

United States Sentencing Commission Public Meeting Minutes
April 16, 2026

Chair Carlton W. Reeves called the meeting to order at 1:30 p.m. in the Commissioners' Conference Room, Suite 2–500, One Columbus Circle, N.E., Washington, D.C., 20002.

The following Commissioners were present:

- Carlton W. Reeves, Chair
- Luis Felipe Restrepo, Vice Chair
- Laura E. Mate, Vice Chair
- Claire Murray, Vice Chair
- Candice C. Wong, Commissioner
- Scott Meisler, Commissioner Ex Officio

The following staff participated in the meeting:

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

Chair Reeves welcomed the public to the Commission's public meeting, whether they were attending in-person or watching via the Commission's livestream broadcast.

Chair Reeves introduced his fellow Commissioners. Sitting to his right were Vice Chair Luis Felipe Restrepo and Commissioner Candice Wong. Sitting to his left were Vice Chair Claire Murray, Vice Chair Laura Mate, and Ex Officio Commissioner Scott Meisler.

Chair Reeves stated that members of Commission staff were also attending. He stated that staff did the research, drafted the priorities, and set up the meeting room. On behalf of the Commission and the public, Chair Reeves thanked staff for the work it does every day.

Chair Reeves also thanked the many people outside of the Agency who participated in the Commission's policymaking process: the Commission's advisory groups, members of the public, members of Congress, judges, probation officers, practitioners, advocacy organizations, and incarcerated individuals and their families.

Chair Reeves announced that the first item of business was a motion to adopt the January 30, 2026, public meeting minutes. Vice Chair Restrepo moved to adopt the minutes, with Commissioner Wong seconding. Chair Reeves called for discussion on the motion. Hearing no discussion, Chair Reeves called for a vote, and the motion was adopted by voice vote.

Chair Reeves stated that the next items of business were possible votes to promulgate proposed amendments. He called on the General Counsel, Kathleen Grilli, to advise the Commission on a possible vote concerning a proposed amendment regarding drug offenses.

Ms. Grilli stated that the proposed drug offenses amendment, attached hereto as Exhibit A, would amend §2D1.1 (Drug Trafficking) to address the enactment of the Halt All Lethal Trafficking of Fentanyl Act, Pub. L. 119–26 (2025), by amending the Drug Quantity Table at §2D1.1(c) and the Drug Equivalency Tables at Application Note 8(D) of the Commentary and amending the enhancement at §2D1.1(b)(13).

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1, 2026, and granting staff technical and conforming amendment authority would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Murray moved to promulgate the proposed amendment, with Vice Chair Mate seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioner Wong voted in favor of adopting the motion. The motion was adopted by voice vote with at least four commissioners voting in favor of the motion.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed amendment on inflationary adjustments.

Ms. Grilli stated that the proposed amendment on inflationary adjustments, attached hereto as Exhibit B, would amend the monetary tables in the Guidelines Manual to adjust for inflation using the same methodology the Commission used in 2015. In addition, the proposed amendment would adjust for inflation the monetary value in specific offense characteristics in other Chapter Two guidelines and include conforming changes to the guidelines that refer to the monetary tables.

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1, 2026, and granting staff technical and conforming amendment authority would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Restrepo moved to promulgate the proposed amendment, with Vice Chair Murray seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioner Wong voted in favor of adopting the motion. The motion was adopted by voice vote with at least four commissioners voting in favor of the motion.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed amendment on multiple counts.

Ms. Grilli stated that the proposed amendment on multiple counts, attached hereto as Exhibit C, would amend the guidelines to simplify the procedure for determining the single offense level for cases involving multiple counts. The proposed amendment would replace the five guidelines in

Chapter Three, Part D, with a single guideline at §3D1.1 (Procedure for Determining Offense Level on Multiple) that provides all the steps necessary to determine the single offense level for multiple counts. The proposed amendment would also provide a revised introductory commentary

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1, 2026, and granting staff technical and conforming amendment authority would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Wong moved to promulgate the proposed amendment, with Vice Chair Restrepo seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioner Wong voted in favor of adopting the motion. The motion was adopted by voice vote with at least four commissioners voting in favor of the motion.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed amendment on simplification.

Ms. Grilli stated that the proposed amendment on simplification, attached hereto as Exhibit D, would delete twenty-six specific offense characteristics in various guidelines that courts did not apply at all in the last five fiscal years. These twenty-six specific offense characteristics applied a small number of times, if at all, using a 25-year lookback window.

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1, 2026, and granting staff technical and conforming amendment authority would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Wong moved to promulgate the proposed amendment, with Vice Chair Restrepo seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioner Wong voted in favor of adopting the motion. The motion was adopted by voice vote with at least four commissioners voting in favor of the motion.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed amendment on sentencing options.

Ms. Grilli stated that the proposed amendment on sentencing options, attached hereto as Exhibit E, would amend Part A of Chapter Five to add new introductory commentary and would move the Sentencing Table to a new guideline, §5A1.1 (Sentencing Table), that also contains provisions describing the structure and operation of the Sentencing Table.

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1, 2026, and granting staff technical and conforming amendment authority would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Mate moved to promulgate the proposed amendment, with Vice Chair Restrepo seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioner Wong voted in favor of adopting the motion. The motion was adopted by voice vote with at least four commissioners voting in favor of the motion.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed miscellaneous amendment.

Ms. Grilli stated that the proposed miscellaneous amendment, attached hereto as Exhibit F, would respond to recently enacted legislation. Part A would respond to the Protecting Americans Data from Foreign Adversaries Act by amending Appendix A and §5H3.1. Part B would respond to the Foreign Extortion Prevention Technical Corrections Act by amending Appendix A and §2C1.1.

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1, 2026, and granting staff technical and conforming amendment authority would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Commissioner Wong moved to promulgate the proposed amendment, with Vice Chair Restrepo seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioner Wong voted in favor of adopting the motion. The motion was adopted by voice vote with at least four commissioners voting in favor of the motion.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote concerning a proposed technical amendment.

Ms. Grilli stated that the proposed technical amendment, attached hereto as Exhibit G, would make technical and other non-substantive changes to the Guideline Manual including replacing references to the “Bureau of Prisons” with “Federal Bureau of Prisons” and making technical changes to update references to the Communications Act of 1934.

Ms. Grilli advised that a motion to promulgate the proposed amendment with an effective date of November 1, 2026, and granting staff technical and conforming amendment authority would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Mate moved to promulgate the proposed amendment, with Vice Chair Murray seconding. The Chair called for

discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioner Wong voted in favor of adopting the motion. The motion was adopted by voice vote with at least four commissioners voting in favor of the motion.

Chair Reeves called on the General Counsel to advise the Commission on a possible vote to publish in the Federal Register a proposed amendment and issues for comment concerning unmanned aircraft.

Ms. Grilli stated that the proposed unmanned aircraft amendment, attached hereto as Exhibit H, responds to the directive in the Safer Skies Act (Title LXXXVI of the National Defense Authorization Act for Fiscal Year 2026, Pub. L. 119–60). The Act included a directive to the Commission to promulgate guidelines or amendments to the guidelines to substantially increase the guideline range of all offenses involving the use of an unmanned aircraft. In response to the directive, the proposed amendment would create a new guideline, §3B1.6 (Use of Unmanned Aircraft), providing a tiered adjustment for offenses that use unmanned aircraft.

Ms. Grilli advised that a motion to publish the proposed unmanned aircraft amendment with an original public comment period closing on June 18, 2026, and technical and conforming amendment authority to staff would be appropriate.

Chair Reeves called for a motion as suggested by Ms. Grilli. Vice Chair Restrepo moved to publish a proposed amendment concerning unmanned aircraft, with Vice Chair Murray seconding. The Chair called for discussion on the motion. Hearing no discussion, Chair Reeves called for a voice vote. Chair Reeves, Vice Chairs Mate, Murray, and Restrepo, and Commissioner Wong voted in favor of adopting the motion. The motion was adopted by voice vote with at least four commissioners voting in favor of the motion.

Before adjourning the meeting, Chair Reeves gave the floor to the Staff Director, Mr. Ken Cohen, for a brief Staff Director's Report.

Mr. Cohen announced that there were two personnel items of importance. First, Christine Kitchens, Senior Research Associate, would be retiring from the Commission's Office of Data and Research at the end of May. Ms. Kitchens had completed thirty-one years of federal service, the entirety of which was served at the Commission. Ms. Kitchens had worked on the Commission's most complicated prison impact and retroactivity analyses, which can be found at the Commission's website, www.ussc.gov. Mr. Cohen extended congratulations and appreciation for Ms. Kitchen's work at the Commission.

Second, the General Counsel, Kathleen Grilli, would also be retiring at the end of May. Ms. Grilli had worked in federal service for twenty-nine years, twenty-two of which had been at the Commission. Upon her retirement, she would be the longest serving General Counsel to serve at the Commission, having been in that position since 2013. Before becoming General Counsel, Ms. Grilli served as Deputy General Counsel when he was General Counsel. Mr. Cohen noted that they had worked side-by-side for twenty years and that while he knew the Commission

would miss Ms. Grilli, he would miss her even more.

Chair Reeves extended his thanks to Ms. Grilli on behalf of the slate of seven commissioners confirmed in 2022, and especially on behalf of the five commissioners that continued to serve. Chair Reeves thanked Ms. Grilli for the advice, counsel, and consultation she had provided and for the scripts—the things Ms. Grilli advised him to say and the things she cautioned him against saying! Chair Reeves thanked Ms. Grilli for everything that she had done for the agency and for the public, noting that they were deeply indebted to her for her service.

Ms. Grilli stated that it had been an honor and a privilege.

Chair Reeves expressed a final thanks to both Ms. Kitchens and Ms. Grilli.

Chair Reeves asked if there was any further business before the Commission and, hearing none, asked if there was a motion to adjourn the meeting in honor of Kathleen Grilli. Vice Chair Murray moved to adjourn, with Vice Chair Mate seconding. The Chair called for a vote on the motion, and the motion was unanimously adopted by voice vote. Chair Reeves thanked everyone, and the meeting was adjourned at 1:50 p.m.

