U.S. Department of Justice

Criminal Division

Appellate Section

Washington, D.C. 20530

March 3, 2025

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 Sentencing Commission's request for comment on its proposed amendments to the Sentencing Guidelines and issues for comment published in the Federal Register on January 24, 2024.[1] The letter also serves as the Department's written testimony for the Commission's upcoming hearing on March 12 and 13, 2025.

The Department greatly appreciates the care and attention that the Commission has shown in each of the proposed amendments. As explained further below, however, we have significant concerns with the proposed amendments that would reduce the highest base offense levels in the Drug Quantity Table and add a reduction for "low-level trafficking" in §2D1.1. Although we understand the Commission's interest in eliminating "ice" and the purity distinction for methamphetamine from the Guidelines, we are concerned that making these changes absent legislative fixes may further complicate the Guidelines, fail to comply with congressional directives, and deviate from the policy choices reflected in the Controlled Substances Act. Accordingly, we recommend that the Commission seek legislative fixes before making such changes.

We thank the Commission for addressing our concerns with how the fake pills enhancement may apply and the public safety risks posed by drug traffickers who possess machineguns. We support revisions to the fake pills enhancement and recommend additional revisions to fully address concerns with the enhancement's effectiveness. Additionally, we support ensuring that §2D1.1 appropriately accounts for the increased dangers of drug traffickers who possess machineguns, including machinegun conversion devices (MCDs), and also recommend accounting for the enhanced public safety risks of drug traffickers who possess machineguns/MCDs *and* large capacity magazines or multiple firearms. Finally, while we

[1] *Notice of request for public comment and hearing*, 90 Fed. Reg. 22, 8968 (Feb 4, 2025), https://www.govinfo.gov/content/pkg/FR-2025-02-04/pdf/2025-02129.pdf; *see also* U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines* (January 24, 2025), https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2024-2025-amendments-published-january-2025.

appreciate the need to ensure that defendants can safely provide truthful information to the government to qualify for safety valve relief, we are concerned that the proposed amendment to the commentary would undermine the guideline's intent.

With respect to the proposed supervised release amendment, the Department is generally supportive of the Commission's proposal to reaffirm judicial discretion in imposing supervised release terms and managing violations. But we are concerned that some aspects of the proposal would add procedural hurdles and complexity by requiring "individualized assessments" at multiple steps, infringe on judicial discretion regarding imposing or revoking supervised release in certain situations, reduce supervised release for sex offenders and certain national security offenses, and introduce confusion with the new grade D violations.

We thank you, the other Commissioners, and Commission staff for being responsive to the Department's sentencing priorities and to the needs and responsibilities of the Executive Branch. And we look forward to working with you during the remainder of the amendment year on all the published amendment proposals.

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I. Drugs

A. Drug Quantity Table Reductions

The Department opposes the Commission's proposal to reduce the base offense levels in §2D1.1 for defendants who are responsible for the largest quantities of controlled substances. In so doing, the Department appreciates the concerns of some stakeholders that §2D1.1 may "overly rel[y] on drug type and quantity as a measure of offense culpability" and may "result[] in sentences greater than necessary."[2] And we recognize data suggesting that, on average, when imposing sentences using the Drug Quantity Table, judges impose sentences below the guideline range at the highest offense levels.[3] As explained further below, however, we are concerned that the Commission's proposal would produce guidelines that provide less useful guidance to judges and fail to reflect the seriousness of conduct that poses grave dangers to society.

The Commission's proposal would impose an artificial ceiling on the drug quantity calculations and substantially reduce the offense levels for those defendants responsible for the largest quantities of drugs. Such a reduction would be inconsistent with Congress' intent, untether the Guidelines from statutory penalties, and be inconsistent with the ongoing public safety and public health crisis stemming from synthetic opioids, drug trafficking by cartels, and other emerging narcotics threats.

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[2] U.S. Sent'g. Comm'n., *Proposed Amendments to the Sentencing Guidelines* (Jan. 24, 2025) at 57, https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2024-2025-amendments-published-january-2025.

[3] *Id.*; see also U.S. Sent'g Comm'n, Public Data Briefing: *Proposed Amendments on Drug Offenses* (2025) ("Drug Data Briefing") Slides 7-8, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Drug-Offenses.pdf.

Our nation is immersed in a drug crisis, with drug deaths having increased significantly since 2017.[4] While 2023 saw the first decrease in drug deaths since 2018, the number of lives lost to drug overdoses remains unacceptably high.[5] Two drugs are primarily responsible for this crisis—methamphetamine and fentanyl.[6] Both are synthetic drugs, largely made in labs abroad and trafficked into the United States, and potentially lethal in small doses.[7] Even as opioid deaths dipped in 2023, deaths associated with cocaine and psychostimulants (such as methamphetamine) increased.[8] Other drug threats continue to emerge, including an increase in deaths involving carfentanil, a fentanyl analogue that is 100 times more potent than fentanyl; and nitazenes, which can also be more powerful than fentanyl.[9] Against this backdrop of drug-related deaths, the Commission's amendments would reduce sentences for those trafficking in particularly large and dangerous quantities of these and other drugs. We have several specific concerns with these amendments.

First, such a reduction would seem counter to the congressional intent underpinning the Controlled Substances Act and the Commission's organic statute. Congress established a sentencing scheme that is based, in part, on the type and quantity of drugs for which a defendant is responsible.[10] As the Supreme Court has stated, "[t]he penalty scheme set out in the Anti-Drug Abuse Act of 1986 is intended to punish severely large-volume drug traffickers at any level."[11] Thus, it "assigns more severe penalties to the distribution of larger quantities of drugs."[12] In establishing the Sentencing Guidelines, the Congress directed the Commission to ensure that its rules were "consistent with all pertinent provisions of any federal statute."[13] Congress also directed that the Guidelines shall "establish a sentencing range that is consistent with all pertinent provisions of Title 18, United States Code" and specify a "substantial term of

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[4] Centers for Disease Control and Prevention, National Vital Statistics System, 12 month-ending Provisional Number and Percent Change of Drug Overdose Deaths, https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (Feb. 2, 2025).

[5] *Id.*; *see also* Centers for Disease Control and Prevention, *U.S. Overdose Deaths Decrease in 2023, First Time Since 2018* (May 15, 2024), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2024/20240515.htm.

[6] Drug Enforcement Administration, *National Drug Threat Assessment 2024* (May 9, 2024) at 1, 24 ("Fentanyl and other synthetic drugs, like methamphetamine, are responsible for nearly all of the fatal drug overdoses and poisonings in our country."), https://www.dea.gov/sites/default/files/2024-05/5.23.2024%20NDTA-updated.pdf.

[7] *Id.* at 1, 22 ("A lethal dose of fentanyl is approximately 2 mg, depending on the user's opiate tolerance and other factors"); *see also United States v. Melendez*, 57 F.4th 505,508 (5th Cir. 2023) (stating that even two ounces could produce thousands of lethal doses).

[8] *U.S. Overdose Deaths Decrease in 2023*, *supra*.

[9] Deaths involving carfentanil increased 720.7 percent from the first half of 2023 to the first half of 2024. *See* L.J. Tanz, *et al.*, *Detection of Illegally Manufactured Fentanyls and Carfentanil in Drug Overdose Deaths—United States, 2021–2024*, MMWR Morb Mortal Wkly Rep 2024; 73:1099–1105, at https://www.cdc.gov/mmwr/volumes/73/wr/mm7348a2.htm; A. Roberts, *et al.*, *Notes from the Field: Nitazene-Related Deaths—Tennessee, 2019–2021*, MMWR Morb Mortal Wkly Rep 2022; 71:1196–1197, at https://www.cdc.gov/mmwr/volumes/71/wr/mm7137a5.htm (discussing rise of nitazenes).

[10] *See* 21 U.S.C. § 841(b).

[11] *Chapman v. United States*, 500 U.S. 453, 465 (1991).

[12] *Id.*

[13] 28 U.S.C. § 994(a).

imprisonment" for a defendant who traffics in "a substantial quantity of a controlled substance."[14] This scheme makes sense. As a general matter, those who traffic in higher quantities are more culpable and merit more serious punishment. But the Commission's proposal would stray from those directives by lowering penalties for those who traffic in the highest quantities of these deadly drugs.

The wholesale elimination of the drug guidelines applicable to larger quantities of illegal drugs is contrary to the Controlled Substances Act and Congress' directives to the Commission. All three proposals would create situations where the Guidelines provide no meaningful additional penalty for drug traffickers who deal in particularly large quantities of drugs. Rather, the Guidelines would set a ceiling on drug weight that would produce sentences at or near the bottom of the applicable statutory sentencing range. As a result, the Guidelines would equate conduct involving four kilograms of fentanyl with conduct involving 40 kilograms or 400 kilograms of fentanyl. Although these quantities would each trigger a statutory mandatory minimum sentence of ten years and a maximum sentence of life,[15] the proposals would remove any graduated penalties and tether all sentences, regardless of quantity, at, near, or below the mandatory minimum sentence.[16]

Under Option One, *any* quantity of fentanyl exceeding four kilograms would trigger a base offense level of 34 (151 to 188 months for a defendant in Criminal History Category I). With credit for acceptance of responsibility, the offense level would be 31 (108 to 135 months). Absent other applicable adjustments, this proposal would set the guideline sentencing range at or near the 120-month mandatory minimum, despite the statutory sentencing range of ten years to life. Under Option Two, the effect is even more dramatic because 1.2 kilograms of fentanyl or more would trigger a base offense level of 32 (121 to 151 months for a defendant in Criminal History Category I). With credit for acceptance of responsibility, the guideline range would be 29 (87 to 108 months), below the ten-year mandatory minimum. Under Option Three, the Guidelines exposure for a fentanyl trafficker would not significantly increase whether the defendant distributes 400 grams, 40 kilograms, or 400 kilograms of fentanyl. Each of those quantities would trigger a level 30 (97 to 121 months for a defendant in Criminal History Category I). With acceptance of responsibility, the guideline range would be 27 (70 to 87 months)—far below the mandatory minimum sentence.

Reducing the maximum guideline exposure for all offenses to levels at, near, or below the mandatory minimum sentences established by Congress would be inconsistent with the Congressional intent to provide for higher penalties for those who traffic in larger quantities of drugs. Doing so would also anchor the guideline calculations for drug trafficking defendants to at, near, or below the statutory minimum sentences, despite the fact that Congress created a much wider range of sentencing exposure for drug trafficking defendants. For many important drug

[14] 28 U.S.C. §§ 994(b)(1), (i)(5).

[15] 21 U.S.C. § 841(b)(1)(A)(vi).

[16] Congress has indicated that certain individuals who are responsible for large quantities of drugs (300 times the quantity that triggers the five-year mandatory minimum) should receive a mandatory life sentence. 21 U.S.C. § 848(b)(2)(A). Given the view of Congress that particularly large quantities of drugs should, in some instances, trigger severe sentences, it would be inappropriate for the Commission to fundamentally alter the structure of the Guidelines so that they provide no additional penalty associated with particularly large quantities of drugs.

cases involving significant quantities, the sentence would be driven solely by the mandatory minimums and not affected at all by the Guidelines.

Second, we appreciate the Commission's data-driven decision making and goal to ensure that the Guidelines reflect sentencing realities. But we disagree that the Commission's data indicating that, on average, judges impose below-guideline sentences at higher offense levels when using the Drug Quantity Table necessarily means that lowering offense levels would better align the guideline range and sentence imposed, or that doing so would be a principled response for those who traffic large quantities of drugs, especially under the current drug crisis. We appreciate the Guidelines' anchoring effect and understand that lowering the range for certain offenses may appropriately result in more within-guideline sentences for those types of offenses. But in our view, lowering base offense levels for the highest drug quantities is unlikely to achieve the Commission's stated goal of aligning drug sentences with the Guidelines. Instead, it may result in an additional lowering of drug sentences similar to what occurred after the Commission reduced offense levels in 2014. That year, the Commission reduced by two levels the base offense levels assigned by the Drug Quantity Table for each drug quantity across all drug types.[17] Despite this reduction, the average sentence imposed in drug trafficking cases continues to be lower than the guideline sentence.[18]

The current amendment would go even farther than 2014. The 2014 amendments changed the relationship between the Guidelines and the statutory mandatory minimums but still "maintain[ed] consistency with such penalties."[19] In lowering the base offense levels, the Commission noted that existing statutory enhancements and guidelines enhancements would continue to ensure that the "most dangerous or serious offenders will continue to receive appropriately severe sentences" and that the Guidelines would still provide for a base offense level of 38 "for offenders who traffic the greatest quantities of most drug types" whose sentences would not be reduced.[20] The Commission's proposal now takes an additional—and dramatic—step to eliminate graduated higher penalties for drug traffickers who distribute significant quantities of drugs.

Third, to the extent that the Commission's proposed changes may be driven by concern about the effect of the current guidelines on less culpable defendants, those concerns may be

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[17] U.S.S.G., App. C, amend. 782 (Amendment 782") (effective Nov. 1, 2014), https://www.ussc.gov/guidelines/amendment/782.

