(B) applies *even where a serial number can still be identified*[84] – that an increase to a four-level

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[77] *United States v. Perez*, 585 F.3d 880, 884 (5th Cir. 2009) (noting that the "legislative history of §2K2.1(b)(4) suggest[s] that 'altered or obliterated' likely is derived from what is today found in 18 U.S.C. § 922(k)", but "'no progenitur of § 922(k) at any point define[d] these words.'") (*quoting United States v. Carter*, 421 F.3d 909, 910 (9th Cir. 2005)).

[78] *United States v. St. Hilaire*, 960 F.3d 61,66 (2d Cir. 2020); *United States v. Sands*, 948 F.3d 709, 719 (6th Cir. 2020).

[79] *United States v. Harris*, 720 F.3d 499, 503-504 (4th Cir. 2013); *see also Perez*, 585 F.3d at 885 (5th Cir. 2009); *United States v. Millender*, 791 F. App'x 782, 783 (11th Cir. 2019) (unpublished).

[80] *United States v. Sands*, 948 F.3d 709, 719 (6th Cir. 2020).

[81] U.S. SENT'G COMM'N, "Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines at 54.

[82] USSC §2K2.1(b)(4) (Nov. 1989) (Amendment 189).

[83] The Department submitted public comments, at the time, recommending that the Commission consider increasing "§2K2.1 (b)(4) regarding stolen firearms and firearms with altered or obliterated serial numbers," explaining that "these offenses are often committed in furtherance of firearm trafficking" and noting that, "[b]y increasing sentences for firearms-trafficking offenses to reflect the serious harm these offenses may cause, the guidelines would provide a stronger deterrent and better reflect the harm of these offenses." *See* Letter from U.S. Dep't of Just. to the U.S. Sent'g Comm. (Aug. 15, 2005).

[84] The Assistant Public Defender for the District of Montana argued, during the Commission's March 15, 2006, Public Hearing, that:

> A defaced serial number is not an obliterated serial number. Crime labs will tell you that they can frequently recover serial numbers that are not visible to the naked eye. Only where the number is grounded down to below the imprint, below the stamp, is the recovery of the serial number impossible, and even in those occasions, many times manufacturers are placing a second hidden serial number on the gun.
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> So unless the Commission recrafts the obliterated serial number enhancement to apply only where the firearm is untraceable--in other words the serial number cannot be recovered or there's not a second hidden

enhancement was appropriate because of the "difficulty in tracing firearms with altered or obliterated serial numbers, and the increased market for these types of weapons."[85] In light of the firearms violence facing our country, we see no reason to retreat from the Commission's prior actions, and we recommend Option Two.

Option Two's definition of "altered or obliterated serial number" is consistent with the ordinary meaning of the phrase "altered or obliterated," as used in §2K2.1(b)(4)(B) and 18 U.S.C. § 922(k).[86] The "ordinary meaning of 'altered' is straightforward."[87] The term "altered" means "'to cause to become different in some particular characteristic . . . without changing into something else' or '[t]o change or make different; modify.'"[88]

The Fourth, Fifth, and Eleventh Circuits have applied this "straightforward" definition and held that a serial number that is "less legible is made different," "frustrate[s] the purpose of the serial numbers," and is therefore "altered" for purposes of §2K2.1(b)(4).[89] The term "obliterated" already embraces situations, as the Second Circuit identified, where the serial number is illegible. If the Commission interprets both "altered or obliterated" to mean the same thing – that the serial number must be illegible – then one of the two terms (either "altered" or "obliterated") in the Guideline text would have no meaning.[90] The courts in *Harris* and *Millender* defined the term "altered or obliterated" in a manner that would not render the term "obliterated" superfluous.[91]

In addition, retaining the scope of the four-level enhancement is consistent with the seriousness of the offense. Congress, in enacting the Gun Control Act of 1968 ("GCA"), created

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> serial number--enhancement is and will continue to be applied where the serial number is identified. In other words, sentences are being enhanced where the harm warranting the enhancement isn't even present. And this all happens without a mens rea requirement.

Testimony of John Rhodes, Assistant Fed. Pub. Def. for the District of Montana, Transcript of Public Hearing (Marh 15, 2006).