Exhibit A

PROPOSED AMENDMENT: DRUG OFFENSES

Synopsis of Proposed Amendment: In August 2025, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2026, “[f]urther examination of the penalty structure for certain drug trafficking offenses under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)),” including “consideration of other miscellaneous issues pertaining to drug trafficking offenses coming to the Commission’s attention, such as statutory changes relating to fentanyl, sentencing enhancements for offenses involving fentanyl, and other fentanyl-related issues.” U.S. Sent’g Comm’n, “Notice of Final Priorities,” 90 FR 39263 (Aug. 14, 2025).

The proposed amendment would amend §2D1.1 to address the enactment of the Halt All Lethal Trafficking of Fentanyl Act (Pub. L. 119–26) (2025) (“HALT Fentanyl Act”), which permanently scheduled “fentanyl-related substances” as Schedule I substances under 21 U.S.C. § 812. The Act also expanded the offenses prohibited by 21 U.S.C. §§ 841 and 960 to include “fentanyl-related substances,” setting the quantities that trigger mandatory minimum penalties at the same level as fentanyl analogues. The Act defined “fentanyl-related substances” as

- (2) For purposes of paragraph (1), except as provided in paragraph (3), the term “fentanyl-related substance” means any substance that is structurally related to fentanyl by 1 or more of the following modifications:
 - (A) By replacement of the phenyl portion of the phenethyl group by any monocycle, whether or not further substituted in or on the monocycle.
 - (B) By substitution in or on the phenethyl group with alkyl, alkenyl, alkoxy, hydroxyl, halo, haloalkyl, amino, or nitro groups.
 - (C) By substitution in or on the piperidine ring with alkyl, alkenyl, alkoxy, ester, ether, hydroxyl, halo, haloalkyl, amino, or nitro groups.
 - (D) By replacement of the aniline ring with any aromatic monocycle whether or not further substituted in or on the aromatic monocycle.
 - (E) By replacement of the N-propionyl group with another acyl group.
- (3) A substance that satisfies the definition of the term “fentanyl-related substance” in paragraph (2) shall nonetheless not be treated as a fentanyl-related substance subject to this schedule if the substance—
 - (A) is controlled by action of the Attorney General under section 201; or
 - (B) is otherwise expressly listed in a schedule other than this schedule.

Pub. L. 119–26, § 2 (2025). The HALT Fentanyl Act does not contain any directives to the Commission.

The proposed amendment would amend the Drug Quantity Table at §2D1.1(c) and the Drug Equivalency Tables at Application Note 8(D) of the Commentary to §2D1.1 to add “fentanyl-related substance.” It would set the quantity thresholds and base offense levels at the same level as fentanyl analogues. The proposed amendment would also amend the Notes to the Drug Quantity Table to add a new Note that includes a definition of “fentanyl-related substance” that references 21 U.S.C. § 812(e) and a rebuttable presumption that the base offense level specified in the Drug Quantity Table applies to fentanyl-related substances.

The new Note would also add a provision stating that if the defendant establishes either that the fentanyl-related substance (i) functions to block, diminish, or counteract the effect produced by fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, or (ii) is significantly less potent than fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide), the court should instead determine the base offense level for the fentanyl-related substance using the converted drug weight of the most closely related controlled substance referenced in §2D1.1.

In addition, the proposed amendment would add “fentanyl-related substance” to the enhancement at §2D1.1(b)(13) for representing or marketing fentanyl or a fentanyl analogue as another substance or as a legitimately manufactured drug. It would include a proviso indicating that this enhancement shall only apply in a case involving a fentanyl-related substance if the court applies the offense level specified in the Drug Quantity Table for fentanyl, a fentanyl analogue, or a fentanyl-related substance.

Proposed Amendment:

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

* * *

(b) Specific Offense Characteristics

* * *

- (13) If the defendant (A) 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, or a fentanyl-related substance, increase by 4 levels; or (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide)—~~or~~, a fentanyl analogue, or a fentanyl-related substance, with reckless disregard that such mixture or substance was not the legitimately manufactured drug, increase by 2 levels. The term “**drug**,” as used in subsection (b)(13)(B), has the meaning given that term in 21 U.S.C. § 321(g)(1).

Provided, however, that this enhancement shall only apply in a case involving a fentanyl-related substance if the court applies the offense level specified in the Drug Quantity Table for fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide), a fentanyl analogue, or a fentanyl-related substance.

* * *

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL
(1) ● 90 KG or more of Heroin; ● 450 KG or more of Cocaine; ● 25.2 KG or more of Cocaine Base; ● 90 KG or more of PCP, or 9 KG or more of PCP (actual); ● 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of “Ice”; ● 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); ● 900 G or more of LSD; ● 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); ● 9 KG or more of a Fentanyl Analogue; ● 9 KG or more of a Fentanyl-Related Substance; ● 90,000 KG or more of Marihuana; ● 18,000 KG or more of Hashish; ● 1,800 KG or more of Hashish Oil; ● 90,000,000 units or more of Ketamine; ● 90,000,000 units or more of Schedule I or II Depressants; ● 5,625,000 units or more of Flunitrazepam; ● 90,000 KG or more of <i>Converted Drug Weight</i>.	Level 38
(2) ● At least 30 KG but less than 90 KG of Heroin; ● At least 150 KG but less than 450 KG of Cocaine; ● At least 8.4 KG but less than 25.2 KG of Cocaine Base; ● At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual); ● At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of “Ice”; ● At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual); ● At least 300 G but less than 900 G of LSD; ● At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); ● At least 3 KG but less than 9 KG of a Fentanyl Analogue; ● At least 3 KG but less than 9 KG of a Fentanyl-Related Substance; ● At least 30,000 KG but less than 90,000 KG of Marihuana; ● At least 6,000 KG but less than 18,000 KG of Hashish; ● At least 600 KG but less than 1,800 KG of Hashish Oil; ● At least 30,000,000 units but less than 90,000,000 units of Ketamine; ● At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants; ● At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam; ● At least 30,000 KG but less than 90,000 KG of <i>Converted Drug Weight</i>.	Level 36
(3) ● At least 10 KG but less than 30 KG of Heroin; ● At least 50 KG but less than 150 KG of Cocaine;	Level 34

- At least 2.8 KG but less than 8.4 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or
at least 1 KG but less than 3 KG of PCP (actual);
- At least 5 KG but less than 15 KG of Methamphetamine, or
at least 500 G but less than 1.5 KG of Methamphetamine (actual), or
at least 500 G but less than 1.5 KG of “Ice”;
- At least 5 KG but less than 15 KG of Amphetamine, or
at least 500 G but less than 1.5 KG of Amphetamine (actual);
- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]
Propanamide);
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 1 KG but less than 3 KG of a Fentanyl-Related Substance;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam;
- At least 10,000 KG but less than 30,000 KG of **Converted Drug Weight**.

- (4) **Level 32**
- At least 3 KG but less than 10 KG of Heroin;
 - At least 15 KG but less than 50 KG of Cocaine;
 - At least 840 G but less than 2.8 KG of Cocaine Base;
 - At least 3 KG but less than 10 KG of PCP, or
at least 300 G but less than 1 KG of PCP (actual);
 - At least 1.5 KG but less than 5 KG of Methamphetamine, or
at least 150 G but less than 500 G of Methamphetamine (actual), or
at least 150 G but less than 500 G of “Ice”;
 - At least 1.5 KG but less than 5 KG of Amphetamine, or
at least 150 G but less than 500 G of Amphetamine (actual);
 - At least 30 G but less than 100 G of LSD;
 - At least 1.2 KG but less than 4 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]
Propanamide);
 - At least 300 G but less than 1 KG of a Fentanyl Analogue;
 - At least 300 G but less than 1 KG of a Fentanyl-Related Substance;
 - At least 3,000 KG but less than 10,000 KG of Marihuana;
 - At least 600 KG but less than 2,000 KG of Hashish;
 - At least 60 KG but less than 200 KG of Hashish Oil;
 - At least 3,000,000 but less than 10,000,000 units of Ketamine;
 - At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
 - At least 187,500 but less than 625,000 units of Flunitrazepam;
 - At least 3,000 KG but less than 10,000 KG of **Converted Drug Weight**.

- (5) **Level 30**
- At least 1 KG but less than 3 KG of Heroin;
 - At least 5 KG but less than 15 KG of Cocaine;
 - At least 280 G but less than 840 G of Cocaine Base;
 - At least 1 KG but less than 3 KG of PCP, or
at least 100 G but less than 300 G of PCP (actual);
 - At least 500 G but less than 1.5 KG of Methamphetamine, or
at least 50 G but less than 150 G of Methamphetamine (actual), or
at least 50 G but less than 150 G of “Ice”;
 - At least 500 G but less than 1.5 KG of Amphetamine, or

- at least 50 G but less than 150 G of Amphetamine (actual);
- At least 10 G but less than 30 G of LSD;
- At least 400 G but less than 1.2 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 100 G but less than 300 G of a Fentanyl-Related Substance;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam;
- At least 1,000 KG but less than 3,000 KG of **Converted Drug Weight**.

(6) **Level 28**

- At least 700 G but less than 1 KG of Heroin;
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 196 G but less than 280 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or
at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or
at least 35 G but less than 50 G of Methamphetamine (actual), or
at least 35 G but less than 50 G of "Ice";
- At least 350 G but less than 500 G of Amphetamine, or
at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 70 G but less than 100 G of a Fentanyl-Related Substance;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- At least 43,750 but less than 62,500 units of Flunitrazepam;
- At least 700 KG but less than 1,000 KG of **Converted Drug Weight**.

(7) **Level 26**

- At least 400 G but less than 700 G of Heroin;
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 112 G but less than 196 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or
at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or
at least 20 G but less than 35 G of Methamphetamine (actual), or
at least 20 G but less than 35 G of "Ice";
- At least 200 G but less than 350 G of Amphetamine, or
at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 40 G but less than 70 G of a Fentanyl-Related Substance;
- At least 400 KG but less than 700 KG of Marihuana;

- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 25,000 but less than 43,750 units of Flunitrazepam;
- At least 400 KG but less than 700 KG of **Converted Drug Weight**.