[18] At the time the Drug Quantity Tables was adjusted in 2014, the need to address prison overcapacity was one of the motivations behind the change. *See* U.S.S. G. Amend. 782. Even several years into the opioid crisis, the federal prison population remains significantly lower than it was in 2014. *See* Federal Bureau of Prisons General Inmate Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops; *see also* U.S. Sent'g Comm'n, *Quarterly Data Report for Fiscal Year 2018*, Figure 10, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2018_Quarterly_Report_Final.pdf; U.S. Sent'g Comm'n, *Quarterly Data Report, 4th Quarter Release Preliminary Fiscal Year Data Through September 30, 2024*, Figure 10, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_FY24.pdf.

[19] Amendment 782, *Reason for Amendment*.

[20] *Id.*

misplaced. As a threshold matter, the large quantities of drugs involved at the highest base offense levels would often negate lower culpability for many defendants. But for lower-level defendants caught with higher quantities, the existing statutory and guideline mechanisms—the safety valve, mitigating role reduction, zero-point offender reduction, and judicial discretion under 18 U.S.C. § 3553(a)—provide relief and reduce sentences in appropriate cases. Notably, the statutory safety valve does not take quantity into account. Role and lack of criminal history are eligibility factors. In designing the safety valve, Congress recognized—and addressed—concerns that a scheme based on drug type and quantity could result in higher sentences for some lower-level participants caught with significant quantities than for the actual leaders. And Congress again addressed additional eligibility concerns by expanding eligibility under the First Step Act well beyond those with little or no criminal history.[21]

The Guidelines similarly provide multiple mechanisms for relief and leniency when appropriate. Many of the defendants whose guideline ranges are at the highest offense levels were involved in methamphetamine trafficking.[22] For example, in a case in which the current Drug Quantity Table could result in a lengthy sentence for a lower-level defendant (such as a courier transporting 50 kilograms of methamphetamine), the Guidelines already provide multiple reductions, including mitigating role reductions under §3B1.2,[23] the related reductions available under §2D1.1(a)(5) and §2D1.1(b)(17), the safety valve reduction under §2D1.1(b)(18), and the zero-point offender reduction under §4C1.1. Even after those reductions, a sentencing judge can consider the individualized factors related to the defendant under 18 U.S.C. § 3553(a) to vary to a lower sentence when appropriate.[24] In the Department's view, the principled scheme is to allow for sentencing judges to impose reduced sentences for particular individuals than to broadly eliminate the top base offense levels of the Drug Quantity Table, equate vastly different drug quantities and drug trafficking behavior under the guidelines, and untether the Guidelines from the statutory penalties.

Commission data indicate that the average sentence imposed for methamphetamine offenses is lower than the applicable guideline sentence.[25] This data suggest that judges already

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[21] Pub. L. No. 115-391 § 402, 132 Stat 5149 (2018).

[22] Drug Data Briefing, *supra*, Slides 4-5, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Drug-Offenses.pdf

[23] The Commission's data shows that the mitigating role adjustment was applied to approximately 39.8 percent of defendants whose base offense level was 38. *Id*. at Slide 10. Many of these same defendants would (or did) qualify for multiple additional adjustments.

[24] The Commission has requested comment on the need for potential changes to the mitigating role cap set forth in §2D1.1(a)(5). As noted in the text, the Department opposes reductions in the Drug Quantity Table. However, if the Commission were to reduce the base offense levels for drug offenses, it would eliminate the need for a mitigating role cap. As discussed, *supra*, the Commission established this cap pursuant to a directive in the Fair Sentencing Act. Pub. L. 111-220, § 7. If the Commission chooses to retain the cap, the Commission could consider simplifying §2D1.1(a)(5) to provide for a two-level reduction for defendants who qualify for a mitigating role reduction, unless the defendant's relevant conduct included the distribution of fentanyl, fentanyl analogues, or other opioids. Given the particularly deadly nature of these substances, we do not think that such offenders should not benefit from any further sentencing reductions for trafficking in these drugs.

[25] U.S. Sent'g Comm'n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* (June 2024) ("Methamphetamine report"), at Figure 28, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.

have the tools they need to reduce sentences below the applicable guidelines when they consider it to be appropriate. Doing more would only further untether the Guidelines from mandatory minimums and statutory penalty ranges and would undermine the Guidelines' ability to provide meaningful guidance to judges.

Fourth, the Commission's proposal could also result in the unintended consequence of lowering sentences for cartel leaders and major drug traffickers. The drug quantities that currently trigger the highest base offense level of 38 are quite substantial. For example, a defendant must be responsible for 36 kilograms or more of fentanyl (18 million potentially lethal doses) to trigger a level 38. By eliminating higher offense levels for defendants who are responsible for substantial and dangerous quantities of drugs, the Commission would be creating a potential sentencing windfall for some of the most culpable drug traffickers who are members of cartels or other transnational criminal organizations that are distributing significant quantities of deadly fentanyl.[26] Many of these individuals at the highest levels of culpability may be located outside the United States. They may lack criminal records or may not personally carry firearms. Reducing the penalties for high-ranking members of large drug trafficking organizations while our nation is immersed in a crisis of drug overdose deaths would seem counter to the Commission's intent and send the wrong message to the criminal networks that are profiting from the distribution of fentanyl and other deadly substances. It could lead to the unintended consequence that cartel leaders who distribute massive quantities of deadly drugs bear no more culpability than those who are far lower in the distribution chain. In addition, this reduction in sentencing exposure could affect the willingness of those who are responsible for large quantities of drugs to cooperate with law enforcement, thus hindering the ability of investigators to identify and prosecute those at the highest levels of the transnational criminal organizations that are sending these dangerous substances into the United States.[27]

The Commission also has requested comment on whether it should consider reducing all drug base offense levels. As discussed above, the drug quantities with respect to the most commonly trafficked drugs should be consistent with the statutory scheme in the Controlled Substances Act. Reducing the offense levels would de-link the Guidelines from the structure established by Congress. While the Commission's data indicate that defendants who are sentenced at high base offense levels often are sentenced below the applicable guideline, this does not provide clear explanations about what motivated individual judges to vary downward in particular cases. Absent clearer information, the Department does not advocate making changes

[26] Take the example of a defendant who is responsible for over 36 kilograms of fentanyl. Under the current version of §2D1.1, that defendant would have a base offense level 38. An additional four-level aggravating role enhancement under §3B1.1 and two-level enhancements for using violence under §2D.1(b)(2) and maintaining a premises for drug distribution under §2D1.1(b)(1) would yield an offense level of 46. Even after a three-level adjustment for acceptance of responsibility, the offense level would be 43, yielding a guideline recommendation of life imprisonment. Under Option One, that same defendant's offense level after acceptance would be 39 (262 to 327 months). Under Option Two, he would be at level 37 (210 to 262 months), and under Option Three, the offense level would be 35 (168 to 210 months). Thus, Option Three would have the effect of reducing a defendant's sentencing range from life down to a low-end sentence of 14 years for a highly violent leader of an organization trafficking in massive amounts of deadly fentanyl.

[27] As the Commission's data show, more than 25 percent of defendants with base offense levels of 30 or higher (and 43.4 percent of those at base offense level 38) received downward departures due to cooperation or participation in early disposition programs.

to the current offense levels, particularly since the levels are consistent with the penalties in the applicable statute. Instead, in the Department's view, district judges should continue to make individualized assessments of each defendant's conduct under 18 U.S.C. § 3553(a) and impose an appropriate sentence.

Fifth, the Department is particularly troubled by any proposal that would reduce penalties for fentanyl. Given the deadly nature of fentanyl, the Department's view is that the current guidelines for many fentanyl offenses are too low. In the context of fentanyl, just two milligrams can be deadly, and one kilogram has the potential to kill 500,000 people.[28] A reasonable scheme imposes higher penalties on those who traffic in multikilogram quantities of fentanyl, which have the potential to kill millions. The potential lethality of fentanyl is particularly significant because it often is distributed in the form of pills that are designed to look like legitimately manufactured pharmaceuticals.[29] This heightens the risk of death for individuals who do not even realize they are consuming fentanyl.

Under the current Drug Quantity Table, it takes 40 grams (20,000 potentially deadly doses) to trigger a level 24. Under the statute, if a defendant distributes over 40 grams of fentanyl, he will face a 60-month mandatory minimum.[30] Under the current guideline, that is a level 24 (51 to 63 months for a defendant in Criminal History Category I). If the base offense were reduced even by two levels to 22, it would yield a range of 41 to 51 months, well below the mandatory minimum sentence. Moreover, if the defendant qualifies for the safety valve, a host of other potential reductions would come into play, including the two-level reduction for safety valve, a two-level reduction for zero-point offenders, and even the further function-based reductions proposed for §2D1.1(b)(17). The result is a cascade of reductions that could put the guideline range at or even below the 24-30 month floor set in §5C1.2 for a defendant responsible for distributing approximately 22,500 potentially deadly doses of fentanyl.[31] We have significant concerns with this result considering the gravity of the offense.

Any further reductions in the guideline sentences for fentanyl offenses sends an inappropriate message to the public at a time when our nation remains in the throes of an opioid crisis. While drug users often need compassion and access to treatment, the traffickers who seek to profit from the sale and distribution of fentanyl and other deadly opioids rightly deserve significant sentences to punish and deter their conduct, which has damaged so many communities throughout the nation. The Department strongly opposes any reductions in the Drug Quantity Table, but it believes that any reduction in the penalties for fentanyl, fentanyl

[28] Drug Enforcement Administration's *Facts About Fentanyl*, at https://www.dea.gov/resources/facts-about-fentanyl.

[29] *Id.*

[30] 21 U.S.C. § 841(b)(1)(B)(vi).

[31] The significant statutory sentences that would be available will make the issue of safety valve eligibility extremely significant in cases where the Department brings charges that carry potential mandatory minimum sentences.

analogues, or other opioids would be particularly misguided.[32] The Department opposes all these proposed reductions to the current Drug Quantity Table as unnecessary and unwise.[33]

B. The New Trafficking Functions Reduction

The Department does not support the Commission's proposal to create new specific offense characteristics that would reduce a defendant's offense level under §2D1.1 based upon the defendant's "functions." We are concerned that the new provisions would add unnecessary complexity and complications to the Guidelines at a time when the Commission is seeking to simplify them. Generally, these changes would pivot the Guidelines to a bifurcated approach to address a defendant's role. While defendants in non-drug cases would continue to have their role assessed on the well-established criteria in Chapter 3, the conduct of drug trafficking defendants would be evaluated under a new and convoluted scheme that is likely to generate a substantial amount of litigation and confusion. Many of the "low-level trafficking functions" identified by the Commission will prove to be difficult to apply and will encompass defendants who perform crucial roles in the drug trade. We have several specific concerns.

First, as noted above, we think that existing statutory and Guidelines mechanisms appropriately account for defendants with lesser culpability. The existing mitigating role adjustment in §3B1.2 already provides a means of reducing the sentences of individuals who play minor or minimal roles in drug trafficking organizations and thus have lower levels of criminal culpability. The mitigating role adjustment already considers the role that the defendant played in a particular criminal enterprise. Litigants and the courts regularly apply this reduction, and there is a substantial body of case law regarding its application.[34] The Guidelines also provide additional mechanisms for reducing the sentences of lower-level drug offenders, including the mitigating role cap in §2D1.1(a)(5), the safety valve reduction under §2D1.1(b)(18), and the zero-point reduction.

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[32] In Issue for Comment Five, the Commission requested comment on the interaction between any reduction in the Drug Quantity Table and its separate consideration of amendments to the methamphetamine guidelines. Should the Commission adopt any reduction of the Drug Quantity Table, the Department opposes any changes to the methamphetamine guidelines that would further reduce the penalties for methamphetamine trafficking. Such a reductions would be inconsistent with the statutory structure and not take into account the significant danger posed by this drug.

[33] Should the Commission consider any reduction in the higher offense levels, it should not go any further than the current level 36. As discussed above, the three options proposed by the Commission would reduce the guideline sentences for significant traffickers close to or at the mandatory minimum, and in doing so, would not account the far greater risk to public health and safety posed by very large quantities of drugs. The Department also opposes changes to §2D1.11. However, if the Commission were to reduce the Drug Quantity Tables, it appears that the chemical tables in subsections (d) and (e), particularly (d), may require consideration for amendments. For example, currently the quantity table for precursor chemicals ephedrine, pseudoephedrine, and phenylpropanolamine goes up to a level 38. If the table for controlled substances no longer goes up to 38, the Commission may need to consider whether changes would be appropriate to the offense levels associated with these chemicals to ensure that the punishment for crimes involving these chemicals is not higher than the punishment for crimes associated with the controlled substances they are used to make.

[34] Commission data shows that §3B1.2 is applied in thousands of cases and at all base offense levels. Drug Data Briefing Slides 9-13.

Second, we are concerned that this new reduction would add complexity and result in litigation that would undermine its application. The Commission's proposal would create a new structure and remove the §3B1.2 analysis from the guideline calculation in drug trafficking cases. The proposed specific offense characteristic envisions a much broader and complicated inquiry into the defendant's role than the §3B1.2 analysis. It would require determining the "defendant's most serious conduct" or the "defendant's primary function" to discern whether the defendant performed sufficiently low-level drug trafficking functions. This fact-based analysis is likely to complicate sentencing proceedings as the parties dispute the wide variety of factual challenges that will arise under this proposed amendment. For example, drug defendants who possess or transport drugs as part of their criminal conduct could argue that they did not have an ownership interest or claim a significant share of the profits from the offense. While a defendant should bear the burden of proof,[35] in an age of encrypted communications, it may be very difficult (if not impossible) for the government to present evidence to address claims related to ownership and profit. The issues of ownership and profit are not elements of the offense, and evidence about them is often unavailable to the government.