[85] USSC §2K2.1(b)(4) (Nov. 2006) (Amendment 691).

[86] *Perrin v. United States*, 444 U.S. 37, 42 (1979) (a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *see also Harris*, 720 F.3d at 503 (looking at the plain meaning of the terms "altered" or obliterated" since they were not defined in §2K2.1(b)(4)(B) and 18 U.S.C. § 922(k)); *see also Millender*, 791 F. App'x at 783 (same).

[87] Br. for Appellee at 17, *United States v. Sands*, Case No. 17-2420 (6th Cir. July 23, 2018) (*citing United States v. Carter*, 421 F.3d 909, 912 (9th Cir. 2005).

[88] *See id*. (*citing United States v. Carter*, 421 F.3d at 912) (quoting Webster's and the American Heritage dictionaries); *see also Harris*, 720 F.3d at 503 (holding that "[t]o 'alter' is 'to cause to become different in some particular characteristic . . . without changing into something else.'") (*quoting* Webster's Third New International Dictionary 63 (1993)); *Millender*, 791 F. App'x at 783 ("In 1986, 'alter' meant 'to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else;'" 'to become different in some respect;' or to 'undergo change usually without resulting difference in essential nature.'") (*citing* Webster's Third New International Dictionary, Unabridged 63 (1986)).

[89] *See Harris*, 720 F.3d at 503; *Millender*, 791 F. App'x at 783.

[90] *See Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 213 (2018) ("one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (citation and internal quotation marks omitted).

[91] *See Harris*, 720 F.3d at 503 (further explaining that the "interpretation that a serial number rendered less legible by gouges and scratches is 'altered' prevents the word 'obliterated' from becoming superfluous."); *Millender*, 791 F. App'x at 783 (holding that the "district court properly declined to adopt an interpretation of 'altered' that would require illegibility because that interpretation would render 'obliterated' superfluous.").

a comprehensive scheme designed to assist Federal, State, and local law enforcement in targeting serious crimes involving firearms. Specifically, the GCA required manufacturers and importers to identify firearms by "a serial number engraved or cast on the receiver or frame of the weapon"; it mandated that Federal firearms licensees maintain records of their firearm transactions, including complete and accurate descriptions of the firearms; and it made it "unlawful for any person knowingly to transport, ship, receive . . . any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered."[92] These requirements enabled "authorities both to enforce the law's verification measures and to trace firearms used in crimes."[93] This information, in turn, "helps to fight serious crime."[94]

ATF, through its National Tracing Center, can use serial numbers and other data points, in response to requests for "crime gun traces by Federal, State, and local law enforcement agencies," to trace the history of a specific firearm from the date it was manufactured or imported into the United States to the first retail purchase of the firearm, thus enabling ATF, and the law enforcement agencies it supports, to "identify suspects involved in criminal violations, determine if the firearm is stolen, and provide other information relevant to an investigation."[95]

As the Fourth Circuit noted in *Harris*, "the regulations reflect the government's interest in having serial numbers placed on firearms that have a minimum level of legibility."[96] A "less legible" serial number "frustrated the purpose of serial numbers" and tracing.[97] This is not new ground. In 2006, the Commission assessed if four levels was appropriate regardless of whether the alteration rendered the serial number untraceable. The Commission received comment explicitly addressing this point, noting that "an altered or obliterated serial number results in no additional harm unless it makes the firearm untraceable."[98] The Commission further considered whether to narrow its enhancement only to firearms that were rendered untraceable.[99] The Commission declined the invitation to exempt incomplete or ineffective alteration and obliteration from application of its four-level enhancement.

Incorporating the definition set forth in Option Two would be consistent with the long-standing recognition from the Commission about the importance of serial numbers, even where tracing is still possible, and the significant efforts the Commission has taken to date to dissuade those who attempt to thwart the firearm-tracing process.[100] The Department commends the