- (8) **Level 24**
- At least 100 G but less than 400 G of Heroin;
 - At least 500 G but less than 2 KG of Cocaine;
 - At least 28 G but less than 112 G of Cocaine Base;
 - At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
 - At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of “Ice”;
 - At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
 - At least 1 G but less than 4 G of LSD;
 - At least 40 G but less than 160 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 10 G but less than 40 G of a Fentanyl Analogue;
 - At least 10 G but less than 40 G of a Fentanyl-Related Substance;
 - At least 100 KG but less than 400 KG of Marihuana;
 - At least 20 KG but less than 80 KG of Hashish;
 - At least 2 KG but less than 8 KG of Hashish Oil;
 - At least 100,000 but less than 400,000 units of Ketamine;
 - At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
 - At least 6,250 but less than 25,000 units of Flunitrazepam;
 - At least 100 KG but less than 400 KG of **Converted Drug Weight**.

- (9) **Level 22**
- At least 80 G but less than 100 G of Heroin;
 - At least 400 G but less than 500 G of Cocaine;
 - At least 22.4 G but less than 28 G of Cocaine Base;
 - At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
 - At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of “Ice”;
 - At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
 - At least 800 MG but less than 1 G of LSD;
 - At least 32 G but less than 40 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
 - At least 8 G but less than 10 G of a Fentanyl Analogue;
 - At least 8 G but less than 10 G of a Fentanyl-Related Substance;
 - At least 80 KG but less than 100 KG of Marihuana;
 - At least 16 KG but less than 20 KG of Hashish;
 - At least 1.6 KG but less than 2 KG of Hashish Oil;
 - At least 80,000 but less than 100,000 units of Ketamine;
 - At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
 - At least 5,000 but less than 6,250 units of Flunitrazepam;
 - At least 80 KG but less than 100 KG of **Converted Drug Weight**.

- (10) **Level 20**
- At least 60 G but less than 80 G of Heroin;
 - At least 300 G but less than 400 G of Cocaine;
 - At least 16.8 G but less than 22.4 G of Cocaine Base;
 - At least 60 G but less than 80 G of PCP, or
at least 6 G but less than 8 G of PCP (actual);
 - At least 30 G but less than 40 G of Methamphetamine, or
at least 3 G but less than 4 G of Methamphetamine (actual), or
at least 3 G but less than 4 G of “Ice”;
 - At least 30 G but less than 40 G of Amphetamine, or
at least 3 G but less than 4 G of Amphetamine (actual);
 - At least 600 MG but less than 800 MG of LSD;
 - At least 24 G but less than 32 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]
Propanamide);
 - At least 6 G but less than 8 G of a Fentanyl Analogue;
 - At least 6 G but less than 8 G of a Fentanyl-Related Substance;
 - At least 60 KG but less than 80 KG of Marihuana;
 - At least 12 KG but less than 16 KG of Hashish;
 - At least 1.2 KG but less than 1.6 KG of Hashish Oil;
 - At least 60,000 but less than 80,000 units of Ketamine;
 - At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
 - 60,000 units or more of Schedule III substances (except Ketamine);
 - At least 3,750 but less than 5,000 units of Flunitrazepam;
 - At least 60 KG but less than 80 KG of **Converted Drug Weight**.
- (11) **Level 18**
- At least 40 G but less than 60 G of Heroin;
 - At least 200 G but less than 300 G of Cocaine;
 - At least 11.2 G but less than 16.8 G of Cocaine Base;
 - At least 40 G but less than 60 G of PCP, or
at least 4 G but less than 6 G of PCP (actual);
 - At least 20 G but less than 30 G of Methamphetamine, or
at least 2 G but less than 3 G of Methamphetamine (actual), or
at least 2 G but less than 3 G of “Ice”;
 - At least 20 G but less than 30 G of Amphetamine, or
at least 2 G but less than 3 G of Amphetamine (actual);
 - At least 400 MG but less than 600 MG of LSD;
 - At least 16 G but less than 24 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]
Propanamide);
 - At least 4 G but less than 6 G of a Fentanyl Analogue;
 - At least 4 G but less than 6 G of a Fentanyl-Related Substance;
 - At least 40 KG but less than 60 KG of Marihuana;
 - At least 8 KG but less than 12 KG of Hashish;
 - At least 800 G but less than 1.2 KG of Hashish Oil;
 - At least 40,000 but less than 60,000 units of Ketamine;
 - At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
 - At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine);
 - At least 2,500 but less than 3,750 units of Flunitrazepam;
 - At least 40 KG but less than 60 KG of **Converted Drug Weight**.
- (12) **Level 16**
- At least 20 G but less than 40 G of Heroin;
 - At least 100 G but less than 200 G of Cocaine;
 - At least 5.6 G but less than 11.2 G of Cocaine Base;
 - At least 20 G but less than 40 G of PCP, or
at least 2 G but less than 4 G of PCP (actual);

- At least 10 G but less than 20 G of Methamphetamine, or
at least 1 G but less than 2 G of Methamphetamine (actual), or
at least 1 G but less than 2 G of “Ice”;
- At least 10 G but less than 20 G of Amphetamine, or
at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD;
- At least 8 G but less than 16 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]
Propanamide);
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 2 G but less than 4 G of a Fentanyl-Related Substance;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam;
- At least 20 KG but less than 40 KG of **Converted Drug Weight**.

- (13) **Level 14**
- At least 10 G but less than 20 G of Heroin;
 - At least 50 G but less than 100 G of Cocaine;
 - At least 2.8 G but less than 5.6 G of Cocaine Base;
 - At least 10 G but less than 20 G of PCP, or
at least 1 G but less than 2 G of PCP (actual);
 - At least 5 G but less than 10 G of Methamphetamine, or
at least 500 MG but less than 1 G of Methamphetamine (actual), or
at least 500 MG but less than 1 G of “Ice”;
 - At least 5 G but less than 10 G of Amphetamine, or
at least 500 MG but less than 1 G of Amphetamine (actual);
 - At least 100 MG but less than 200 MG of LSD;
 - At least 4 G but less than 8 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]
Propanamide);
 - At least 1 G but less than 2 G of a Fentanyl Analogue;
 - At least 1 G but less than 2 G of a Fentanyl-Related Substance;
 - At least 10 KG but less than 20 KG of Marihuana;
 - At least 2 KG but less than 5 KG of Hashish;
 - At least 200 G but less than 500 G of Hashish Oil;
 - At least 10,000 but less than 20,000 units of Ketamine;
 - At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
 - At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine);
 - At least 625 but less than 1,250 units of Flunitrazepam;
 - At least 10 KG but less than 20 KG of **Converted Drug Weight**.

- (14) **Level 12**
- Less than 10 G of Heroin;
 - Less than 50 G of Cocaine;
 - Less than 2.8 G of Cocaine Base;
 - Less than 10 G of PCP, or
less than 1 G of PCP (actual);
 - Less than 5 G of Methamphetamine, or
less than 500 MG of Methamphetamine (actual), or
less than 500 MG of “Ice”;
 - Less than 5 G of Amphetamine, or
less than 500 MG of Amphetamine (actual);

- Less than 100 MG of LSD;
- Less than 4 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- Less than 1 G of a Fentanyl Analogue;
- Less than 1 G of a Fentanyl-Related Substance;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);
- At least 312 but less than 625 units of Flunitrazepam;
- 80,000 units or more of Schedule IV substances (except Flunitrazepam);
- At least 5 KG but less than 10 KG of **Converted Drug Weight**.

* * *

*Notes to Drug Quantity Table:

* * *

(K) The term “**Fentanyl-Related Substance**” is defined in 21 U.S.C. § 812(e). There is a rebuttable presumption that the base offense level specified in the Drug Quantity Table applies to fentanyl-related substances. However, if the defendant establishes either that the fentanyl-related substance (i) functions to block, diminish, or counteract the effect produced by fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, or (ii) is significantly less potent than fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide), the court should instead determine the base offense level for the fentanyl-related substance using the converted drug weight of the most closely related controlled substance referenced in this guideline (as provided in Application Note 6 below).

(KL) The term “**Converted Drug Weight**,” for purposes of this guideline, refers to a nominal reference designation that is used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.

Commentary

* * *

Application Notes:

* * *

8. Use of Drug Conversion Tables.—

* * *

(D) **Drug Conversion Tables.—**

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

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

* * *

Exhibit B

PROPOSED AMENDMENT: INFLATIONARY ADJUSTMENTS

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's work in examining §2B1.1 (Theft, Property Destruction, and Fraud) and related guidelines to consider whether the loss table should be revised to simplify application or to adjust for inflation. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 90 FR 39263 (Aug. 14, 2025). As part of that work, the Commission is considering whether to adjust all monetary tables and values in the guidelines for inflation.

The monetary tables and values in the guidelines, including the monetary values in the fine tables for individual defendants and for organizational defendants, were last revised to account for inflation in 2015. *See* USSG App. C, amend. 791 (effective Nov. 1, 2015). The proposed amendment would amend the monetary tables in the guidelines to adjust for inflation, *i.e.*, the tables in §§2B1.1 (Theft, Property, Destruction, and Fraud), 2B2.1 (Burglary), 2B3.1 (Robbery), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 2T4.1 (Tax Table), 5E1.2 (Fines for Individual Defendants), and 8C2.4 (Base Fine). The proposed amendment would adjust the monetary tables and values in the guidelines using a specific multiplier derived from the Bureau of Labor Statistics' Consumer Price Index and then would round the amounts using a set of rules extrapolated from the provisions for adjusting monetary penalties for inflation set forth in section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990. This is the same methodology the Commission used in 2015. *See* USSG App. C, amend. 791 (effective Nov. 1, 2015).

In addition, the proposed amendment adjusts for inflation the monetary value in specific offense characteristics in other Chapter Two guidelines and includes conforming changes to guidelines that refer to the monetary tables.

Proposed Amendment:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

- (1) If the loss exceeded ~~\$6,500~~**\$9,000**, increase the offense level as follows:

[MULTIPLIER USED]	LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
[1.38]	(A) \$6,500 \$9,000 or less	no increase
[1.38]	(B) More than \$6,500 \$9,000	add 2
[1.33]	(C) More than \$15,000 \$20,000	add 4
[1.38]	(D) More than \$40,000 \$55,000	add 6
[1.58]	(E) More than \$95,000 \$150,000	add 8
[1.33]	(F) More than \$150,000 \$200,000	add 10
[1.40]	(G) More than \$250,000 \$350,000	add 12
[1.36]	(H) More than \$550,000 \$750,000	add 14
[1.33]	(I) More than \$1,500,000 \$2,000,000	add 16
[1.43]	(J) More than \$3,500,000 \$5,000,000	add 18
[1.58]	(K) More than \$9,500,000 \$15,000,000	add 20
[1.40]	(L) More than \$25,000,000 \$35,000,000	add 22
[1.38]	(M) More than \$65,000,000 \$90,000,000	add 24
[1.33]	(N) More than \$150,000,000 \$200,000,000	add 26
[1.40]	(O) More than \$250,000,000 \$350,000,000	add 28
[1.36]	(P) More than \$550,000,000 \$750,000,000	add 30 .