Third, it is not at all clear that the specific functions in the proposed amendments necessarily reflect the nature and extent of an individual's role in a particular drug offense. Each offense is unique, involving specific situations and actors, and each participant important to furthering the conspiracy. The various terms used in the proposed amendment do not adequately reflect the breadth of conduct that occurs in drug trafficking offenses. We note that many of the roles that the Commission has identified are not low-level at all but are fundamental to the success of drug operations.

We have several concerns with how the proposed amendment seeks to delineate those with lower culpability, and how in doing so, it fails to reflect the realities of drug trafficking. Under either option, those who package, store, or engage in electronic communications related to drug transactions would potentially be eligible for the reduction. But those who do so are not necessarily less culpable than the individual who engages in the final sale, particularly if they do so on a regular basis. The descriptions of "low-level" functions would appear to apply to an individual who operated a drug distribution location where bulk quantities of drugs were received, processed and packaged for sale, provided that the person operating the distribution location used others to deliver the drugs to customers. As drafted, this reduction could even potentially apply to an individual who qualified for an aggravating role adjustment under §3B1.1 by organizing or supervising cooks, packagers, and drug distributors at the location. As a result, nothing in the proposal's language would preclude an individual from obtaining an aggravating role enhancement yet qualifying for a reduction under the proposed trafficking functions adjustment.

Another concern involves how the proposed amendment treats those who play an important role in facilitating a drug operation by transporting drugs. The proposal makes no distinction based on quantity or frequency. It does not distinguish between an individual who

[35] As with a mitigating role adjustment, the defendant should bear the burden of proof that the defendant is entitled to a reduction under this new provision. *See, e.g., United States v. Wynn*, 108 F.4th 73, 80 (2d Cir. 2024) (defendant has burden of establishing entitlement to mitigating role reduction). If the Commission adopts this proposed amendment, it should consider adding language to make clear that the defendant bears this burden.

does so once and another who does so dozens of times, regardless of the quantities involved. Thus, a drug courier who is paid $500 to drive a small load of drugs across the border on one occasion, a tractor trailer driver who routinely transports hundreds of kilograms of drugs across the country, and a drug courier who routinely and frequently transports small quantities of drugs across the border, would all be considered to perform low-level functions that merit sentence reductions. And those that organized and paid them to do so may also qualify. The result would treat very differently situated defendants as similar and lacks the broader flexibility that exists in the current §3B1.2 analysis.

Another concern involves how the proposal characterizes some quintessential drug trafficking activity (distributing controlled substances) as a low-level function. Street level dealers who sell drugs to customers are key players in drug distribution networks. They are the individuals responsible for providing the drugs to end users who die each day from drug poisonings—behavior with severe real-world consequences. Yet this proposal would allow at least some such drug dealers to draw the benefit of a reduced sentence.

Fourth, the proposal would inject uncertainty into one of the most-commonly applied guidelines and in a manner that will require substantial litigation for what may amount to limited benefit. Take, for example, the determination of whether a defendant distributed "retail or user-level quantities." These are not terms with clearly accepted definitions and may even vary by region or community. It will likewise be challenging to litigate issues surrounding the defendant's "motivation." While such factors are part of the current §2D1.1(b)(17), this proposal would greatly expand the scope of litigation over a defendant's motivations.[36] It is likely that, in many cases, the only evidence of whether a defendant was "motivated by a family relationship or threats" or "was otherwise unlikely to commit" the offense will be a defendant's own self-serving statement. Such evidence is not required to prove the elements of the offense and is generally inaccessible to the government. Sentencing hearings over the application of this provision may descend into significant disputes over the meaning of emails, text messages, prior conversations or past actions to find evidence that sheds light on a defendant's various motivations and criminal proclivities. All of this fact-finding and sentencing litigation will deepen the complexity of sentencing proceedings and, at least in the short term, the need for clarifying case law through the appellate process.

Similarly, discerning whether a defendant's conduct was "motivated primarily by a substance abuse disorder" will often be difficult to demonstrate. While it is not uncommon for

[36] The current version of §2D1.1(b)(17) only can apply when a defendant qualifies for the four-level minimal role adjustment under §3B1.2(a). It is not applied frequently and was not applied to any cases in 2022 or 2023. *See* U.S. Sent'g Comm'n, *2022 Guideline Application Frequences Report*, https://www.ussc.gov/research/data-reports/guideline/2022-guideline-application-frequencies; *see also* U.S. Sent'g Comm'n, *2023 Guideline Application Frequences Report*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2023/Ch2_Guideline_FY23.pdf. Adopting this proposal would greatly increase the occasions in which judges will be asked to assess the motivations of defendants, which are not part of the elements of an offense, not generally accessible to the government, and for which the defendant is often the sole possessor of relevant evidence.

drug trafficking defendants to use drugs, it will be extremely challenging to litigate questions about how much their substance use motivated their criminal activity. A defendant's self-serving statements may require prosecutors to contest the defendant's credibility and identify other potential motivations (such as profit, status, or personal relationships), and judges then would need to sift through various motivations to determine whether substance abuse was the *primary* motivator.

For all of these reasons, this proposal would seem to complicate the Guidelines at a time when the Commission has been seeking to simplify them. It would jettison the longstanding application of §3B1.2 and create a variety of new, undefined terms that will be the source of substantial litigation. It will require cumbersome factfinding on a variety of topics about which the government often has limited information (*e.g.*, a defendant's motivation, ownership interest, claims to a significant share of the profit). As a result, government resources will be diverted to investigating these peripheral issues to combat defendants' efforts to qualify for these guideline reductions. If this proposal is motivated by concerns about the scope of the current mitigating role adjustment, the Department recommends that the Commission to conduct a review of §3B1.2 and its commentary rather than making this substantial change to §2D1.1. Should the Commission wish to provide additional mechanisms for relief, providing additional guidance on appropriate use of the mitigating role reduction for "minimal" participants may better accomplish this goal without adding complexity and litigation.

Despite our significant concerns with its application, if the Commission nevertheless adopts a version of the proposed trafficking functions amendment, we note several changes that the Commission should consider. While these changes will not address our core concerns with the proposal, these changes may help the Commission accomplish its apparent goal with fewer negative consequences:

- Although the proposal would not apply to a defendant who possessed a firearm or induced another participant to do so, it would be cleaner, clearer, and consistent with provisions such as §4C1.1(a)(7) to exclude from application any defendant who qualified for the dangerous weapon enhancement under §2D1.1(b)(1). This would ensure consistency across §2D1.1 and limit the application of the reduction to defendants who are associated with violence or risks of violence.

- Individuals whose relevant conduct resulted in death or serious bodily injury should similarly be excluded. There are some instances where a defendant's drug trafficking results in death or serious bodily injury but the defendant has not been charged or convicted of a statutory death-resulting offense that triggers the offense levels under §2D1.1(a)(1)-(4). Defendants who are responsible for death or serious bodily injury, like defendants who engage in violence, have a higher level of culpability and should not be permitted to benefit from a sentence reduction targeted toward lower-level offenders.

- Defendants who qualify for an aggravating role adjustment under §3B1.1 should be explicitly excluded from receiving the reduction, similar to §4C1.1(a)(10). A defendant who has a leadership or organizational role in the offense does not perform a low-level function, even if the defendant is part of a much larger

operation. For example, a defendant who supervises and organizes other workers in a stash house or drug packaging operation should not be able to claim to be performing a low-level function.

- The reduction should be available only to those "whose most serious conduct was limited to" performing low-level functions. The alternative proposal, which requires an assessment of the defendant's "primary function," is far more subjective and is likely to generate significant and unproductive litigation. Limiting the reduction to those whose most serious conduct was low level and who never performed a more significant function in the drug trafficking operation would more appropriately limit the availability of this reduction to the most-deserving defendants and will avoid situations where defendants who perform higher-level functions seek to characterize other roles as their primary function.

- Option One would likely result in less litigation than Option Two. By characterizing the various roles merely as examples, Option Two opens the door to arguments that a particular defendant's conduct somehow should be characterized as a "low-level function." Option One, although flawed, provides somewhat more specific guidance regarding its operation.

We address additional issues for comment below. In Issue for Comment Eight, the Commission requested comment on the possibility of placing language from application note 3(A) in §3B1.2 into proposed note 21(A) of §2D1.1. Doing so is unnecessary and may cause confusion. Application note 3(A) in §3B1.2 was originally added in Amendment 635 to resolve a circuit conflict over whether the mitigating role adjustment could apply only when a defendant's relevant conduct was limited to drugs that the defendant personally handled.[37] Because proposed (b)(17) is focused solely on the defendant's own conduct and not the conduct of others, adding application note 21(A) does not serve the same clarifying purpose and could potentially be interpreted to render this reduction unavailable for defendants whose relevant conduct includes the conduct of others involved in the offense. The Department does not oppose the proposed application note 21(B), which would make this new amendment inapplicable to matters where the defendant's base offense level is lower because he has been convicted of an offense that is significantly less serious than his actual conduct.

The proposed reduction for trafficking functions is far broader than §3B1.2 (which can range from two to four levels) and potentially may apply to a far larger number of defendants whose conduct could not credibly be described as minor or minimal.[38] It would be inappropriate to expand the scope of the role/function reduction while making an even greater six-level reduction available. Rather, since the Commission is seeking to broaden the applicability of the reduction, the Department suggests that the available reduction should be no greater than two-

[37] U.S.S.G., App. C, amend. 635, https://www.ussc.gov/guidelines/amendment/635.

[38] Given this breadth, if the Commission adopts this proposal, the Department agrees that it would be appropriate to include a special instruction that §3B1.2 should not be applied to defendants whose guidelines are calculated under §2D1.1. Similarly, if a defendant's guideline sentence is calculated under another section of Chapter 2 that includes a cross-reference to §2D1.1, the guidelines should not permit the defendant to qualify for both a mitigating role adjustment and the low-level function adjustment.

levels in most cases, with a four-level reduction available in particularly extraordinary cases where a defendant's functions were exceedingly limited.

In Issues for Comment Four and Five, the Commission requested comment on the potential effect of the trafficking functions proposal on §2D1.1(a)(5). In the Department's view, it would make little sense as a matter of policy to retain §2D1.1(a)(5) if the Commission adopted its proposal to reduce the Drug Quantity Table. The difficulty is that eliminating §2D1.1(a)(5) might require congressional action because the level 32 cap was established in the Fair Sentencing Act based upon the then-existing (and still current) Drug Quantity Table.[39] In particular, Congress created the reduction in the Fair Sentencing Act for situations where defendants receive a "minimal role adjustment." We are concerned about whether the guideline would continue to be consistent with the directives of the Fair Sentencing Act if §3B1.2 is no longer applicable to drug trafficking offenses.[40] If, by contrast, the Commission retains the Drug Quantity Table in its current form but implements the trafficking functions amendment, then the need for (a)(5) would be more limited. The breadth of the proposed change and the scope of its potential applicability to many defendants who perform important roles in drug trafficking offenses would seem to reduce the need for further reductions under §2D1.1(a)(5).

If the Commission were to adopt the trafficking functions amendment, it would create substantial redundancy with the current §2D1.1(b)(17), which the Commission proposes to retain as (b)(18) and, as with §2D1.1(a)(5), it also may create a discrepancy with the congressional directive in the Fair Sentencing Act. In § 7(2) of the Fair Sentencing Act, Congress directed the Commission to amend the guidelines to provide for additional reductions for the conduct described in the current (b)(17) for a defendant who "qualifies for a minimal role adjustment under the guidelines." Although we recognize that the Commission's proposal would incorporate many of the existing (b)(17) factors into the new (b)(18), eliminating the application of the minimal role adjustment from drug trafficking offenses may be inconsistent with this congressional directive.[41] Additionally, because the existing (b)(17) factors would be incorporated into the new (b)(17) while also be retained in the new (b)(18), some defendants who qualify for the reduction based on these factors would be entitled to a duplicative further reduction for the same factors. If the Commission adopts the trafficking functions amendment, it should eliminate this redundancy by striking these factors from the trafficking functions amendment.

In several Issues for Comment, the Commission also requested comment on other provisions that may be affected by this proposal. Section 2D1.8 currently provides for a four-level reduction in the offense level for convictions under 21 U.S.C. § 856 (related to maintain a premises for drug trafficking) when the defendant had no participation in the underlying drug offense but precludes application of the mitigating role adjustment under §3B1.2. If the low-

[39] Fair Sentencing Act, Pub. L. 111-220, §7, 124 Stat. 2374 (2010).

[40] We explain in Section I.C.1, *infra*, our view concerning the Commission's ongoing obligation to comply with extant congressional directives.

[41] As noted above, this same issue arises with the §2D1.1(a)(5), which is also based on the Section 7 of the Fair Sentencing Act and also makes direct reference to the minimal role adjustment.

level function adjustment is adopted, the special instruction in §2D1.8(b)(1) should be amended to preclude application of the trafficking functions adjustment to avoid a double reduction.

C. Methamphetamine Amendments

1. Elimination of "Ice" Guideline

The Department recognizes the desire to eliminate the separate guideline for "ice" but does not believe that the proposed amendment can be reconciled with the existing 1990 Crime Control Act directive from Congress. Accordingly, the Department recommends against proceeding with the amendment at this time and instead recommends that the Commission first seek legislative changes from Congress.