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[92] Gun Control Act of 1968, § 102, 82 Stat. 1213.
[93] *Abramski v. United States*, 573 U.S. 169, 173 (2014) (*citing* H. Rep. No. 1577, 90th Cong., 2d Sess., 14 (1968)).
[94] *Id*. at 182; *see also* Identification Markings Placed on Firearms, 66 Fed. Reg. 40597 (Aug. 3, 2001) ("Firearms tracing is an integral part of any investigation involving the criminal use of firearms."); *Blaustein & Reich, Inc. v. Buckles*, 220 F. Supp. 2d 535, 537 (E.D. Va. 2002) (the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") has a statutory duty pursuant to the GCA to trace firearms to keep them out of the hands of criminals).
[95] *Id*.
[96] *Harris*, 720 F.3d at 503.
[97] *Id.*
[98] *See* Letter from Jon M. Sands, Fed. Pub. Def. for the District of Arizona (Mar. 9, 2006).
[99] *See* Testimony of John Rhodes, Assistant Federal Public Defender for the District of Montana, Transcript of Public Hearing (Mar. 15, 2006) (suggesting that the Commission could narrow the enhancement to only apply to untraceable firearms).
[100] The Commission first addressed the issue in its September 1986 Preliminary Guidelines, where it proposed adding "6 to the base offense level" and noted, in general, that "appropriate penalties [were] added" where "specific offense characteristics address conduct that by law constitutes a particular danger to public safety." Preliminary

efforts the Commission has taken to date. If the Commission adopts Option One's definition, we also recommend that the Commission consider a lower, two-level enhancement for those cases where an alteration would be considered "altered or obliterated" under the view of the Fourth, Fifth, and Eleventh Circuits but where law enforcement can still determine the serial number with an unaided eye.

b. *Grouping*

The Department does not oppose the Commission's proposal to amend §2K2.4, which applies to certain firearms offenses with mandatory-minimum terms of imprisonment, including 18 U.S.C. § 924(c). Section 3D1.2 permits grouping of closely-related counts of conviction, including "[w]hen 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."[101] This provision generally results in the grouping of firearms counts under 18 U.S.C. § 922(g), to which §2K2.1 applies, and drug counts under 21 U.S.C. § 841, to which §2D1.1 applies.[102] The courts of appeals disagree, however, whether those counts can group under §3D1.2 when a defendant is also convicted of a § 924(c) count. Because the § 924(c) count carries a mandatory term of imprisonment, it is covered by §2K2.4, not §2K2.1. And the Commentary to §2K2.4 (Application Note 4) provides that "[i]f a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense." §2K2.4 cmt. (n.4). In other words, §3D1.2 allows grouping as a specific offense characteristic, whereas §2K2.4 seemingly does not. Thus, as the Seventh Circuit has correctly observed, there is no basis for grouping § 922(g) and drug trafficking counts because grouping rules are to be applied only after the offense level for each count has been determined and "by virtue of §2K2.4, [the counts] did not operate as specific offense characteristics of each other."[103]

The Department agrees, however, that there are cases in which the firearms and drug trafficking counts are closely related and, but for the language in current Application Note 4, would be grouped. The Department thus does not oppose the Commission's proposal to amend Application Note 4 to permit grouping "[i]f two or more counts would otherwise group under subsection (c) of §3D1.2."

* * *

Draft Sentencing Guidelines (Sept. 1986). The Commission, in its 1987 Guidelines, ultimately included a "1-level enhancement," *see* U.S. SENT'G COMM'N, GUIDELINES MANUAL, §2K2.1(b)(1) (1987), but increased it to a "2-level" enhancement in 1989 to "better reflect the seriousness of this conduct," USSC §2K2.1(b)(4) (Nov. 1989). And the Commission revisited the enhancement again, in 2006, and noted that an increase to a "4-level enhancement" was necessary to reflect "both the difficulty in tracing firearms with altered or obliterated numbers, and the increased market for these types of weapons." *See* Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2006 (May 11, 2006).

[101] USSG §3D1.2(c).

[102] USSG §§2D1.1(b)(1), 2K2.1(b)(6)(B).

[103] *United States v. Sinclair*, 770 F.3d 1148, 1157-58 (7th Cir. 2014). B*ut see United States v. Bell*, 477 F.3d 607, 615-16 (8th Cir. 2007) (permitting grouping); *United States v. Gibbs*, 395 F. App'x 248, 250 (6th Cir. 2010) (unpublished) (same); and *United States v. King*, 201 F. App'x 715, 718 (11th Cir. 2006) (unpublished).

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to discussing all of this further with you.

Sincerely,

/s/ JW
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cc: Commissioners
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