* * *

§2B1.4. Insider Trading

* * *

(b) Specific Offense Characteristics

- (1) If the gain resulting from the offense exceeded ~~\$6,500~~**\$9,000**, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources

* * *

(b) Specific Offense Characteristics

- (1) If the value of the cultural heritage resource or paleontological resource (A) exceeded ~~\$2,500~~ **\$3,500** but did not exceed ~~\$6,500~~ **\$9,000**, increase by 1 level; or (B) exceeded ~~\$6,500~~ **\$9,000**, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B2.1. Burglary of a Residence or a Structure Other than a Residence

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the loss exceeded ~~\$5,000~~ **\$7,000**, increase the offense level as follows:

[MULTIPLIER USED]	LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
[1.40]	(A) \$5,000 \$7,000 or less	no increase
[1.40]	(B) More than \$5,000 \$7,000	add 1
[1.25]	(C) More than \$20,000 \$25,000	add 2
[1.58]	(D) More than \$95,000 \$150,000	add 3
[1.40]	(E) More than \$500,000 \$700,000	add 4
[1.33]	(F) More than \$1,500,000 \$2,000,000	add 5
[1.33]	(G) More than \$3,000,000 \$4,000,000	add 6
[1.40]	(H) More than \$5,000,000 \$7,000,000	add 7
[1.58]	(I) More than \$9,500,000 \$15,000,000	add 8.

* * *

§2B2.3. Trespass

* * *

(b) Specific Offense Characteristics

* * *

- (3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded ~~\$2,500~~ **\$3,500** but did not exceed ~~\$6,500~~ **\$9,000**, increase by 1 level; or (ii) exceeded ~~\$6,500~~ **\$9,000**, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B3.1. Robbery

* * *

(b) Specific Offense Characteristics

* * *

- (7) If the loss exceeded ~~\$20,000~~ **\$25,000**, increase the offense level as follows:

[MULTIPLIER USED]	LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
[1.25]	(A) \$20,000 \$25,000 or less	no increase
[1.25]	(B) More than \$20,000 \$25,000	add 1
[1.58]	(C) More than \$95,000 \$150,000	add 2
[1.40]	(D) More than \$500,000 \$700,000	add 3
[1.33]	(E) More than \$1,500,000 \$2,000,000	add 4
[1.33]	(F) More than \$3,000,000 \$4,000,000	add 5
[1.40]	(G) More than \$5,000,000 \$7,000,000	add 6
[1.58]	(H) More than \$9,500,000 \$15,000,000	add 7.

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the greater of the amount demanded or the loss to the victim exceeded ~~\$20,000~~**\$25,000**, increase by the corresponding number of levels from the table in §2B3.1(b)(7).

* * *

§2B3.3. Blackmail and Similar Forms of Extortion

* * *

(b) Specific Offense Characteristic

- (1) If the greater of the amount obtained or demanded (A) exceeded ~~\$2,500~~**\$3,500** but did not exceed ~~\$6,500~~**\$9,000**, increase by 1 level; or (B) exceeded ~~\$6,500~~**\$9,000**, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

* * *

(b) Specific Offense Characteristics

- (1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded ~~\$2,500~~**\$3,500** but did not exceed ~~\$6,500~~**\$9,000**, increase by 1 level; or (B) exceeded ~~\$6,500~~**\$9,000**, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B5.1. Offenses Involving Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

- (1) If the face value of the counterfeit items (A) exceeded ~~\$2,500~~\$3,500 but did not exceed ~~\$6,500~~\$9,000, increase by 1 level; or (B) exceeded ~~\$6,500~~\$9,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B5.3. Criminal Infringement of Copyright or Trademark

* * *

(b) Specific Offense Characteristics

- (1) If the infringement amount (A) exceeded ~~\$2,500~~\$3,500 but did not exceed ~~\$6,500~~\$9,000, increase by 1 level; or (B) exceeded ~~\$6,500~~\$9,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B6.1. Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers

* * *

(b) Specific Offense Characteristics

- (1) If the retail value of the motor vehicles or parts (A) exceeded ~~\$2,500~~\$3,500 but did not exceed ~~\$6,500~~\$9,000, increase by 1 level; or (B) exceeded ~~\$6,500~~\$9,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded ~~\$6,500~~ **\$9,000**, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2C1.2. Offering, Giving, Soliciting, or Receiving a Gratuity

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the value of the gratuity exceeded ~~\$6,500~~ **\$9,000**, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2C1.8. Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property

* * *

(b) Specific Offense Characteristics

- (1) If the value of the illegal transactions exceeded ~~\$6,500~~\$9,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2E5.1. Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded ~~\$2,500~~\$3,500 but did not exceed ~~\$6,500~~\$9,000, increase by 1 level; or (B) exceeded ~~\$6,500~~\$9,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2Q2.1. Offenses Involving Fish, Wildlife, and Plants

* * *

(b) Specific Offense Characteristics

* * *

- (3) (If more than one applies, use the greater):

- (A) If the market value of the fish, wildlife, or plants (i) exceeded ~~\$2,500~~\$3,500 but did not exceed ~~\$6,500~~\$9,000, increase by 1 level; or (ii) exceeded ~~\$6,500~~\$9,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount; or
- (B) If the offense involved (i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 C.F.R. § 216.15); (ii) fish, wildlife, or plants that are listed

as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23), increase by 4 levels.

* * *

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the volume of commerce attributable to the defendant was more than ~~\$1,000,000~~ **\$1,500,000**, adjust the offense level as follows:

[MULTIPLIER USED]	VOLUME OF COMMERCE (APPLY THE GREATEST)	ADJUSTMENT TO OFFENSE LEVEL
[1.50]	(A) More than \$1,000,000 \$1,500,000	add 2
[1.50]	(B) More than \$10,000,000 \$15,000,000	add 4
[1.40]	(C) More than \$50,000,000 \$70,000,000	add 6
[1.50]	(D) More than \$100,000,000 \$150,000,000	add 8
[1.33]	(E) More than \$300,000,000 \$400,000,000	add 10
[1.33]	(F) More than \$600,000,000 \$800,000,000	add 12
[1.38]	(G) More than \$1,200,000,000 \$1,650,000,000	add 14
[1.35]	(H) More than \$1,850,000,000 \$2,500,000,000	add 16 .

* * *

§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

(a) Base Offense Level:

- (1) The level from §2T4.1 (Tax Table) corresponding to the tax loss, if the tax loss exceeded ~~\$1,500~~ **\$2,000**; or
- (2) **5**, if the tax loss exceeded ~~\$200~~ **\$300** but did not exceed ~~\$1,500~~ **\$2,000**; or
- (3) **4**, if the tax loss did not exceed ~~\$200~~ **\$300**.

For purposes of this guideline, the “tax loss” is the amount of the duty.

* * *

§2T4.1. Tax Table

[MULTIPLIER USED]	TAX LOSS (APPLY THE GREATEST)	OFFENSE LEVEL
[1.25]	(A) \$2,500 \$3,500 or less	6
[1.25]	(B) More than \$2,500 \$3,500	8
[1.25]	(C) More than \$6,500 \$9,000	10
[1.25]	(D) More than \$15,000 \$20,000	12
[1.25]	(E) More than \$40,000 \$55,000	14
[1.25]	(F) More than \$100,000 \$150,000	16
[1.25]	(G) More than \$250,000 \$350,000	18
[1.25]	(H) More than \$550,000 \$750,000	20
[1.25]	(I) More than \$1,500,000 \$2,000,000	22
[1.25]	(J) More than \$3,500,000 \$5,000,000	24
[1.25]	(K) More than \$9,500,000 \$15,000,000	26
[1.25]	(L) More than \$25,000,000 \$35,000,000	28
[1.25]	(M) More than \$65,000,000 \$90,000,000	30
[1.25]	(N) More than \$150,000,000 \$200,000,000	32
[1.25]	(O) More than \$250,000,000 \$350,000,000	34
[1.25]	(P) More than \$550,000,000 \$750,000,000	36.

* * *

§5E1.2. Fines for Individual Defendants

* * *

- (c) (1) The minimum of the fine guideline range is the amount shown in column A of the table below.
- (2) Except as specified in paragraph (4) below, the maximum of the fine guideline range is the amount shown in column B of the table below.

(3) FINE TABLE

[MULTIPLIER USED]	OFFENSE LEVEL	A MINIMUM	B MAXIMUM
[1.50, 1.58]	3 and below	\$200 \$300	\$9,500 \$15,000
[1.40, 1.58]	4–5	\$500 \$700	\$9,500 \$15,000
[1.50, 1.58]	6–7	\$1,000 \$1,500	\$9,500 \$15,000
[1.25, 1.25]	8–9	\$2,000 \$2,500	\$20,000 \$25,000
[1.38, 1.38]	10–11	\$4,000 \$5,500	\$40,000 \$55,000

[1.36, 1.36]	12–13	\$5,500	\$7,500	\$55,000	\$75,000
[1.33, 1.33]	14–15	\$7,500	\$10,000	\$75,000	\$100,000
[1.50, 1.58]	16–17	\$10,000	\$15,000	\$95,000	\$150,000
[1.50, 1.50]	18–19	\$10,000	\$15,000	\$100,000	\$150,000
[1.33, 1.33]	20–22	\$15,000	\$20,000	\$150,000	\$200,000
[1.25, 1.25]	23–25	\$20,000	\$25,000	\$200,000	\$250,000
[1.40, 1.40]	26–28	\$25,000	\$35,000	\$250,000	\$350,000
[1.33, 1.33]	29–31	\$30,000	\$40,000	\$300,000	\$400,000
[1.43, 1.43]	32–34	\$35,000	\$50,000	\$350,000	\$500,000
[1.38, 1.38]	35–37	\$40,000	\$55,000	\$400,000	\$550,000
[1.40, 1.40]	38 and above	\$50,000	\$70,000	\$500,000	\$700,000.