The nature of methamphetamine trafficking and use has evolved since the passage of the 1990 Crime Control Act. In particular, when the Commission created the "ice" guideline, there was substantial concern about the high purity level of crystal methamphetamine.[42] But methamphetamine production has evolved over time so that nearly all methamphetamine seized in the United States can be considered "ice" because of its high purity level.[43] As the Commission notes, most methamphetamine that is tested for purity is over 90 percent pure.[44] The Guidelines define "ice' as "a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity."[45] In most cases the drug quantity calculation for "ice" results in the same offense level as if the substance were calculated under the methamphetamine (actual) guideline. For example, six kilograms of 95 percent pure methamphetamine would trigger base offense level 38 whether the ice or methamphetamine (actual) guideline is applied.[46] Generally, the only reason methamphetamine does not satisfy this definition is because some labs (particularly state labs) do not always conduct a purity analysis. As a result, there may no longer be compelling reasons to retain a separate guideline specifically targeting "ice."

Although the Department does not necessarily oppose the elimination of the "ice" guideline to the extent permitted by law, we have concerns with the Commission's ability to do

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[42] U.S. Sent'g Comm'n, *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System* (June 2024) ("Methamphetamine report") at 14-15, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2024/202406_Methamphetamine.pdf.

[43] *Id*. at 9, Figure 3.

[44] As the Commission has noted, in 2003, the average purity of methamphetamine was 57.4 percent, but rose to 97.2 percent in 2019. *Id*. at 9-10.

[45] §2D1.1 (note C to Drug Quantity Table). The term "ice" does not have a commonly accepted scientific definition nor is it defined in the Controlled Substances Act.

[46] There are some situations where the ice guidelines and methamphetamine (actual) guidelines will produce different results. For example, 502 grams of 92 percent pure methamphetamine would trigger a base offense level of 34 under the "ice" guideline (because the quantity was over 500 grams) but would trigger a base offense level 32 under the methamphetamine (actual) guideline because the purity factor would reduce the quantity calculation below 500 grams. Such situations are relatively rare.

so while complying with congressional directives.[47] Specifically, the Crime Control Act of 1990 instructed the Commission to amend the existing guidelines "so that convictions for offenses involving smokable crystal methamphetamine" would be assigned an offense level that "is two levels above that which could have been assigned to the same offense involving other forms of methamphetamine."[48] We acknowledge that Congress did not specifically use the term "ice" and, accordingly, its directive does not require the Commission to retain the term "ice" in the Guidelines. But even if the Commission elects to eliminate "ice" from the Guidelines, compliance with this directive would require the Commission to impose a higher penalty for offenses involving "smokable crystal methamphetamine."

Because most methamphetamine on the market today is in crystal form and capable of being smoked, the Commission has suggested the alternative approach of permitting a two-level reduction for offenses that involve methamphetamine that is in a non-smokable, non-crystalline form. We acknowledge the intuitive appeal to this approach, but we have concerns about its practical application.

First, the proposed specific offense characteristic addressing methamphetamine in a non-smokable, non-crystalline form is likely to result in confusion and protracted litigation. The Commission has not proposed any definitions of the terms "non-smokable" and "non-crystalline form," and there may not be universal consensus on the meanings of these terms, which can easily lead to inconsistent interpretations. For example, methamphetamine is sometimes smuggled in a liquid form to facilitate its trafficking.[49] While a liquid may not be considered smokable or crystalline, it can readily be converted to such a form through a simple evaporation process. Methamphetamine can also be in tablet form. Although tablets are not typically smoked, they can be consumed by smoking (particularly if the tablet is ground into a powder or not intact). This practice is common with fake tablets containing fentanyl. Sentencing hearings could become debates about whether a particular form of methamphetamine is smokeable or is in crystal form and lead to inconsistent results across jurisdictions for the same offense

Second, there is no clear policy reason why liquid or tablet forms of methamphetamine should be treated differently than other forms of methamphetamine for sentencing purposes. Applying the proposed specific offense characteristic to these forms of methamphetamine could create confusion in the application of the Guidelines and have the unintended effect of causing drug traffickers to increase their production of these forms of methamphetamine (such as

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[47] In the Comprehensive Methamphetamine Control Act of 1996, Congress directed the Commission to increase penalties for methamphetamine offenses. Pub. L. No. 104-237 § 301, 110 Stat. 3099. This directive, which is not specific to ice, requires that the Guidelines and policy statements provide for "increased penalties" for methamphetamine trafficking offenses, among other requirements. In response, the Commission reduced by half the quantities of a mixture or substance containing methamphetamine for each offense level in the Drug Quantity Table. U.S.S.G. App. C, amend. 555 (effective Nov. 1, 1997). Although the Commission may not have seen this directive as an impediment to reducing drug penalties in 2014, if the Commission chooses to reduce methamphetamine penalties by setting levels at the mixture level, we urge the Commission to evaluate compliance with this and other congressional directives.

[48] Crime Control Act of 1990, Pub. L. No. 101-647, § 2701, 104 Stat. 4789, 4912 (1990).

[49] Methamphetamine report at 41.

increasing the use of liquid methamphetamine as a trafficking tool). Additionally, distinguishing between tablet, liquid, and powder forms of methamphetamine would seem to introduce the very disparities that the Commission is seeking to avoid in eliminating "ice" from the Guidelines.

Finally, the Department responds to the suggestion in some recent stakeholder submissions that directives such as the one in the 1990 Crime Control Act do not bind the Commission indefinitely when, as here, they are not "codified" and/or the Commission has previously taken measures to implement the directive.[50] The Department sees no merit in either strand of that argument. As to the first, it should make no difference that the 1990 congressional directive appears in the Statutes at Large, in a provision indicating that it would be codified as a "note" to 28 U.S.C. § 994.[51] To the contrary, "[t]hough the appearance of a provision in the current edition of the United States Code is prima facie evidence that the provision has the force of law, . . . it is the Statutes at Large that provides the legal evidence of laws."[52] As for the additional suggestion that a statutory directive ceases to bind the Commission once it has responded to the directive for the first time, that contention runs contrary to the foundational principle that "American statutes not limited by their own terms remain in force until amended or repealed by competent authority."[53]

An example illustrates the problems with deviating from that principle in the manner that has been proposed. Suppose that, in 2024, Congress directed the Commission to increase the base offense level for federal robbery offenses and that the Commission responded in 2025 by implementing a two-level increase in the pertinent guidelines. Then suppose the Commission decided the following year that it preferred to study the matter further and so reversed the two-level increase pending further data collection. Under the stakeholder's submission, the Commission need not ever return to the higher robbery base offense levels directed by Congress, because the Commission's initial action in increasing those levels for a single amendment cycle sufficed to comply with the directive. We respectfully suggest that such an understanding finds no support in sound principles of statutory construction—and provides no basis for disregarding the directive in the 1990 Crime Control Act concerning smokeable crystal methamphetamine.

In sum, eliminating the "ice" guideline while still complying with the directive of Congress is challenging and could potentially produce unintended consequences. We therefore recommend that the Commission refrain from acting on this proposal at this time and that it instead advise Congress of this issue and suggest that Congress consider repealing its 1990 directive. In the Department's view, it would be more appropriate to take that approach than to

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[50] *See* Heather Williams, Federal Public and Community Defenders Comment on Simplification of the Three-Step Process, at 18-24 (Feb. 22, 2024); *see also* Heather Williams, Federal Defender Sentencing Guidelines Committee Letter, Defender Comment on Simplification of the Three-Step Process, at Appendix p. 4 (February 3, 2025).

[51] Pub. L. No. 101-647, § 2701, 104 Stat. 4789, 4912 (1990).

[52] *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (quotation marks omitted); *see Cameron v. McDonough*, 1 F.4th 992, 995 (Fed. Cir. 2021) (calling it "well-established that the placement of a provision in the United States Code as a note is not dispositive").

[53] 2 Shambie Singer, Sutherland Statutory Construction § 34:1 (8th ed.); *see id.* § 34:4 (explaining that, while a statute does "occasionally . . . specify a date, event, or circumstance for its own termination," "[a] legislature must clearly evince such an intent in the act at issue or a related act in order to overcome the presumption of continuity").

attempt to craft a new guideline (and potentially create substantial litigation) seeking to address the rare cases of methamphetamine that are neither smokable nor crystalline.

2. Methamphetamine Purity Distinction

The Commission also proposes to eliminate the distinction between methamphetamine (mixture) and methamphetamine (actual). The Department recognizes that a number of judges have concerns about this distinction and have expressed a categorical disagreement with the methamphetamine guidelines.[54] While the Department is not necessarily opposed to eliminating this distinction in the Guidelines, any such change must account for the statutory distinction in the Controlled Substances Act and should not establish guideline levels that are below the applicable mandatory minimum sentences. Accordingly, the Department suggests that the Commission consider engaging with Congress about these concerns prior to making significant changes to the methamphetamine guidelines. We also acknowledge that one of the issues that the Commission is trying to solve is disparity that results from different sentencing practices across the country. The Department favors one rule across the country that has uniform application. While we recommend engaging with Congress to avoid complications that would result from a guidelines scheme that diverges from the statutory scheme, we appreciate that the Commission may wish to act sooner. If the Commission decides to proceed, we think that setting the guideline at the current actual levels would result in fewer complications.

The Controlled Substances Act provides for a ten-year mandatory minimum sentence for drug trafficking offenses involving 50 grams or more of methamphetamine or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine.[55] It also provides for a five-year mandatory minimum penalty for drug trafficking offenses involving five grams or more of methamphetamine or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine.[56] The current methamphetamine guidelines retain this distinction, and the statute's 10:1 ratio for mixture/actual methamphetamine appears throughout the Drug Quantity Table.

The market for methamphetamine has evolved in recent years. While there was a time when trafficking in higher-purity methamphetamine reasonably could be associated with high-level drug suppliers, that is no longer true in all cases. Large-scale methamphetamine laboratories now consistently produce methamphetamine with a high purity level, frequently well over 90 percent pure.[57] As a result, methamphetamine traffickers at all levels of the chain of distribution often distribute methamphetamine that has a purity level that is just as high as that of

[54] *See, e.g., United States v. Robinson*, 2022 WL 17904534, at *3 (S.D. Miss. Dec. 23, 2022) (Reeves, J.).

[55] 21 U.S.C. § 841(b)(1)(A)(viii).

[56] 21 U.S.C. § 841(b)(1)(B)(viii).

[57] Methamphetamine report, *supra*, at 3.

an individual who is at the top of the chain.[58] This has led some judges to question the rationale for imposing higher penalties for "actual" methamphetamine.[59]

The current methamphetamine guidelines also present some challenges that can result in disparate treatment of similarly situated defendants. First, not all laboratories that test methamphetamine will produce a purity analysis. As a result, two defendants with the same quantity of methamphetamine of equivalent purity may face different sentences under the guidelines based upon which laboratory tested the seized drugs or whether the lab results are available at the time of sentencing.[60] Second, the fact that several judges have expressed categorical disagreement with the methamphetamine guidelines has created situations where two defendants in the same district may have significantly different sentences depending upon whether the judge assigned to their case has endorsed this categorical disagreement.[61]

The Department acknowledges these concerns and the criticism that has been raised by some judges. However, not all judges have been persuaded that the actual/mixture distinction in the Guidelines is inappropriate.[62] As noted above, despite the concerns expressed by some judges about the actual/mixture disparity, this is a distinction created by Congress that is part of the structure of the Controlled Substances Act's sentencing scheme. Any changes adopted by the Commission should take into consideration the directives set forth by Congress in 28 U.S.C. § 994(b) and other congressional directives.[63] Given the Commission's concerns and the possibility that the proposal may deviate from congressionally set policy, the Department suggests that the Commission refrain from making any changes before Congress acts. Instead, we recommend that the Commission seek legislative changes from Congress.

Although we do not think it appropriate to proceed absent a legislative change, should the Commission nevertheless proceed, Option Two—which would set the quantity thresholds at the current levels for methamphetamine (actual)—would present fewer problems. Option One, which would set the quantity thresholds at the current levels for methamphetamine mixture, would create an inappropriate discrepancy between the mandatory minimums created by

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[58] *See, e.g., United States v. Bean,* 371 F.Supp.3d 46, 52-53 (D.N.H. 2019) (low level street dealers are just as likely as kingpins to have access to extremely pure methamphetamine).

[59] *See, e.g., United States v. Nawanna*, 321 F.Supp.3d 943, 951-55 (N.D. Iowa 2018).

[60] *See, e.g.*, *United States v. Johnson*, 812 Fed. App'x 329, 332 (6th Cir. 2020) (unpublished) (defendants faced different sentencing calculations because drug purity results became available after first defendant was sentenced but before second defendant was sentenced); *United States v. Rodriguez*, 382 F.Supp.3d 892, 897 (D. Alaska 2019) (noting that methamphetamine cases investigated by federal law enforcement agencies almost always had purity analysis but such analysis was less frequently available in cases investigated by state or local law enforcement agencies).

[61] *United States v. Jimenez-Marquez*, 2024 WL 4281014, at *4 (D.N.M. Sept 24, 2024) (refusing to grant downward variance based upon actual/mixture disparity despite the fact that another judge in the district had done so).