* * *

(h) Special Instructions

- (1) For offenses committed prior to November 1, 2015, use the applicable fine guideline range that was set forth in the version of §5E1.2(c) that was in effect on November 1, 2014, rather than the applicable fine guideline range set forth in subsection (c) above.
- (2) For offenses committed on or after November 1, 2015 but prior to November 1, 2026, use the applicable fine guideline range that was set forth in the version of §5E1.2(c) that was in effect on November 1, 2025, rather than the applicable fine guideline range set forth in subsection (c) above.

* * *

§8C2.4. Base Fine

* * *

(d) OFFENSE LEVEL FINE TABLE

[MULTIPLIER USED]	Offense Level	Amount
[1.18]	6 or less	\$8,500
[1.33]	7	\$15,000
[1.33]	8	\$15,000
[1.40]	9	\$25,000
[1.43]	10	\$35,000
[1.40]	11	\$50,000
[1.36]	12	\$70,000
[1.50]	13	\$100,000
[1.33]	14	\$150,000
[1.25]	15	\$200,000

[1.33]	16	\$300,000	\$400,000
[1.33]	17	\$450,000	\$600,000
[1.33]	18	\$600,000	\$800,000
[1.18]	19	\$850,000	\$1,000,000
[1.50]	20	\$1,000,000	\$1,500,000
[1.33]	21	\$1,500,000	\$2,000,000
[1.25]	22	\$2,000,000	\$2,500,000
[1.33]	23	\$3,000,000	\$4,000,000
[1.43]	24	\$3,500,000	\$5,000,000
[1.40]	25	\$5,000,000	\$7,000,000
[1.38]	26	\$6,500,000	\$9,000,000
[1.18]	27	\$8,500,000	\$10,000,000
[1.50]	28	\$10,000,000	\$15,000,000
[1.33]	29	\$15,000,000	\$20,000,000
[1.25]	30	\$20,000,000	\$25,000,000
[1.40]	31	\$25,000,000	\$35,000,000
[1.33]	32	\$30,000,000	\$40,000,000
[1.38]	33	\$40,000,000	\$55,000,000
[1.40]	34	\$50,000,000	\$70,000,000
[1.38]	35	\$65,000,000	\$90,000,000
[1.25]	36	\$80,000,000	\$100,000,000
[1.50]	37	\$100,000,000	\$150,000,000
[1.33]	38 or more	\$150,000,000	\$200,000,000.

(e) Special Instructions

- (1) For offenses committed prior to November 1, 2015, use the offense level fine table that was set forth in the version of §8C2.4(d) that was in effect on November 1, 2014, rather than the offense level fine table set forth in subsection (d) above.
- (2) For offenses committed on or after November 1, 2015 but prior to November 1, 2026, use the offense level fine table that was set forth in the version of §8C2.4(d) that was in effect on November 1, 2025, rather than the offense level fine table set forth in subsection (d) above.

* * *

Exhibit C

PROPOSED AMENDMENT: MULTIPLE COUNTS

Synopsis of Proposed Amendment: In August 2025, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2026, “[c]ontinued exploration of ways to simplify the *Guidelines Manual*,” including “examining the operation of the grouping rules in Chapter Three, Part D (Multiple Counts).” U.S. Sent’g Comm’n, “Notice of Final Priorities,” 90 FR 39263 (Aug. 14, 2025).

The guidelines generally require a single, combined offense level in each case. Chapter Three, Part D (Multiple Counts) of the *Guidelines Manual* “provides the rules for determining a single offense level that encompasses all the counts of which the defendant is convicted.” USSG Ch. 3, Pt. D, intro comment (Nov. 1, 2025). The rules in Part D apply to multiple counts regardless of whether they are contained in the same indictment or are contained in different indictments and sentences on those counts are to be imposed at the same time. These rules also apply to some single count cases that include additional conduct that is treated under the *Guidelines Manual* as if it were a separate count of conviction. *See, e.g.*, USSG §§1B1.2(c) & (d); 2G1.1(d), 2G1.3(d), 2G2.1(d). As provided in §3D1.1 (Procedure for Determining Offense Level on Multiple Counts), the multiple count rules proceed in three steps: (1) grouping the counts into distinct groups of closely related counts by applying the rules specified in §3D1.2 (Groups of Closely Related Counts); (2) determining the offense level applicable to each group, as provided in §3D1.3 (Offense Level Applicable to Each Group of Closely Related Counts); and (3) determining the combined offense level applicable to all groups using the unit system, as provided in §3D1.4 (Determining the Combined Offense Level).

The first step requires grouping counts “involving substantially the same harm.” Subsections (a) through (d) of §3D1.2 set forth the four situations when multiple counts involve substantially the same harm: (a) when the counts involve the same victim and arise from a single criminal act or transaction; (b) when the counts involve the same victim and two or more distinct criminal transactions connected by a common criminal objective or constituting part of a common scheme or plan; (c) when one of the counts “embodies conduct that is treated” as a specific offense characteristic or adjustment in the guideline applicable to another of the counts; and (d) when the counts involve offenses to which the same guideline or two different guidelines “of the same general type” apply and the offense level is determined largely based on cumulative measures (such as total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm) or the offense behavior is ongoing or continuous in nature. Section 3D1.2(d), which applies to the fourth situation described above, provides lists of both offenses that are covered by this rule and offenses that are excluded from application of this rule. The rules contained in §3D1.2 aim to ensure that the guideline range reflects the overall harm and conduct without accounting for the same or similar conduct twice. More than one rule may provide a basis for grouping, but only one rule must apply for counts to group.

The second step requires determining the offense level applicable to each group. This determination depends on which grouping rule applies. As provided in §3D1.3(a), each count grouped under §3D1.2(a)–(c) is calculated separately, and the offense level for the group will be the highest offense level of the counts in the group. Section 3D1.3(b) sets forth a different procedure for counts grouped under §3D1.2(d). If the counts involve offenses to

which the same guideline applies, instead of calculating the offense level for each count and choosing the count resulting in the highest offense level, the guideline is applied one time using the aggregate harm or quantity of the grouped counts to determine the offense level. The resulting offense level will be applicable to the group of counts. However, if the counts involve offenses of the same general type to which different guidelines apply, each count is calculated separately, and the offense level for the group will be the highest offense level of the counts in the group.

The third and final step set forth in §3D1.4 requires assigning units to determine the combined offense level. The group with the highest offense level is assigned one unit, and each remaining group is assigned either one, one-half, and no additional units. The number of additional units is based on the relationship between the group with the highest offense level and any remaining groups. One unit is assigned to any remaining group of comparable seriousness, that is, a group with the same offense level or with one to four fewer offense levels. One-half unit is assigned to any remaining group of somewhat comparable seriousness, that is, a group with five to eight fewer offense levels. No units are assigned to any remaining group of incomparable seriousness, that is, a group with nine or more fewer offense levels. The total number of units determines whether—and the extent to which—additional offense levels are assigned to the most serious group.

The Commission is considering simplification of these multiple count rules for three reasons. First, some commenters have requested simplification of these rules because they are “confusing” and may lead to “incorrect calculations.” Second, the Commission’s HelpLine responds to hundreds of calls each year from practitioners specifically seeking guidance on the application of the multiple count rules. Third, despite the expenditure of significant training resources, the Commission has continued to observe misapplication of the multiple count rules, resulting in unwarranted sentencing disparities.

The proposed amendment would amend the guidelines to simplify the procedure for determining the single offense level for cases involving multiple counts. It would replace the five guidelines in Chapter Three, Part D with a single guideline at §3D1.1 that provides all the steps necessary to determine the single offense level for multiple counts. The proposed amendment would also provide a revised introductory commentary. The revised §3D1.1 would contain the following four subsections.

New subsection (a) provides that, if multiple counts use the same guideline and the guideline is listed therein, the offense level for this group of counts is determined using the combined offense behavior taken as a whole. The guidelines listed in new subsection (a) are the same guidelines that require aggregation under current §3D1.2(d). As such, new subsection (a) maintains the current approach for aggregate harm offenses as set forth in current §3D1.3(b).

New subsection (b) provides that, if multiple counts (A) to which the same guideline applies, (B) for which the applicable guideline is listed in the provision, and (C) involving different victims or the same victim on different occasions, the offense level for each count is calculated separately and an adjustment based on the number of counts applies to the count in this group resulting in the highest offense level. The guidelines listed in new subsection (b) are all guidelines that are not aggregated pursuant to current §3D1.2(d) and generally involve physical harm to individuals.

New subsection (c) explains how to determine the offense level for counts not covered by subsection (a) or (b).

New subsection (d) instructs courts to use the highest offense level applicable to: (1) any group of counts as determined under subsection (a); (2) any group of counts as determined under subsection (b); or (3) any count as determined under subsection (c).

New subsection (e) retains the provisions of current §3D1.1(b) identifying certain types of convictions that are excluded from the guideline rules applicable to multiple counts.

The proposed amendment would also add new commentary at §3D1.1 providing examples of how to apply the rules for determining a single offense level.

Finally, the proposed amendment would make conforming changes throughout the *Guidelines Manual* to reflect the new procedure of determining the offense level applicable to cases involving multiple counts, and the deletion of the current provisions of Chapter Three, Part D.