[62] *Id.* at *3 (identifying the need to reduce methamphetamine overdoses and deaths, the addictive nature of high purity methamphetamine, and the need to combat international drug trafficking organizations as policy reasons supporting the current guideline structure).

[63] We explain in Section I.C.1, *supra*, our view concerning the Commission's ongoing obligation to comply with extant congressional directives.

Congress and the Guidelines. For example, a defendant who distributed 60 grams of 95 percent pure methamphetamine would face a ten-year mandatory minimum under 21 U.S.C. § 841(b)(1)(A)(viii). Under Option One, the base offense under the Drug Quantity Table would be 24 (51 to 63 months for a defendant with a Criminal History Category of I). Thus, the low end of the base offense level would be less than half of the applicable mandatory minimum sentence. For a defendant who qualifies for the safety valve reduction and has no prior criminal history who is potentially eligible for the two-level safety valve reduction, the two-level zero-point offender reduction, and a three-level reduction for acceptance of responsibility, the adjusted offense level would be 17 (24 to 30 months), which is the safety valve floor set forth in §5C1.2.

Moreover, the Commission's proposal would vastly increase the quantity of actual methamphetamine that is necessary to trigger higher offense levels. Currently, 4.5 kilograms would trigger a level 38. Under Option One, 4.5 kilos would be level 32 (121 to 151 months). Thus, the change would mean that the Guidelines would recommend a sentence at or near the mandatory minimum for a quantity 90 times the quantity necessary to trigger the mandatory minimum. The base offense level for a kilogram of actual methamphetamine would be reduced from 34 to 30 (97 to 121 months) despite being 20 times the quantity that triggers the 120-month mandatory minimum. This also could create a substantial disincentive for defendants to engage in high-level cooperation of the sort that warrants a substantial-assistance motion from the government, because merely qualifying for the safety valve will be sufficient to dramatically reduce their sentencing exposure.[64]

Option Two would equalize the guidelines for all methamphetamine at the higher level that is currently associated with methamphetamine (actual). Given the highly pure nature of the methamphetamine that is proliferating in the United States today and the increased number of overdoses and deaths associated with these substances, that approach is appropriate and will provide for more uniform sentences in methamphetamine cases.[65] It is also more consistent with the clear intent of Congress that highly pure methamphetamine should be punished more severely. Because most methamphetamine is highly pure, the lower penalties under the mixture

[64] In Issue for Comment Four, the Commission requested comment on whether §2D1.11 would need to be amended if Option One were adopted. As discussed above, the Department opposes Option One. If, however, the Commission chooses to adopt Option One, the Department believes that the risks posed by methamphetamine are substantial and crimes involving methamphetamine precursors are crimes that merit significant punishment. The Department would oppose any changes to §2D1.11 that would reduce the penalties for precursor chemicals.

[65] In Issue for Comment Two, the Commission requested comment on the potential risk that Option Two would raise the guideline range in some limited number of cases involving methamphetamine (actual). While such a possibility exits, given the high level of methamphetamine purity, such a risk would likely only come into play in a small number of cases where the drug weight was slightly over the triggering threshold for a particular base offense level. Absent some empirical evidence that this will present a widespread problem, the Department does not believe that the Commission needs to separately address this issue. When such unique issues arise, the district court can address any concerns when applying the § 3553(a) factors.

guideline are generally inappropriate and have the potential to yield disparate results for similarly situated defendants.[66]

D. Crack-Powder Cocaine

In Issue for Comment Four, the Commission requested comment on whether it should take future action to address the 18:1 ratio involving powder and crack cocaine. The Department previously has expressed its view that this ratio is inappropriate. However, the ratio was established by Congress and remains in the Controlled Substances Act. The Department's view is that the Guidelines should be consistent with the statutory scheme. The Commission should refrain from taking further action on the crack/powder ratio issue until Congress acts to address the matter.

E. Fentanyl Fake Pills Enhancement

The Commission has proposed amendments to the specific offense characteristic at §2D1.1(b)(13), which was first added to the Guidelines in 2018 and subsequently amended in 2023. The Department appreciates the Commission's willingness to address the application issues with §2D1.1(b)(13) and agrees that this enhancement should be further refined. The current version of §2D1.1(b)(13) is ineffective because it requires proof related to a defendant's *mens rea* and by further requiring that the defendant knowingly engage in misrepresentation or marketing related to the nature of the substance involved in the offense.

The Commission has proposed three options. Option One presents an offense-based enhancement that would remove the *mens rea* requirement. Option Two presents a defendant-based enhancement with a *mens rea* requirement (knowledge/reason to believe or knowledge/reckless disregard). Option Three presents a tiered approach retaining a *mens rea* requirement (knowledge/reason to believe or knowledge/reckless disregard) for the defendant-based enhancement and offering an offense-based enhancement with no *mens rea* requirement.

As discussed below, the Department has concerns with each of these three proposals. The Department recommends a hybrid approach that retains the current defendant-based language of part (A) that addresses defendants who make knowing misrepresentations about the identity of the fentanyl that are trafficking but amends part (B) to establish an offense-based approach to provide enhancements for offenses involving fake fentanyl pills and other similar substances that would appear to a reasonable person to be legitimately manufactured or which the defendant represented as being legitimately manufactured. The second clause of our part (B) would apply to defendants who assure consumers that the pill is real without making any affirmative representation about what the substance is and without the need to specifically establish that the defendant knew the substance was fentanyl. This approach would expand the

[66] If a defendant is charged with the ten-year mandatory minimum under the "mixture" statute, 21 U.S.C. § 841(b)(1)(A)(viii), that would yield a base offense level of 34 (151 to 188 months) under Option Two. While this is somewhat higher than the mandatory minimum threshold, that result is not overly problematic because (as discussed elsewhere) the purity of most mixtures is so high that the higher guideline is likely to fairly reflect the significance of the quantity of the substance involved in the offense. However, in applying the factors set forth in 18 U.S.C. § 3553(a), the sentencing court would have the ability to vary downward to address any perceived unfairness in the application of this guideline to a particular defendant.

scope of §2D1.1(b)(13) so that it applies not only to those who affirmatively make misrepresentations, but also to those who manufacture and distribute these deceptive and deadly substances absent evidence of affirmative misrepresentations.

Since 2012, fentanyl has shown a dramatic increase in the illicit drug supply as a single substance, in mixtures with other illicit drugs (*i.e.*, heroin, cocaine, and methamphetamine), and in forms that mimic pharmaceutical preparations including prescription opiates and benzodiazepines.[67] Fentanyl is often pressed into fake prescription pills either before or after being brought into the United States for distribution.[68] In 2023, DEA seized more than 80 million fentanyl-laced fake pills, an increase from the previous year. DEA estimations vary but approximately 40 to 60 percent of pills tested contain a potentially lethal dose of fentanyl.[69] These fake pills are made to look like legitimate prescription drugs such as Oxycontin, Percocet, Vicodin, Xanax, or Adderall, but actually contain fentanyl, methamphetamine, or other synthetic drugs.[70] These fake pills are often sold on social media and e-commerce platforms, where they are available to anyone with a smartphone, including minors.[71] The pills are sold on these platforms, in many instances purposely appearing to resemble legitimate pharmaceutical drugs, and often through the use of coded language or emojis that disguise the true nature of the pills.[72]

Although the number of fentanyl-laced pilled seized by DEA is steadily rising, the §2D1.1(b)(13) enhancement is applied infrequently. As noted by the Commission, this enhancement was applied in only 2.2 percent of fentanyl cases and 1.5 percent of fentanyl analogue cases in FY 2023, and 2.7 percent of fentanyl cases and 2.3 percent of fentanyl analogue cases in FY 2024; those percentages amount to only 70 defendants in FY 2023 and 106 defendants in FY 2024 in fentanyl and fentanyl analogue cases, when in each of those years there were over 3,000 fentanyl and fentanyl analogue cases.[73] The enhancement is applied rarely despite the growing prevalence of fake pills containing fentanyl, fentanyl analogues, and synthetic opioids and the danger posed by these pills, as shown by the staggering number of

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[67] United Nations Office on Drugs and Crime, Global SMART Update Volume 17, March 2017, at https://www.unodc.org/documents/scientific/Global_SMART_Update_17_web.pdf.

[68] *Hearing on Countering Illicit Fentanyl Trafficking Before the S. Comm. on Foreign Relations*, 118th Cong. (February 15, 2023) (statement of Anne Milgram, Administrator, Drug Enforcement Administration), https://www.foreign.senate.gov/imo/media/doc/f4597c23-de04-fa71-e612-bcbc49b6826c/021523_Milgram_Testimony.pdf.

[69] *See* Milgram Statement, *supra*, n.68 ("DEA lab testing reveals that 6 out of 10 of these fentanyl-laced fake prescription pills contain a potentially lethal dose"). *But see* Drug Enforcement Administration, *Facts About Fentanyl* (March 2025), https://www.dea.gov/resources/facts-about-fentanyl (estimating "42% of pills tested for fentanyl contained at least 2 mg of fentanyl, considered a potentially lethal dose").

[70] Drug Enforcement Administration, *One Pill Can Kill* (March 2025), https://www.dea.gov/onepill/teens.

[71] Drug Enforcement Administration, *Emoji Drug Code Decoded* (March 2025), https://www.dea.gov/sites/default/files/2022-04/Emoji%20Decoded_FO%20One%20Page_v2.pdf

[72] *Id*.

[73] Drug Data Briefing, Slides 27-28, *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2025_Drug-Offenses.pdf*.

overdose deaths. Although the Commission has recognized these concerns, its proposed amendments will not adequately address the problem.

1. Option One's Offense-Based Enhancement

The Commission has proposed eliminating the *mens rea* requirement in Option One and alternatively offered an offense-based enhancement. While the Department has acknowledged that the *mens rea* requiring knowledge can be difficult to prove and is a likely reason for relatively few cases in which the enhancement is applied, the Department believes that eliminating the *mens rea* but using the specific offense-based formulation in Option One will not meaningfully expand the number of instances in which the enhancement is applied. That is because this offense-based provision appears to require proof that the defendant has affirmatively misrepresented or marketed the substance containing fentanyl as another substance—a flaw that exists in the current version of §2D1.1(b)(13).

As the Commission notes, "the specific offense characteristic includes a *mens rea* requirement to ensure that only the most culpable" are subject to an enhancement.[74] However, by retaining the misrepresentation/marketing requirement, Option One will continue to apply to only a limited number of defendants. In fact, the language in Option One means that the enhancement is likely to apply primarily to offenses involving defendants operating at the lowest level of the drug distribution chain and not cases involving actors higher in the distribution chain. To be effective, this enhancement should apply not only to street-level dealers who might mislead a drug customer, but to the kingpins and higher-level dealers making and profiting from the distribution of these fake pills. As the Department has explained, those higher-level dealers generally are not actively marketing or misrepresenting the nature of the drug to the lower-level dealers. In fact, drug traffickers frequently communicate in coded or vague terms that are not sufficiently specific to satisfy the misrepresentation/marketing requirement. However, these higher-level traffickers are equally, if not more culpable, than street-level dealers for the proliferation of these dangerous substances and should be subject to the same enhancement. Moreover, the proliferation of fake pills is so substantial that many drug traffickers and customers are seeking out fentanyl pills, meaning that cases of actual misrepresentation (even at the street level) have become less common.

2. Options Two and Three

Options Two and Three both include a *mens rea* requirement for the defendant-based enhancement. As a preliminary matter, the Department endorses the decision to eliminate the distinction between knowledge and willful blindness and conscious avoidance that is in the current version of §2D1.1(b)(13). In distinguishing between a four-level enhancement and a two-level enhancement, the Commission adopted a standard of "willful blindness" or "conscious avoidance" that differs from the standard for knowledge. This interpretation may run counter to Supreme Court precedent that recognized that conscious avoidance and willful blindness are already the legal equivalent of knowledge. The Court has explained that "[m]any criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by

[74] U.S.S.C. Supp. to App. C, amend. 807 (2021), https://www.ussc.gov/guidelines/amendment/807.

deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances."[75] The Court went on to note "[t]he traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge . . . It is also said that persons who know enough to blind themselves to direct proof of critical facts *in effect have actual knowledge of those facts*."[76] Thus, eliminating the distinction between knowledge and willful blindness (or conscious avoidance) is consistent with the Supreme Court's views and the approach taken in courts across the country when considering conscious avoidance and knowledge.[77] Because conscious avoidance is simply an alternative method of proving knowledge, the method by which *mens rea* is proven should not result in a different guideline calculation.

While it is widely known that many fake pills contain fentanyl, with the *mens rea* requirement under Options Two and Three, prosecutors must prove that defendants have specific knowledge or reason to believe that the pills they are trafficking contain fentanyl.[78] The difficulty of establishing such knowledge, combined with a continued requirement that the defendant make misrepresentations or market the fentanyl as another substance, will make either Option Two or Option Three inapplicable in the vast majority of cases. Drug traffickers frequently use coded language that is purposely vague to describe the illegal substances that are the subject of their transactions. Prosecutors have reported that this coded language and the claim by defendants that they do not know that the specific pills they trafficked contain fentanyl can make it difficult to prove that defendants have the actual knowledge that they are trafficking fentanyl (as opposed to another controlled substance). As noted above, these options will again be inapplicable in cases involving the high-level traffickers who are profiting handsomely from producing and distributing dangerous fake pills.

3. The Department's Proposal

The Department believes that an alternative offense-based description of the enhancement that more accurately reflects the problem associated with fake fentanyl pills and similar substances is the most appropriate. The Department offers this alternative approach to

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[75] *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011).

[76] *Id.* (emphasis added).

[77] *See Ragbir v. United States,* 950 F.3d 54, 65 n.29 (3d Cir. 2020) ("*Global-Tech* did not promulgate a new test; rather, it stated already settled law."); *see also United States v. Mikaitis*, 33 F.4th 393, 398 (7th Cir. 2022) ("A properly worded, appropriately given ostrich instruction informs the jury that deliberate avoidance of knowledge is a form of knowledge at least functionally equivalent to actual knowledge."); *United States v. Valbrun*, 877 F.3d 440, 445 (1st Cir. 2017) ("The doctrine of willful blindness permits the government to prove scienter when a defendant deliberately shields himself from apparent evidence of criminality. In effect, the law treats persons who know enough to blind themselves to direct proof of critical facts as having actual knowledge of those facts.") (internal quotation omitted); *United States v. Clay*, 832 F.3d 1259, 1313 (11th Cir. 2016) (approving jury instruction that "[i]f a defendant's knowledge of a fact is an essential part of a crime, it is enough that the defendant was aware of a high probability that the fact existed and took deliberate action to avoid learning of the fact unless the defendant actually believed the fact did not exist").

[78] Demonstrating the defendant's knowledge that a substance contained fentanyl will often require unusual facts. *See United States v. Wiley*, 122 F.4th 725, 731 (8th Cir. 2024) (concluding the district court did not err in applying the enhancement when the defendant advertised his drugs without reference to fentanyl and established knowledge of the presence of fentanyl in the pills from his own overdose on similar pills).

appropriately address concerns raised by commenters and address harm and culpability. The Department's recommended alternative is below.

> "(13) If (A) the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels; or if (B) the offense involved an illicitly-manufactured substance that would appear, to a reasonable person, to be legitimately manufactured, or that the defendant represented or marketed as legitimately manufactured, but was in fact a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide), a fentanyl analogue, or a synthetic opioid, increase by 4 levels, unless the defendant establishes by a preponderance of the evidence that the defendant did not know, and had no reason to believe, that the substance contained fentanyl, a fentanyl analogue, or a synthetic opioid."

This alternative retains language in the current version of §2D1.1(b)(13) that provides an enhancement when a defendant affirmatively misrepresents or markets a substance as something other than fentanyl, but also provides for a four-level enhancement if the offense involved a substance that would appear to a reasonable person to be legitimately manufactured or that the defendant represented or marketed as legitimately manufactured, but was in fact another mixture or substance containing fentanyl, a fentanyl analogue[79], or a synthetic opioid.[80] This offense-based enhancement will address the significant problem presented by the sale of these fake pills—that an individual can unwittingly consume fentanyl because of the deceptive way that the pills are designed. It also allows the enhancement to apply in situations where a defendant does not make specific representations about the precise identity of the substance but provides general assurances that it is legitimately manufactured. The Department has added "synthetic opioid" to the enhancement to reflect the reality that many of these pills leading to overdoses contain more than one substance and that fentanyl is not the only synthetic opioid that is being illegally produced and trafficked. The Department noted this worrying trend during the last amendment cycle and requested that the Commission monitor the situation. Should the Commission determine that this enhancement is appropriately limited to fentanyl and fentanyl analogues at this time, we urge continued attention to synthetic opioids when considering future amendments.

In recognition that the offense-based enhancement proposed by the Department does not include a *mens rea*, it does include a rebuttable presumption. Although it is difficult for prosecutors to prove that the defendant had knowledge, facts establishing that the defendant lacked actual or constructive knowledge that the substance they were selling contained fentanyl, a fentanyl analogue, or a synthetic opioid are more appropriately established by the defendant.

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[79] Because the definition of "fentanyl analogue" in note (J) of the Drug Quantity Table includes any substance that is structurally similar to fentanyl, this definition would necessarily include fentanyl-related substances that have been scheduled as a class. *See* 21 C.F.R. § 1308.11(h)(30); U.S.S.G. §2D1.1(c) n.J.

[80] The Department recognizes that our proposal of a four-level increase for both forms of covered conduct differs from 2D1.1(b)(13)'s current tiered structure. If the Commission agrees that our proposal is substantively sound but prefers to retain a tiered structure, it would be possible to provide a four-level increase in our proposed subparagraph (A) and a two-level increase in subparagraph (B).

The enhancement would thus apply presumptively, but a defendant would be afforded the opportunity to rebut that presumption.

The Department's goal is to provide an enhancement that meaningfully accounts for the pernicious and dangerous conduct at issue and resolves ambiguity related to the application of this enhancement leading to appropriate broader use of this enhancement. Neither the options presented by the Commission nor the current enhancement adequately addresses the danger posed by criminal drug networks mass-producing fake pills that contain potentially lethal doses of fentanyl that can be consumed by an individual who may think they are taking a safe pharmaceutical. These unwitting consumers are often placed at higher risk of a drug poisoning or overdose death.

F. Machinegun Drug Trafficking Enhancement

The Department thanks the Commission for publishing proposed amendments to reflect the increased dangers of drug traffickers who possess machineguns or machinegun conversion devices. We appreciate the Commission's other amendments to address the emerging public safety threat posed by crimes involving machinegun conversion devices (MCDs) that we addressed in our February 3 letter and at the February 12 hearing. We similarly support amending the enhancement at §2D1.1(b)(1) to appropriately account for the extreme risk of serious violence when drug traffickers possess these deadly tools of the drug trade.

As the Commission explains, its proposal responds to concerns that the Guidelines in their current form fail to reflect the gravity of drug trafficking offenses involving machineguns. The problem arises because when a defendant is convicted of a drug trafficking offense and the offense also involves the possession of a firearm, §2D1.1 does not distinguish between offenders possessing a firearm with six bullets, a firearm with a large-capacity magazine loaded with 20 bullets, and a firearm with a large-capacity magazine loaded with 20 bullets and also equipped with an MCD. Rather, §2D1.1 simply provides a two-level increase for when a "dangerous weapon" (defined to include a firearm) is possessed in connection with a drug trafficking offense.[81]

The courts have repeatedly recognized the dangerousness of machineguns and their adverse impact on public safety.[82] MCDs only compound these concerns. As we noted in our February 3, 2025 letter, these devices, "which are easily manufactured,"[83] are designed to be inserted into semiautomatic firearms to convert that weapon into an illegal fully automatic machinegun.[84] By so doing, MCDs substantially increase a firearm's

[81] §2D1.1(b)(1). "The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet." §2D1.1 cmt. (n.1).

[82] *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) ("A modern machine gun can fire more than 1,000 rounds per minute, allowing a shooter to kill dozens of people within a matter of seconds. Short of bombs, missiles, and biochemical agents, we can conceive of few weapons that are more dangerous than machineguns.") (internal citations omitted).

[83] *United States v. Hixson*, 624 F. Supp. 3d 930, 940 (N.D. Ill. 2022).

[84] Subject to few exceptions, machineguns are illegal to possess. 18 U.S.C. § 922(o).

dangerousness. MCDs are cheap to make (often on a 3D-printer), easy to disguise, and difficult to regulate. As one court has explained, the added "dangerousness manifests itself not only in the sheer number of bullets that can be emptied from the magazine in the blink of an eye but also in the resulting lack of control of the firearm when discharging it."[85] Federal law accordingly makes the possession of an unregistered MCD, even when not affixed to a firearm, a separate, stand-alone crime.[86]

Machineguns are among the deadliest "tools of the trade" employed by drug traffickers,[87] and machineguns used to support drug trafficking conspiracies have become more common in recent years. In a recent District of Columbia drug conspiracy prosecution, for example, defendants used AR-15 pistol machineguns to protect their open-air drug operation from rival gangs.[88] The use of machineguns, including MCDs, to support drug trafficking can be seen in communities as diverse as Seattle (where 12 individuals were indicted in October of 2024 on drug distribution and weapons charges in connection with a fentanyl-trafficking ring);[89] Anchorage (where a man was indicted in July 2024 for possessing with intent to distribute controlled substances and possessing a "ghost gun" that had been modified to be capable of fully automatic fire);[90] and West Columbia, South Carolina (where a December 2023 multi-agency takedown led to charges against 20 individuals, including members of the Bloods, Crips, and Gangster Disciple street gangs, and led to the seizure of several MCDs).[91]

Dangerous weapons enhancements appear in a significant percentage of drug trafficking cases. The Commission recently reported that the dangerous weapon enhancement was applied in 21.2 percent of all cases sentenced under §2D1.1 in fiscal year 2023, a total of 3,906 cases. A machinegun was involved in 148 of those cases. Machinegun cases represented 3.9 percent of the drug trafficking cases in which the

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[85] *Hixson*, 624 F. Supp. 3d at 940.

[86] *See* 18 U.S.C. § 922(o); 26 U.S.C. § 5861(d).

[87] *See United States v. Morales Velez*, 100 F.4th 334, 340-46 (1st Cir. 2024) (affirming upward variance to a sentence of twice the guideline range based upon the nature of machineguns and the amount and type of ammunition found with the gun in a case involving possession of a firearm in furtherance of a drug trafficking crime).

[88] U.S. Dep't of Justice, Press Release, *Senior Leaders of Violent Drug Gang Convicted of Drug Trafficking While Armed with Machine Guns* (September 16, 2024), at https://www.justice.gov/usao-dc/pr/senior-leaders-violent-drug-gang-convicted-drug-trafficking-while-armed-machine-guns.

[89] See WAW-USAO Press Release, Twelve Indicted in Connection with Violent Drug Trafficking Gang that Distributed Fentanyl in Seattle and Everett (October 31, 2024), available at https://www.justice.gov/usao-wdwa/pr/twelve-indicted-connection-violent-drug-trafficking-gang-distributed-fentanyl-seattle.

[90] *See* AK-USAO Press Release, *Anchorage Man Indicted for Trafficking Drugs, Possessing Fully Automatic "Ghost Gun"* (July 25, 2024), *available at* https://www.justice.gov/usao-ak/pr/anchorage-man-indicted-trafficking-drugs-possessing-fully-automatic-ghost-gun.

[91] *See* SC-USAO Press Release, *Multi-Agency Take Down Results in Numerous Firearms, Illegal Narcotics, and Conspiracy Charges* (December 15, 2023), *available at* https://www.justice.gov/usao-sc/pr/multi-agency-take-down-results-numerous-firearms-illegal-narcotics-and-conspiracy.

dangerous weapon specific offense characteristic was applied.[92]

The Commission has requested comment on several issues. For example, the Commission asks whether the changes set forth in Part D of the proposed amendment are appropriate in light of the fact that the proposed four-level enhancement for possession of a machinegun "does not require that the defendant possessed the weapon" and the enhancement should be applied "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."[93] The Department supports the proposed changes because, as noted above, the specific offense characteristic of a four-level enhancement recognizes that the possession of a machinegun by one or more participants in a drug trafficking crime dramatically increases the risk to public safety.

Courts regularly employ the fact-specific analysis required to ascertain whether a dangerous weapon was present during the drug trafficking offense and whether it is "clearly improbable" that the weapon related to the offense.[94] The same analysis is appropriate for the proposed tiered enhancement, based on whether the weapon possessed was a machinegun or some other dangerous weapon.

The Department appreciates the opportunity to provide input on additional changes that the Commission should consider in its evaluation of §2D1.1(b)(1). While the Department strongly supports the proposed enhancement for a machinegun, including MCDs, in §2D1.1(b)(1)(A), we believe that the Commission should consider the following additional changes:

§2D1.1(b)(1) should include enhancements for the number of firearms

Similar to the recommendation in our annual 2023 and 2024 letters to the Commission, the Department recommends that §2D1.1(b)(1) incorporate enhancements that account for the number of firearms possessed. It is unreasonable that a defendant who possesses three or more firearms in a drug trafficking case should receive the same enhancement as a defendant who possesses a single firearm. Section 2D1.1(b)(1) may also reach leaders, managers, and organizers who direct others to possess firearms but who, to insulate themselves from criminal liability, intentionally do not possess firearms themselves. In such situations, a defendant's sentence should properly reflect the number of firearms possessed by the members of the entire conspiracy, because the danger to the public increases when a drug trafficking organization possesses multiple firearms.

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[92] *See* United States Sentencing Commission Public Data Briefing Video Transcript (February 2025), at pgs. 6-7, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/transcript_2025-Drug-Offenses.pdf.

[93] Proposed Amendment, §2D1.1(b)(1).

[94] *See United States v. Graham*, 123 F.4th 1197, 1288-89 (11th Cir 2024) (trial testimony regarding a firearm observed during surveillance of a drug deal and a second firearms recovered adjacent to drugs supported application of the enhancement); *see also, e.g.*, *United States v. Zamudio*, 18 F.4th 557, 561-62 (7th Cir. 2021); *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764-66 (5th Cir. 2008).