Proposed Amendment:

PART D — MULTIPLE COUNTS

Introductory Commentary

~~This part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. These rules apply to multiple counts of conviction (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding. The single, “combined” offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.~~

~~The rules in this part seek to provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine how much to increase the offense level. The amount of the additional punishment declines as the number of additional offenses increases.~~

~~Some offenses that may be charged in multiple count indictments are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range. For example, embezzling money from a bank and falsifying the related records, although legally distinct offenses, represent essentially the same type of wrongful conduct with the same ultimate harm, so that it would be more appropriate to treat them as a single offense for purposes of sentencing. Other offenses, such as an assault causing bodily injury to a teller during a bank robbery, are so closely related to the more serious offense that it would be appropriate to treat them as part of the more serious offense, leaving the sentence enhancement to result from application of a specific offense characteristic.~~

~~In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct, this part provides rules for grouping offenses together. Convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines. In essence, counts that are grouped together are treated as constituting a single offense for purposes of the guidelines.~~

~~Some offense guidelines, such as those for theft, fraud and drug offenses, contain provisions that deal with repetitive or ongoing behavior. Other guidelines, such as those for assault and robbery, are oriented more toward single episodes of criminal behavior. Accordingly, different rules are required for dealing with multiple count convictions involving these two different general classes of offenses. More complex cases involving different types of offenses may require application of one rule to some of the counts and another rule to other counts.~~

~~Some offenses, e.g., racketeering and conspiracy, may be “composite” in that they involve a pattern of conduct or scheme involving multiple underlying offenses. The rules in this part are to be used to determine the offense level for such composite offenses from the offense level for the underlying offenses.~~

~~Essentially, the rules in this part can be summarized as follows: (1) If the offense guidelines in Chapter Two base the offense level primarily on the amount of money or quantity of substance involved (e.g., theft, fraud, drug trafficking, firearms dealing), or otherwise contain provisions dealing with repetitive or ongoing misconduct (e.g., many environmental offenses), add the numerical quantities and apply the pertinent offense guideline, including any specific offense characteristics for the conduct taken as a whole. (2) When offenses are closely interrelated, group them together for purposes of the multiple count rules, and use only the offense level for the most serious offense in that group. (3) As to other offenses (e.g., independent instances of assault or robbery), start with the offense level for the most serious count and use the number and severity of additional counts to determine the amount by which to increase that offense level.~~

~~This part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. These rules apply to multiple counts of conviction (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding. The single offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the applicable guideline range.~~

~~The Commission first designed these rules primarily based on the more commonly prosecuted offenses with the goals of providing incremental punishment for significant additional criminal conduct, preventing multiple punishments for substantially identical conduct, and limiting the significance of the formal charging decision. These goals led to the development of three principles: (1) combining the offense behavior of offenses using a Chapter Two guideline primarily based on the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm; (2) grouping related offenses together and assigning an offense level based on the most serious of the related offenses; and (3) assigning incremental offense-level increases based on any remaining unrelated offenses using a unit system. The Guidelines Manual expanded on these three principles in five guidelines, each containing several rules that courts and commenters frequently found confusing, particularly the rules for determining whether multiple offenses were related or unrelated.~~

~~In 2026, the Commission revised Chapter Three, Part D to simplify the multiple count rules while maintaining the principles of the original rules. The current rules still combine offenses to which the applicable Chapter Two guideline is primarily based on the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm. However, to simplify the process for assigning incremental punishment in certain cases, the current rules set forth one rule~~

that was developed based on the situations where incremental punishment applied most frequently under the original rules and the average increase involved in those cases. This rule provides for incremental offense-level increases to multiple counts involving different victims or the same victim on different occasions, such as multiple counts of murder, assault, robbery, and sexual abuse, based solely on the number of counts instead of a unit system.

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

- ~~(a) When a defendant has been convicted of more than one count, the court shall:~~
 - ~~(1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts (“Groups”) by applying the rules specified in §3D1.2.~~
 - ~~(2) Determine the offense level applicable to each Group by applying the rules specified in §3D1.3.~~
 - ~~(3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in §3D1.4.~~
- ~~(b) Exclude from the application of §§3D1.2–3D1.5 the following:~~
 - ~~(1) Any count for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).~~
 - ~~(2) Any count of conviction under 18 U.S.C. § 1028A. See Application Note 2(B) of the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how sentences for multiple counts of conviction under 18 U.S.C. § 1028A should be imposed.~~
- (a) If there are multiple counts to which the same guideline applies and the guideline is listed below, determine the offense level applicable to these counts using the combined offense behavior taken as a whole.

The guidelines covered by subsection (a) are as follows:

§2A3.5;
§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.8;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2G2.2, 2G3.1;
§2K2.1;

§§2L1.1, 2L2.1;
 §2N3.1;
 §2Q2.1;
 §2R1.1;
 §§2S1.1, 2S1.3;
 §§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

- (b) (1) If there are multiple counts (A) to which the same guideline applies, (B) for which the applicable guideline is listed below, and (C) involving different victims or the same victim on different occasions, determine the offense level applicable to these counts by calculating the offense level for each count separately and applying the adjustment set forth in subsection (b)(2) to the count resulting in the highest offense level.

The guidelines covered by subsection (b) are as follows:

all offenses in Chapter Two, Part A (except §2A3.5);
 §§2B2.1, 2B3.1, 2B3.2, 2B3.3;
 §2D2.3;
 §§2E1.3, 2E1.4, 2E2.1;
 §§2G1.1, 2G1.3, 2G2.1;
 §§2H1.1, 2H4.1;
 §2J1.2, 2J1.3;
 §2K1.4;
 §§2M3.9, 2M6.1;
 §2N1.1;
 §2Q1.4;
 §2X6.1.

- (2) The adjustment set forth in the table below shall be based on the number of counts covered by the guidelines listed in paragraph (1).

NUMBER OF COUNTS COVERED BY GUIDELINE LISTED IN PARAGRAPH (1)	INCREASE IN OFFENSE LEVEL
(A) 2	add 2 levels
(B) 3	add 3 levels
(C) 4 or 5	add 4 levels
(D) 6 or more	add 5 levels.

- (c) If there are any remaining counts not covered by subsection (a) or (b), determine the offense level for these counts by calculating the offense level for each count separately.

- (d) The offense level applicable to all counts of conviction is the highest offense level applicable to: (1) any group of counts as determined under

subsection (a); (2) any group of counts as determined under subsection (b); or (3) any count as determined under subsection (c).

(e) **SPECIAL INSTRUCTION FOR CERTAIN MULTIPLE COUNTS.**—If there are multiple counts of conviction, exclude from the application of subsections (a) through (d) above the following counts:

(1) Any count for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by subsection (a) of §5G1.2 (Sentencing on Multiple Counts of Conviction).

(2) Any count of conviction under 18 U.S.C. § 1028A. *See* Application Note 2(B) of the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how sentences for multiple counts of conviction under 18 U.S.C. § 1028A should be imposed.

Commentary

Application Notes:

1. **In General.**—For purposes of sentencing multiple counts of conviction, counts can be (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.
2. **Application of Subsection (b).**—Subsection (b)(1) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.,* 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, to run consecutively). The multiple count rules set out under this part **guideline** do not apply to a count of conviction covered by subsection (b). However, a count covered by subsection (b)(1) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory minimum five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. *See* §5G1.2(a).

Unless specifically instructed, subsection (b)(1) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (*i.e.*, the statute does not otherwise require a term of imprisonment to be imposed). *See, e.g.,* 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 924(a)(4) (regarding penalty for 18 U.S.C. § 922(q) (possession or discharge of a firearm in a school zone)); 18 U.S.C. § 1791(c) (penalty for providing or possessing a controlled substance in prison). Accordingly, the multiple count rules set out under this part do apply to a count of conviction under this type of statute.

3. **Rules for Determining a Single Offense Level.**—Subsections (a) through (c) set forth the rules for determining a single offense level in cases involving multiple counts of conviction, and subsection (d) instructs to use the highest resulting offense level. In most cases, the single offense level applicable to all counts can be determined by applying only one subsection in this guideline. In some cases, the application of two subsections will be necessary to determine the single offense level applicable to all counts. In rare cases, the application of all three subsections will be necessary to determine the single offense level applicable to all counts. The following examples illustrate the interaction of the rules set forth in this guideline.

(A) **Cases Involving Subsections (a), (c), and (d).**—Defendant A is convicted of two counts of wire fraud, in violation of 18 U.S.C. § 1343, and one count of tax evasion, in violation of 26 U.S.C. § 7201. The guideline that applies to the wire fraud counts is §2B1.1, while the guideline that applies to the tax evasion is §2T1.1. Although both guidelines are specifically listed in subsection (a), the rule set forth in subsection (a) is only used to determine a single offense level for the multiple counts to which the same guideline applies (*i.e.*, wire fraud counts). Therefore, the offense level for the wire fraud counts is determined by using the combined behavior. Subsection (c) would then apply to the remaining tax evasion count, and the offense level applicable to this count will be calculated separately. Subsection (d) is used to determine the single offense level for all three counts. Defendant A’s offense level will be the greater of the offense levels determined above: the offense level based on the combined behavior calculated for the two counts of wire fraud or the offense level calculated for the tax evasion count.

(B) **Cases Involving Subsections (b), (c), and (d).**—Defendant B is convicted of two counts of impeding a federal officer (each count involving a different federal officer), in violation of 18 U.S.C. § 111(a), and one count of burglary of a post office, in violation of 18 U.S.C. § 2115. The guideline that applies to the two counts of impeding a federal officer is §2A2.4, while the guideline that applies to the burglary count is §2B2.1. Although both guidelines are specifically listed in subsection (b), the rule set forth subsection (b) is only used to determine a single offense level for the multiple counts to which the same guideline applies (*i.e.*, the counts of impeding a federal officer). Under subsection (b), each count of impeding a federal officer is calculated separately. Because subsection (b) applies to two counts, two levels are added to the count of impeding a federal officer that results in the highest offense level. Subsection (c) would apply to the remaining burglary count, and the offense level applicable for this count will be calculated separately. Subsection (d) is then used to determine the single offense level for all three counts, which will be the greater of the offense levels determined above: the offense level based under subsection (b) for the counts of impeding a federal officer or the offense level calculated for the burglary count under subsection (c).

(C) **Cases Involving Subsections (a), (b), and (d).**—Defendant C is convicted of two counts of distribution of child pornography, in violation of 18 U.S.C. § 2252A, and three counts of sexual exploitation of a minor (each count involving a different minor), in violation of 18 U.S.C. § 2251(a). Subsection (a) is to be used to determine the single offense level for the two counts of child pornography distribution because §2G2.2, a guideline specifically listed in subsection (a), applies to both counts. The offense level for both counts is determined by using “the combined offense behavior taken as a whole.” Subsection (b) is to be used to determine the single offense level for the three sexual exploitation counts because §2G2.1, a guideline specifically listed in subsection (b), applies to these counts. Each sexual exploitation count is calculated separately, and three levels are added under subsection (b)(2)(B) because there are three counts to which the same guideline applies. Subsection (d) is then used to determine the single offense level applicable to all five counts, which will be the greater of the offense level determined under subsection (a) for the two

counts of child pornography distribution or the offense level determined under subsection (b) for the three counts of sexual exploitation.

4. **Counts Involving Different Victims or the Same Victim on Different Occasions.**—To prevent double counting of offense behavior, subsection (b)(1)(C) requires that the counts involve different victims or the same victim on different occasions. For example, a defendant convicted of two counts of robbery of Victim A, where the robberies occurred several days apart, would be subject to a multiple count adjustment under subsection (b). On the other hand, a defendant convicted of two counts of robbery of Victim A, where one count charges conspiracy or solicitation to commit robbery and the other charges the substantive robbery, would not be subject to a multiple count adjustment under subsection (b).

5. **Interaction with §1B1.5(c).**—Subsection (c) of §1B1.5 (Interpretation of References to Other Offense Guidelines) provides (with certain exceptions) that, in the case of a cross reference or other reference to use an entire Chapter Two guideline, this guideline applies based on the referenced offense guideline, not the offense guideline containing the reference. The following examples illustrate the circumstances where this instruction would apply.

(A) **Cross References.**—Defendant A is convicted of one count of distribution of child pornography, in violation of 18 U.S.C. § 2252A, and one count of sexual exploitation of a minor, in violation of 18 U.S.C. § 2251(a). Distribution of child pornography is referenced in Appendix A (Statutory Index) to §2G2.2, while sexual exploitation of a minor is referenced to §2G2.1. However, §2G2.2 contains a cross reference to §2G2.1 for certain cases. If the cross reference in §2G2.2(c) applies to the count of distribution of child pornography based on a different victim or the same victim on a different occasion, subsection (b) is to be used to determine the single offense level for both counts because the same guideline (§2G2.1), a guideline specifically listed in subsection (b), is applicable to the counts.

(B) **Other References.**—Defendant B is convicted of one count of Hobbs Act robbery, in violation of 18 U.S.C. § 1951, and one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371. The Hobbs Act robbery is referenced in Appendix A (Statutory Index) to §2B3.1, while conspiracy to commit bank robbery is referenced to §2X1.1. Section 2X1.1(a) requires the offense level to be determined by applying the base offense level and adjustments from the guideline for the underlying substantive offense, which is §2B3.1 in this case. If the counts involve different victims or the same victim on different occasions, subsection (b) is to be used to determine the single offense level for both counts because the same guideline (§2B3.1), a guideline specifically listed in subsection (b), is applicable to the counts.

(C) **Exception.**—Defendant C is convicted of money laundering, in violation of 18 U.S.C. § 1956, and one count of conspiracy to commit murder, in violation of 18 U.S.C. § 1117. Defendant C laundered proceeds that were wired to him as advanced payment for murder, which never took place. Money laundering is referenced in Appendix A (Statutory Index) to §2S1.1, while conspiracy to commit murder is referenced to §2A5.1. For the money laundering count, §2S1.1(a)(1) instructs to determine the offense level for the underlying offense from which the laundered funds were derived. Therefore, the base offense level for the money laundering count is determined by applying §2A1.5, the guideline applicable to the conspiracy to commit murder. Although the offense level for both counts is calculated by applying §2A1.5 (a guideline listed in subsection (b)), subsection (b) cannot be used to determine the single offense level for the counts because of a special instruction included in the Commentary to §2S1.1. This instruction provides that “[n]otwithstanding §1B1.5(c), . . . application of any Chapter Three adjustment shall be determined based on

the offense covered by this guideline (*i.e.*, the laundering of criminally derived funds) and not on the underlying offense from which the laundered funds were derived.” Consequently, for purposes of subsection (b), two different guidelines (§2S1.1 and §2A1.5) apply to the counts.

Background: This section outlines the procedure to be used for determining the combined offense level. After any adjustments from Chapter Three, Parts E (Acceptance of Responsibility) and F (Early Disposition Programs), and Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders) are made, this combined offense level is used to determine the guideline sentence range. Chapter Five (Determining the Sentencing Range and Options Under the Guidelines) discusses how to determine the sentence from the (combined) offense level; §5G1.2 deals specifically with determining the sentence of imprisonment when convictions on multiple counts are involved. References in Chapter Five (Determining the Sentencing Range and Options Under the Guidelines) to the “offense level” should be treated as referring to the combined offense level after all subsequent adjustments have been made.

§3D1.2. Groups of Closely Related Counts

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

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

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

~~§2A3.5;
§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.8;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2G2.2, 2G3.1;~~

~~§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.~~

Specifically excluded from the operation of this subsection are:

~~all offenses in Chapter Two, Part A (except §2A3.5);
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, 2G1.3, 2G2.1;
§§2H1.1, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3;
§2X6.1.~~

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

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

Commentary

Application Notes:

- ~~1. Subsections (a) (d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment are excepted from application of the multiple count rules. See §3D1.1(b)(1); *id.*, comment. (n.1).~~
- ~~2. The term “*victim*” is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (e.g., drug or immigration offenses, where society at large is the victim), the “victim” for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related. Where one count, for example, involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the~~

~~societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the sale of controlled substances and the other involves an immigration law violation, the counts are not grouped together because different societal interests are harmed. Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, i.e., to identify and group “counts involving substantially the same harm.”~~

- ~~3. Under subsection (a), counts are to be grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim.~~

~~When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a).~~

~~**Examples:** (1) The defendant is convicted of forging and uttering the same check. The counts are to be grouped together. (2) The defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping. The counts are to be grouped together. (3) The defendant is convicted of bid rigging (an antitrust offense) and of mail fraud for signing and mailing a false statement that the bid was competitive. The counts are to be grouped together. (4) The defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension as part of a single criminal episode. The counts are to be grouped together. (5) The defendant is convicted of three counts of unlawfully bringing aliens into the United States, all counts arising out of a single incident. The three counts are to be grouped together. *But:* (6) The defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days. The counts *are not* to be grouped together.~~

- ~~4. Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times. This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).~~

~~When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).~~

~~**Examples:** (1) The defendant is convicted of one count of conspiracy to commit extortion and one count of extortion for the offense he conspired to commit. The counts are to be grouped together. (2) The defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme. The counts are to be grouped together, even if the mailings and telephone call occurred on different days. (3) The defendant is convicted of one count of auto theft and one count of altering the vehicle identification number of the car he stole. The counts are to be grouped together. (4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under §1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting. *But:* (5) The defendant is convicted of two counts of rape for raping the same person on different days. The counts *are not* to be grouped together.~~

5. Subsection (c) provides that when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents “double counting” of offense behavior. Of course, this rule applies only if the offenses are closely related. It is not, for example, the intent of this rule that (assuming they could be joined together) a bank robbery on one occasion and an assault resulting in bodily injury on another occasion be grouped together. The bodily injury (the harm from the assault) would not be a specific offense characteristic to the robbery and would represent a different harm. On the other hand, use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under this subsection. Frequently, this provision will overlap subsection (a), at least with respect to specific offense characteristics. However, a count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a).

Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count provides an adjustment for only one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count. For example, if in a robbery of a credit union on a military base the defendant is also convicted of assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault conviction would be treated separately.

A cross reference to another offense guideline does not constitute “a specific offense characteristic . . . or other adjustment” within the meaning of subsection (c). For example, the guideline for bribery of a public official contains a cross reference to the guideline for a conspiracy to commit the offense that the bribe was to facilitate. Nonetheless, if the defendant were convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together by virtue of the cross reference. If, however, the bribe was given for the purpose of hampering a criminal investigation into the offense, it would constitute obstruction and under §3C1.1 would result in a 2 level enhancement to the offense level for the fraud. Under the latter circumstances, the counts would be grouped together.

6. Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).

A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d).

Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; *see* §3D1.3(b). The “same general type” of offense is to be construed broadly.

Examples: (1) The defendant is convicted of five counts of embezzling money from a bank. The five counts are to be grouped together. (2) The defendant is convicted of two counts of theft of social security checks and three counts of theft from the mail, each from a different victim. All five counts are to be grouped together. (3) The defendant is convicted of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involves a

monetary objective. All fifteen counts are to be grouped together. (4) The defendant is convicted of three counts of unlicensed dealing in firearms. All three counts are to be grouped together. (5) The defendant is convicted of one count of selling heroin, one count of selling PCP, and one count of selling cocaine. The counts are to be grouped together. The Commentary to §2D1.1 provides rules for combining (adding) quantities of different drugs to determine a single combined offense level. (6) The defendant is convicted of three counts of tax evasion. The counts are to be grouped together. (7) The defendant is convicted of three counts of discharging toxic substances from a single facility. The counts are to be grouped together. (8) The defendant is convicted on two counts of check forgery and one count of uttering the first of the forged checks. All three counts are to be grouped together. Note, however, that the uttering count is first grouped with the first forgery count under subsection (a) of this guideline, so that the monetary amount of that check counts only once when the rule in §3D1.3(b) is applied. *But:* (9) The defendant is convicted of three counts of bank robbery. The counts *are not* to be grouped together, nor are the amounts of money involved to be added.

7. — A single case may result in application of several of the rules in this section. Thus, for example, example (8) in the discussion of subsection (d) involves an application of §3D1.2(a) followed by an application of §3D1.2(d). Note also that a Group may consist of a single count; conversely, all counts may form a single Group.
8. — A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. See §1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. **Example:** The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under §3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.

Background: Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placed in the same Group of Closely Related Counts (“Group”). This section specifies four situations in which counts are to be grouped together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.

A primary consideration in this section is whether the offenses involve different victims. For example, a defendant may stab three prison guards in a single escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. Although such a proposal was considered, it was rejected because, in many cases, it would not adequately capture the scope and impact of the criminal behavior. Cases involving injury to distinct victims are sufficiently comparable, whether or not the injuries are inflicted in distinct transactions, so that each such count should be treated separately rather than grouped together. Counts involving different victims (or societal harms in the case of “victimless” crimes) are grouped together only as provided in subsection (e) or (d).

Even if counts involve a single victim, the decision as to whether to group them together may not always be clear cut. For example, how contemporaneous must two assaults on the same victim be in order to warrant grouping together as constituting a single transaction or occurrence? Existing case law may provide some guidance as to what constitutes distinct offenses, but such decisions often turn

on the technical language of the statute and cannot be controlling. In interpreting this part and resolving ambiguities, the court should look to the underlying policy of this part as stated in the Introductory Commentary.

§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

Determine the offense level applicable to each of the Groups as follows:

- (a) In the case of counts grouped together pursuant to §3D1.2(a)–(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, *i.e.*, the highest offense level of the counts in the Group.
- (b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level.