In our July 15, 2024, annual letter and in our recent February 3 letter, the Department requested that the Commission make cumulative, rather than applicable in the alternative, enhancements for adding a large capacity magazine and an MCD to a semiautomatic firearm.[95] We believe that making such a change would more fully address the dangers presented by MCDs, because when a defendant possesses an MCD it makes that defendant's conduct more threatening to public safety. Indeed, a defendant with an MCD-equipped firearm is more likely also to use a high-capacity magazine because the benefit of a high rate of fire would be diminished if used in conjunction with a standard capacity magazine. Difficult to control even for experienced users, machineguns and firearms with MCDs are unlikely to be used for hunting or sport. That too speaks in favor of a cumulative enhancement. For the reasons noted in our February 3 letter and during the February 12 hearing, we do not think that unaffixed and affixed MCDs should be treated differently.

To that end, and in accord with the Department's previous proposals,[96] the Department recommends that the Commission consider an enhancement for possession of quantities of firearms, such as three or more:

(b) Specific Offense Characteristics

(1) (apply the greater):

(A) If three or more firearms were possessed, a semiautomatic firearm capable of accepting a large capacity magazine was possessed, or ~~If~~ a firearm ~~machinegun~~ ~~(~~as described ~~defined~~ in 26 U.S.C. § 5845~~(b))~~ was possessed, increase by **4** levels;

(B) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

§2D1.1 should include an additional enhancement for all NFA firearms

The Department also recommends that the Commission consider incorporating all firearms as defined under the National Firearms Act (NFA) in the proposed four-point enhancement in §2D1.1(b)(1)(A). While incorporating machineguns (including MCDs) would be an improvement over the status quo, we are concerned that failing to incorporate all NFA firearms could lead to an unintended and incongruous result where a defendant whose offense involves the possession of other types of more dangerous weapons, such as pipe bombs, Molotov cocktails, or silencers, would receive a lower sentence than a similarly situated defendant whose offense involves the possession of a machinegun, because such weapons would be "firearms"

[95] *See* Scott A.C. Meisler, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 3 (July 15, 2024), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202407/89FR48029_public-comment_R.pdf#page=129.

[96] *See* Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 10 (July 31, 2023), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=38.

under the Title 18 definition, and subject only to the two-point enhancement in the proposed §2D1.1(b)(1)(B). [97]

G. Expansion of the §5C1.2 Commentary

The Department does not support the proposed amendment to the Guidelines commentary to §5C1.2 regarding the safety valve. By specifically underscoring the use of written submissions to comply with the safety valve requirements, the proposed amendment will greatly incentivize their use. That outcome is problematic because, in our experience, such written submissions may be insufficient to demonstrate a defendant's truthfulness. The proposal is thus likely to result in additional sentencing disputes over the applicability of the safety valve.

Section 5C1.2 is premised upon the statutory language in 18 U.S.C. § 3553(f). To obtain relief from a mandatory minimum sentence, a defendant must satisfy five criteria. One key element of qualifying for the safety valve is that, "not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan."[98] While the safety valve does not specifically state how a defendant can satisfy this obligation, personal debriefings are the most common way this is accomplished. As the First Circuit has stated, "[a]s a practical matter, a defendant who declines to offer himself for a debriefing takes a very dangerous course."[99] A defendant who relies upon a written submission "runs an obvious and profound risk: The government is perfectly free to point out the suspicious omissions at sentencing, and the district court is entitled to make a common sense judgment."[100]

A defendant bears the burden of proving that he has satisfied the safety valve factors and has an affirmative responsibility to disclose all relevant information truthfully.[101] Gauging whether a defendant's proffer is "complete and truthful" is often challenging under the best of circumstances. An in-person, face-to-face proffer is typically the most effective and efficient method to assess a defendant's truthfulness. A safety valve debriefing "is a situation that cries out for straight talk; equivocations, half-truths, and veiled allusions will not do."[102] The real-time back-and-forth directly with the defendant allows the prosecutor and case agent to assess the internal logic of the defendant's statements and how well the statements comport with the known evidence in the case. Follow-up questions are critical. And, oftentimes, proffers include

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[97] We recognize that the Commission is currently considering how to account for MCDs in §2K2.1 pursuant to the proposed amendments published on January 2, 2025. Depending on how the Commission proceeds with regard to affixed and unaffixed MCDs, large capacity magazines, and other issues raised in stakeholder comments and at the February 12 hearing, it may want to make similar adjustments in §2D1.1 here. We would welcome an opportunity to engage further with the Commission to discuss other potential options to provide for enhancements for situations where drug traffickers possess these particularly dangerous weapons.

[98] 18 U.S.C. § 3553(f)(1)(5); U.S.S.G. §5C1.2(a)(5).

[99] *United States v. Montanez*, 82 F.3d 520, 523 (1st Cir. 1996).

[100] *Id.*

[101] *United States v. Mancilla-Ibarra*, 947 F.3d 1343, 1350-51 (11th Cir. 2020).

[102] *United States v. Matos*, 328 F.3d 34, 39 (1st Cir. 2003).

reviewing pieces of evidence with the defendant, such as showing photographs of potential associates, playing audio or video, or reviewing the contents of a defendant's cell phone or social media. Through this real-time exchange, defendants often discuss individuals and events related to their drug network they would otherwise withhold. In addition, there is value in trained investigators being able to observe the defendant's body language and facial expressions, as those visual cues can spur follow-up questions or areas of inquiry. But written submissions, which may be curated by counsel, deprive the government of these opportunities to test the defendant's candor in a meaningful way. Moreover, even in in-person proffers, safety valve defendants are often loath to "name names" and specifically identify other wrongdoers and their contact information, at least initially. Defendants will be even less likely to be forthcoming when having to commit those names or phone numbers to writing, which will in turn only prompt further follow-up questions from the government.

Additionally, requiring defendants to confer directly with investigators further incentivizes truthfulness by providing an opportunity for the government to emphasize the importance of telling the truth. Making false statements to prosecutors and investigators can carry additional negative consequences for lying or minimizing, such as the loss of acceptance of responsibility credit,[103] an enhancement for obstruction of justice,[104] or a prosecution for making false statements.[105] A written submission, particularly one prepared and submitted by counsel, may have the unintended consequence of serving to insulate defendants from fully appreciating the importance of being truthful and complete in their statements, thus decreasing the likelihood that defendants will be as forthcoming as they would be in an in-person proffer.

The Department is sympathetic to the safety concerns of incarcerated defendants, including those who are perceived to be cooperators by dint of their being temporarily transported out of a pretrial detention facility. The proposed amendment, however, is not tailored to addressing that concern. Moreover, where a defendant faces such risks, prosecutors and defense counsel can—and frequently do—work together to craft tailored solutions to protect a particular defendant's safety. For example, because in-person safety-valve debriefings are not necessarily lengthy, the parties can conduct safety valve proffers on the same day a defendant is scheduled for court, conduct proffers at the pretrial detention facility, conduct proffers by video, or in some limited circumstances where the typical back-and-forth is unnecessary, conduct a carefully tailored proffer in writing.

Presently, §5C1.2 is silent as to means by which a safety valve proffer must take place—which is consistent with the language of 18 U.S.C. § 3553(f). By not singling out one mode of communication, the guideline permits the government full latitude to evaluate whether the defendant is being "complete and truthful," while at the same time affording the parties flexibility to address acute safety risks as they arise in individual cases. Similarly, it permits prosecutors and defense attorneys the ability to agree to accept written proffers in other unique or limited situations. The proposed amendment, by contrast, highlights and enshrines the written proffer method in the guideline's commentary for all cases, which will only incentivize efforts to

[103] §3E1.1, cmt. n.1(A).

[104] §3C1.1, cmt. n.4(G).

[105] 18 U.S.C. § 1001.

use that method and lead to the significant shortcomings outlined above, especially since it will be unlikely to satisfy the defendant's burden of demonstrating their eligibility for the safety valve in many cases. Adopting this language will encourage the submission of written proffers, which will often be inadequate, resulting in increased litigation over safety valve issues and failing to satisfy the statutory requirement of a truthful and complete statement. Accordingly, the Commission should decline to adopt the proposed amendment to the application notes to §5C1.2.

II. Supervised Release Amendments

The Commission proposes to amend guidelines and policy statements relating to a district court's decision to impose supervised release (Part A) and the court's response to violations of those terms (Part B). Supervised release serves several important societal needs, including protection of the public and rehabilitation of the defendant.[106] According to the 2023 Sentencing Commission Data File,[107] supervised release was ordered in 82.5 percent of all criminal cases in Fiscal Year 2023. The Commission's proposed amendments would change the current system by, among other things, placing procedural requirements on many steps of the supervised release process. The Department appreciates the Commission's attention to this important aspect of sentencing and the desire to ensure that supervised release is not reflexively imposed or revoked upon discovery of a violation. As discussed below, the Department has several concerns with these proposed amendments, many of which would add procedural requirements that may create confusion and unnecessary litigation and interfere with the ability of district courts to manage the supervised release process.

A. Part A (Imposition of Supervised Release)

1. General Discussion

One of the Commission's stated goals for the Part A amendment "is to provide courts greater discretion to impose a term of supervised release in the manner it determines is most appropriate based on an individualized assessment of the defendant."[108] In general, the Department does not oppose amendments that support and strengthen the sentencing discretion of district courts—or that underscore that supervised release should not be imposed mechanically and in all cases. The Department therefore does not oppose the Commission's proposal to eliminate the current language in §5D1.1(a)(2) requiring courts to impose a term of supervised release in certain situations. As referenced previously, however, the Department has concerns with several other aspects of these amendments.

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[106] *See, e.g., United States* v. *Johnson*, 529 U.S. 53, 59 (2000) ("Supervised release fulfills rehabilitative ends, distinct from those served by incarceration."); *United States v. Hamilton*, 986 F.3d 413, 418 (4th Cir. 2021) ("This system of supervised release serves several purposes as demonstrated by the selected sentencing factors that § 3583 mandates courts consider when setting the term and conditions of supervised release . . . Key among these are protection of the public . . . and rehabilitation of the defendant.").

[107] *2023 Sourcebook of Federal Sentencing Statistics*, Table 18, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf.

[108] Proposed Amendment, Supervised Release, at 3.

First, the proposed language in §5D1.1(b) would limit courts' discretion to impose supervised release while adding additional administrative burdens. The proposed amendment to §5D1.1(b) (concerning the imposition of a term of supervised release) would replace current guideline language that arises out of 18 U.S.C. § 3583. Section 3583(a) states that a court "may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." Similarly, §5D1.1(b) currently provides that a court "may order a term of supervised release to follow imprisonment." The proposed amendment, however, seems to place a greater restriction on the district court than required by statute by stating that "[w]hen a term of supervised release is not required by statute, the court should order a term of supervised release to follow imprisonment *when, and only when*, warranted by an individualized assessment of the need for supervision."[109] The proposed amendment includes individualized assessment language when courts decide what supervised release conditions to apply and how long a term of supervised release is appropriate;[110] whether to modify a defendant's supervised release conditions upon release from imprisonment;[111] whether to terminate a defendant's supervised release;[112] whether to extend a term of supervised release;[113] how to respond to an allegation of non-compliance;[114] whether to revoke a term of supervised release;[115] and whether to impose a revocation sentence concurrently or consecutively.[116]

These proposed amendments would create confusion within the courts and among litigants as they try to determine whether and to what extent this new language interacts with the statutory obligations in § 3583. Imposing this procedural requirement at every step of the supervised release process also may place form (the need to follow this particular approach) over substance (the court's evaluation of the § 3583(c) factors). It also may interfere with the district court's authority to manage its sentencing proceedings. We agree that, "[i]f terms of supervised release are too long, the [c]ourts already have the necessary discretion in many cases to set limits as they see fit, both at initial sentencing and at revocation."[117]

Second, we have reservations about the Commission's proposed amendments to §5D1.4 (concerning altering or terminating a term of supervised release). Those proposed amendments appear to add a new process and series of requirements to a statutory scheme that already

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[109] Proposed Amendment §5D1.1(b) (emphasis added). If the Commission chooses to retain this provision, we recommend that it alter the language to avoid placing a thumb on the scale against imposition of supervised release. In our view, more neutral wording would advise courts that, "[w]hen a term of supervised release is not required by statute, the court may order a term of supervised release to follow imprisonment when warranted by an individualized assessment of the need for supervision."

[110] Proposed Amendment, §5D1.2(a).

[111] *Id.*, §5D1.4(a).

[112] *Id.*, §5D1.4(b).

[113] *Id.*, §5D1.4(c).

[114] *Id.*, §7C1.3(a).

[115] *Id.*, §7C1.3(b).

[116] *Id.*, §7C1.4.

[117] Comments of John Marshall (Feb. 5, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/20250206_comment-prelim-jan.pdf.

provides courts with the authority to take these steps.[118] Section 3583(e) allows courts, working with probation officers and counsel, to evaluate defendants' circumstances and determine whether any changes need to be made to the term of supervised release. Through this process, courts and probation officers focus their time and resources on defendants who would benefit from modification or termination.

By contrast, the amendment "encourage[s]" courts to conduct a review of a defendant's supervised release conditions "as soon as practicable after the defendant's release from imprisonment."[119] Similarly, the amendment "encourage[s]" courts to consider whether to terminate a defendant's supervised release "upon the expiration of one year of supervision and periodically throughout the term of supervision thereafter."[120] It also says that courts "should" consider a list of non-exhaustive factors. Although we do not object to a court considering the types of factors listed in proposed §5D1.4(b),[121] it is not clear what problem these additional procedural steps are designed to address. These amendments also would encourage inefficiency by pushing courts and probation officers to review all defendants for possible modification and termination. As Judge Cote notes, "while individual judges may wish to conduct a re-assessment at the beginning of supervision of the conditions of supervised release they imposed at sentencing, it infringes on judicial discretion in case management to add the re-assessment recommendation as a policy statement to the Guidelines"[122] There also is a risk that these steps will create confusion and interfere with existing court and probation processes. For these reasons, we urge the Commission to rely on the existing statutes rather than add additional procedural requirements, including the requirements discussed in Issue for Comment Seven.[123]

We oppose the removal of the recommendation in §5D1.2(b)(2) to impose the maximum term of supervised release for people convicted of sex offenses. In general, we believe that requiring a defined and lengthy period of supervised release for this universe of offenders will help reduce recidivism, benefit offender rehabilitation, and protect children and other victims from abuse. Notably, the Commission does not appear to offer a specific reason why this requirement should be removed. This recommendation has been part of the Guidelines since 2001, tracks the statute, and is consistent with the Commission's recent amendments.[124] A longer period of supervised release for an offender with this offense conduct appropriately provides more rehabilitation and assists in protecting the members of the community. We

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[118] *See* 18 U.S.C. § 3583(e).

[119] Proposed Amendment, §5D1.4(a).

[120] *Id.*, §5D1.4(b).

[121] *See id.*, Issue for Comment Three.

[122] Comments of District Judge Denise Cote (Jan. 24, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/20250206_comment-prelim-jan.pdf.

[123] In response to Issue for Comment Six, the Department does not object to including completion of a reentry program as a factor for a court to consider when determining whether to terminate a defendant's supervised release.

[124] We recognize that the Commission's recent amendments raising penalties for sexual abuse of a ward (Amendment 816) and recalibrating the sex offense definition in §4C1.1(b)(2) (Amendment 830) affect sentencing and punishment, which serves different functions than supervised release. But these changes also recognize the special nature of sex offenses and that sex offenders may require different supervision and rehabilitation.

similarly oppose removing the current supervised release guidance for violations of 18 U.S.C. § 2332b(g)(5)(B) (acts of terrorism transcending national boundaries) that resulted in, or created a foreseeable risk of, death or serious bodily injury to another.

2. Issues For Comment Not Addressed Previously

With respect to Issue for Comment One, which discusses whether and how to provide courts with discretion and guidance, as noted previously, the Department is generally opposed to imposing additional procedural requirements on the supervised release process.

In answer to Issue for Comment Two, which addresses whether to impose supervised release for defendants who are likely to be deported, the Guidelines currently discourage courts from imposing a term of supervised release when such a term is not required by statute and the defendant "is a deportable alien who likely will be deported after imprisonment."[125] It is not clear how useful additional language would be for district courts. In cases where a term of supervised release is not required by statute, courts have the discretion to determine, consistent with § 3583, whether to impose supervised release.

In response to Issue for Comment Four, which addresses the interplay between supervised release and the First Step Act, we generally would prefer an inmate who is eligible to earn First Step Act (FSA) time credits to have a term of supervised release so that the Bureau of Prisons (BOP) may use its statutory discretion to apply up to one year of credits toward early supervised release. For those inmates who do not have a supervised release term to follow their confinement, BOP is required by the FSA to apply their credits to prerelease custody—that is, to a Residential Reentry Center (RRC) or home confinement. Depending on how many credits those inmates have accrued, the community placement could last for many months or even years.

In addition to using limited bedspace in RRCs for FSA-eligible inmates, the BOP is required by 18 U.S.C. § 3624(c)(1) to ensure, to the extent practicable, that an inmate spends up to 12 months "under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community." Many of these inmates who are not FSA-eligible are completing lengthy sentences and require the full 12 months to help them achieve successful reentry into the community. When RRC beds are occupied for an extensive time by low- or minimum-recidivism risk inmates who have earned FSA time credits (but do not have a term of supervised release), they limit the opportunities for those inmates who are more likely to need the full benefit of community placements.

In response to Issue for Comment Five, which addresses the conditions of supervised release, the Department prefers the terms currently used in the guidelines (standard and special conditions). Although we understand the Commission's desire to provide district courts with greater discretion, there is value in making changes in an incremental fashion.

In answer to Issue for Comment Seven, which addresses guidance for termination decisions, we do not believe that the new policy statement should include additional guidance on the procedures to use when deciding whether to terminate a term of supervised release.

[125] §5D1.1(c).

Section 3583(e)(1) provides that a court may terminate a term of supervised release "pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." Federal Rule of Criminal Procedure 32.1(c), in turn, generally provides for a hearing, subject to certain specific exceptions, including if "the relief sought is favorable to the person and does not extend the term of probation or of supervised release."[126] Taken together, the statute and rule provide the court with the guidance necessary in deciding whether to terminate supervised release.

B. Part B (Revocation of Supervised Release)

1. General Discussion

Consistent with our prior comments, the Department appreciates the need for district courts to have the discretion to manage their supervised release dockets. For example, the Southern District of New York has developed a court-involved supervised release program that helps defendants complete their terms of supervision successfully.[127] The Eastern District of Pennsylvania,[128] along with other districts,[129] also have developed reentry programs. Districts and district courts should have the flexibility to devise solutions to achieve similar ends and to identify ways to respond when defendants violate their terms of supervised release.

For many of the same reasons discussed previously, we are concerned that some of the amendments in Part B (dealing with the revocation of supervised release) do not appropriately channel district courts' discretion in this area. For example, the amendment proposes to add the following to the introductory language regarding supervised release violations:

> Because supervised release is intended to promote rehabilitation and ease the defendant's transition back into the community, the Commission encourages courts—where possible—to consider a wide array of options to respond to non-compliant behavior and violations of the conditions of supervised release. These interim steps before revocation are intended to allow courts to address the defendant's failure to comply with court-imposed conditions and to better address the needs of the defendant while also maintaining public safety.[130]

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[126] Fed. R. Crim. P. 32.1(c)(2)(B).

[127] Comments of Senior District Judge Richard M. Berman (Jan. 29, 2025) (including a report entitled Court Involved Supervised Release (June 10, 2024)), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/20250206_comment-prelim-jan.pdf.

[128] Eastern District of Pennsylvania Reentry Court, https://www.paed.uscourts.gov/reentry-court.

[129] *Problem-Solving Courts*, https://www.ussc.gov/education/problem-solving-court-resources (including a map of reentry programs).

[130] Proposed Amendment at 41.

As noted previously, supervised release is designed to, among other things, rehabilitate the defendant *and* protect the public.[131] As the Seventh Circuit has noted, "Congress told courts to consider various factors, including the nature and circumstances of a violation and the corresponding need to protect the public, before choosing a sentence."[132] Courts are well-equipped to consider alternatives to incarceration, and § 3583(e) empowers courts to, among other things, modify supervised release conditions, extend a term of supervised release, and revoke supervised release. Judges have used these tools effectively to distinguish between violations of supervised release that warrant imprisonment and those that do not. For example, the judiciary published research in 2022 showing that "revocations for technical violations had relatively negligible impacts on federal prison populations."[133] The above encouragement for courts to take interim steps before revocation does not sufficiently take into account the need to protect the public and the other factors cross-referenced in § 3583(e). It also interferes with the district court's authority to fashion an appropriate sentence.

We also have several concerns with how proposed §7C1.3 would create a new framework for responding to violations of supervised release. First, the amendment requires a court to "conduct an individualized assessment" to decide what steps to take when it "receiv[es] an allegation that the defendant is in non-compliance." This language places a procedural obligation on the court but does not carefully define what constitutes an "allegation that the defendant is in non-compliance." For example, it does not explain in what form the allegation should take (whether through a motion or through something less formal) and does not expressly state who should make the allegation. To the extent the amendment is designed to address the perception that courts reflexively impose revocation, it is not clear that this is occurring. It also is not clear that these procedural steps are an appropriately tailored solution. Rather than create an entirely new policy statement, we would prefer that the Commission make tailored amendments (if any are justified) to the existing §7B1.3.

The proposed §7C1.3 provides two options: requiring revocation only if a statute requires it (Option One) or requiring revocations for statutory violations or a Grade A or B violation (Option Two). If the Commission is inclined to adopt this new proposed §7C1.3, we strongly prefer Option Two, as this would retain some of the elements of the previous policy statement. It also would continue to distinguish criminal conduct based on seriousness.

The proposed §7C1.4 (revocation of supervised release) shortens the text of the policy statement and also provides two options. Under Option One, a court should conduct an individualized assessment to decide the length of imprisonment and whether the sentence should be served concurrently, partially concurrently, or consecutively. Option Two requires the same individualized assessment but states that any term of imprisonment "should" be consecutive to any other sentence of imprisonment. If the Commission is going to make these larger

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[131] *Hamilton*, 986 F.3d at 418; *see also* 18 U.S.C. § 3583(c) (cross-referencing, among others, 18 U.S.C. § 3553(a)(2)(C)).

[132] *United States v. Dawson*, 980 F.3d 1156, 1164 (7th Cir. 2020).

[133] *Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes* (June 14, 2022), https://www.uscourts.gov/data-news/judiciary-news/2022/06/14/just-facts-revocations-failure-comply-supervision-conditions-and-sentencing-outcomes.

amendments, we prefer Option Two, as it continues to recognize how violating a term of supervised release is separate from any underlying criminal conduct.

Indeed, one goal of supervised release is to encourage defendants, as part of their rehabilitation efforts, to follow rules, including the rules and conditions imposed by the court as part of its sentence. Imposing a consecutive sentence for a supervised release violation supports this goal. As Senior United States Probation Officer Whitver states, "The impact of certain and proportional judicial responses cannot be overstated—when individuals understand that violations will lead to immediate and predictable sanctions, they are far more likely to take their supervision seriously and commit to real change."[134] Without such a consecutive sentence, the punishment for the defendant's behavior will depend on the views of another court and potentially from a different criminal justice system.[135] As Senior Officer Whitver warns, the "lack of enforcement will simply embolden individuals under supervision to disregard their conditions, knowing there are few real consequences. I fear the result will reduce federal probation to a meaningless bureaucratic process, rather than a tool for rehabilitation and accountability."[136]

2. Issues For Comment Not Addressed Previously

Issues for Comment One(a)-(c) address the balance between providing courts more discretion to address a defendant's non-compliance on supervised release while also providing sufficient guidance. With respect to Issues for Comment One(a) and One(c), as discussed previously, we believe that focusing on the language of § 3583 provides the courts with information needed to tailor responses to violations of supervised release. We take no position on Issue One(b), which addresses whether to include instructions on violations related to community confinement conditions in the commentary to the new guideline §7C1.4.

Issue for Comment Two concerns the proposed amendments to §7C1.3. As discussed previously, the Guidelines should continue to tie revocation to the grade of the violation. Grade A and B violations are serious—they may involve crimes of violence, dangerous weapons, controlled substances, and/or lengthy sentences.[137] Engaging in such behavior amounts to a serious violation of judicially imposed conditions of release and warrants revocation.

Issue for Comment Three asks whether the Commission should replace the supervised release revocation table "with guidance indicating that courts abide by the statutory limits regarding maximum and minimum terms." We recommend that the Commission retain the

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[134] Comments of Senior United States Probation Officer Chris K. Whitver, https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/20250206_comment-prelim-jan.pdf.

[135] We appreciate that the proposed supervised release amendments seek to move away from the "breach of trust" view of supervised release. *See* Proposed Introduction to Chapter 7, *Updating the Approach*. Even under the proposed new approach, however, encouraging defendants to follow the court's rules and conditions remains an important goal. *Id.* ("These changes are intended to better allocate taxpayer dollars and probation resources, encourage compliance and improve public safety, and facilitate the reentry and rehabilitation of defendants.").

[136] Comments of Senior United States Probation Officer Chris K. Whitver.

[137] §7B1.1(a).

supervised release revocation table. Although we appreciate the Commission's desire to provide district courts with greater discretion, eliminating the table risks creating greater sentencing disparities.

Issue for Comment Four seeks comment on "whether and how a retained Supervised Release Revocation Table should make recommendations to courts regarding their consideration of criminal history." Relatedly, Issue for Comment Six asks whether a defendant's criminal history score should be recalculated at revocation proceedings. We do not believe that the district court should attempt to recalculate a defendant's criminal history score as part of the revocation proceeding. The focus at a revocation hearing should be on the original judgment and the defendant's non-compliance with conditions imposed by the court. Attempting to recalculate a defendant's criminal history score will introduce additional procedural uncertainty and will overly complicate what should be a relatively simple proceeding. To the extent a defendant's criminal history score has meaningfully changed since the time of the original sentencing, the district court can consider that information as part of its § 3583(e) analysis.

Issue for Comment Five addresses whether the Commission "should issue more specific guidance on the appropriate response to Grade D violations." There appears to be considerable overlap between the proposed punishment ranges of Grades C and D. For example, a Grade D violation with a Criminal History Category of II would carry a 2-8 month range, while a similar Grade C violation would have a 4-10 month range. We are not certain that this additional grade is necessary, especially since district judges are capable of making distinctions between the proposed Grades C and D as part of the § 3583(e) analysis. But if the Commission does include separate ranges for Grade D violations, we see no need to further channel the court's exercise of discretion through language suggesting that revocation "is not ordinarily appropriate" for such violations or tying revocation to multiple violations.

* * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions, and we look forward to working with the Commission on these and other issues throughout the amendment year.

Sincerely,

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