Commentary

Application Notes:

1. The “**offense level**” for a count refers to the offense level from Chapter Two after all adjustments from Parts A, B, and C of Chapter Three.
2. When counts are grouped pursuant to §3D1.2(a)–(c), the highest offense level of the counts in the group is used. Ordinarily, it is necessary to determine the offense level for each of the counts in a Group in order to ensure that the highest is correctly identified. Sometimes, it will be clear that one count in the Group cannot have a higher offense level than another, as with a count for an attempt or conspiracy to commit the completed offense. The formal determination of the offense level for such a count may be unnecessary.
3. When counts are grouped pursuant to §3D1.2(d), the offense guideline applicable to the aggregate behavior is used. If the counts in the Group are covered by different guidelines, use the guideline that produces the highest offense level. Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole. Note that guidelines for similar property offenses have been coordinated to produce identical offense levels, at least when substantial property losses are involved. However, when small sums are involved the differing specific offense characteristics that require increasing the offense level to a certain minimum may affect the outcome.

Background: This section provides rules for determining the offense level associated with each Group of Closely Related Counts. Summary examples of the application of these rules are provided at the end of the Commentary to this part.

§3D1.4. Determining the Combined Offense Level

The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:

NUMBER OF UNITS	INCREASE IN OFFENSE LEVEL
1	none
1 1/2	add 1 level
2	add 2 levels
2 1/2 3	add 3 levels
3 1/2 5	add 4 levels
More than 5	add 5 levels.

In determining the number of Units for purposes of this section:

- (a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from 1 to 4 levels less serious.
- (b) Count as one half Unit any Group that is 5 to 8 levels less serious than the Group with the highest offense level.
- (c) Disregard any Group that is 9 or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

Commentary

Application Notes:

1. Application of the rules in §§3D1.2 and 3D1.3 may produce a single Group of Closely Related Counts. In such cases, the combined offense level is the level corresponding to the Group determined in accordance with §3D1.3.
2. The procedure for calculating the combined offense level when there is more than one Group of Closely Related Counts is as follows: First, identify the offense level applicable to the most serious Group; assign it one Unit. Next, determine the number of Units that the remaining Groups represent. Finally, increase the offense level for the most serious Group by the number of levels indicated in the table corresponding to the total number of Units.

Background: When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of

two Units for purposes of the table (one plus one half plus one half) and the combined offense level would be 17.

§3D1.5. Determining the Total Punishment

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

Commentary

This section refers the court to Chapter Five (Determining the Sentencing Range and Options Under the Guidelines) in order to determine the total punishment to be imposed based upon the combined offense level. The combined offense level is subject to adjustments from Chapter Three, Parts E (Acceptance of Responsibility) and F (Early Disposition Programs), and Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero Point Offenders).

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Concluding Commentary to Part D of Chapter Three

Illustrations of the Operation of the Multiple-Count Rules

The following examples, drawn from presentence reports in the Commission's files, illustrate the operation of the guidelines for multiple counts. The examples are discussed summarily; a more thorough, step by step approach is recommended until the user is thoroughly familiar with the guidelines.

1. Defendant A was convicted of four counts, each charging robbery of a different bank. Each would represent a distinct Group. §3D1.2. In each of the first three robberies, the offense level was 22 (20 plus a 2-level increase because a financial institution was robbed) (§2B3.1(b)). In the fourth robbery \$21,000 was taken and a firearm was displayed; the offense level was therefore 28. As the first three counts are 6 levels lower than the fourth, each of the first three represents one-half unit for purposes of §3D1.4. Altogether there are 2 1/2 Units, and the offense level for the most serious (28) is therefore increased by 3 levels under the table. The combined offense level is 31.
2. Defendant B was convicted of four counts: (1) distribution of 230 grams of cocaine; (2) distribution of 150 grams of cocaine; (3) distribution of 75 grams of heroin; (4) offering a DEA agent \$20,000 to avoid prosecution. The combined offense level for drug offenses is determined by the total quantity of drugs, converted to converted drug weight (using the Drug Conversion Tables in the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking)). The first count translates into 46 kilograms of converted drug weight; the second count translates into 30 kilograms of converted drug weight; and the third count translates into 75 kilograms of converted drug weight. The total is 151 kilograms of converted drug weight. Under §2D1.1, the combined offense level for the drug offenses is 24. In addition, because of the attempted bribe of the DEA agent, this offense level is increased by 2 levels to 26 under §3C1.1 (Obstructing or Impeding the Administration of Justice). Because the conduct constituting the bribery offense is accounted for by §3C1.1, it becomes part of the same Group as the drug offenses pursuant to §3D1.2(e). The combined offense level is 26 pursuant to §3D1.3(a), because the offense level for bribery (20) is less than the offense level for the drug offenses (26).

3. ~~Defendant C was convicted of four counts arising out of a scheme pursuant to which the defendant received kickbacks from subcontractors. The counts were as follows: (1) The defendant received \$1,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received \$1,000 from subcontractor A relating to contract X (Commercial Bribery). (3) The defendant received \$1,000 from subcontractor A relating to contract Y (Mail Fraud). (4) The defendant received \$1,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts are covered by §2B1.1 (Theft, Property Destruction, and Fraud). The bribery counts are covered by §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), which treats the offense as a sophisticated fraud. The total money involved is \$4,000, which results in an offense level of 9 under either §2B1.1 (assuming the application of the “sophisticated means” enhancement in §2B1.1(b)(10)) or §2B4.1. Since these two guidelines produce identical offense levels, the combined offense level is 9.~~

* * *

§1B1.1. Application Instructions

- (a) STEP ONE: CALCULATION OF GUIDELINE RANGE AND DETERMINATION OF SENTENCING REQUIREMENTS AND OPTIONS UNDER THE GUIDELINES MANUAL.—The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:
- (1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* §1B1.2.
 - (2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.
 - (3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
 - (4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply **Part D of Chapter Three §3D1.1 (Procedure for Determining Offense Level on Multiple Counts)** to **group the various counts and adjust determine the combined offense level accordingly applicable to all counts.**

* * *

§1B1.2. Applicable Guidelines

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- (c) A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).
- (d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Commentary

Application Notes:

* * *

- 3. Subsections (c) and (d) address circumstances in which the provisions of Chapter Three, Part D (Multiple Counts) are to be applied although there may be only one count of conviction. Subsection (c) provides that in the case of a stipulation to the commission of additional offense(s), the guidelines are to be applied as if the defendant had been convicted of an additional count for each of the offenses stipulated. For example, if the defendant is convicted of one count of robbery but, as part of a plea agreement, admits to having committed two additional robberies, the guidelines are to be applied as if the defendant had been convicted of three counts of robbery. Subsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.
- 4. Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if **the combined offense level for the object offenses specified in the conspiracy count would be grouped together under §3D1.2(d) is determined pursuant to 3D1.1(a)** (e.g., a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, ~~because §1B1.3(a)(2) governs consideration of the defendant's conduct.~~

* * *

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

- (a) CHAPTERS TWO (OFFENSE CONDUCT) AND THREE (ADJUSTMENTS).—Unless otherwise specified, (i) the base offense level where the guideline specifies

more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—
 - (i) within the scope of the jointly undertaken criminal activity,
 - (ii) in furtherance of that criminal activity, and
 - (iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

- (2) solely with respect to offenses ~~of a character for which §3D1.2(d) would require grouping of multiple counts~~ described in subsection (d) below, all acts and omissions described in subdivisions paragraphs (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
 - (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
 - (4) any other information specified in the applicable guideline.
- (b) CHAPTERS FOUR (CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD) AND FIVE (DETERMINING THE SENTENCING RANGE AND OPTIONS UNDER THE GUIDELINES).—Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.
- (c) ACQUITTED CONDUCT.—Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.

(d) **OFFENSES COVERED BY SUBSECTION (a)(2).**—Subsection (a)(2) applies to offenses where the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or where the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Subsection (a)(2) applies to offenses covered by the following guidelines:

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

Subsection (a)(2) does not apply to the offenses covered by the following guidelines:

all offenses in Chapter Two, Part A (except §2A3.5);
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, 2G1.3, 2G2.1;
§§2H1.1, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3;
§2X6.1.

For offenses covered by guidelines that are not listed, subsection (a)(2) may or may not apply. In such instances, a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Commentary

Application Notes:

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5. Application of Subsection (a)(2).—

- (A) **Relationship to Grouping of Multiple Counts In General.**—“Offenses of a character for which §3D1.2(d) would require grouping of multiple counts,” as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision subsection (a)(2) does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.

As noted above in subsection (d), subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts where the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or where the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. § 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by violating different statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts covered by a guideline to which subsection (a)(2) is applicable pursuant to subsection (d). Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.

* * *

11. **Application of Subsection (d).**—Subsection (d) provides that subsection (a)(2) covers most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior. The list of instances in which subsection (a)(2) should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (a)(2).

Subsection (a)(2) applies to a conspiracy, attempt, or solicitation to commit an offense if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d).

* * *

Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

* * *

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of ~~§3D1.2(d)~~ **subsection (d)**, ~~which provides for grouping together (i.e., treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged.~~ Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would *not* be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) ~~(i.e., to which §3D1.2(d) applies)~~ often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. ~~Conversely, when §3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent “double counting” of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to §3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.~~

* * *

§1B1.5. Interpretation of References to Other Offense Guidelines

- (a) A cross reference (an instruction to apply another offense guideline) refers to the entire offense guideline (*i.e.*, the base offense level, specific offense characteristics, cross references, and special instructions).
- (b)
 - (1) An instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline (*i.e.*, the base offense level, specific offense characteristics, cross references, and special instructions), except as provided in subdivision (2) below.
 - (2) An instruction to use a particular subsection or table from another offense guideline refers only to the particular subsection or table referenced, and not to the entire offense guideline.
- (c) If the offense level is determined by a reference to another guideline under subsection (a) or (b)(1) above, the adjustments in ~~Chapter Three (Adjustments)~~ **Chapter Three, Parts A through D**, also are determined in respect to the referenced offense guideline, except as otherwise expressly provided.
- (d) A reference to another guideline under subsection (a) or (b)(1) above may direct that it be applied only if it results in the greater offense level. In such case, the greater offense level means the greater Chapter Two offense level, except as otherwise expressly provided.

Commentary

Application Notes:

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- 3. A reference may direct that, if the conduct involved another offense, the offense guideline for such other offense is to be applied. Consistent with the provisions of §1B1.3 (Relevant Conduct), such other offense includes conduct that may be a state or local offense and conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States. Where there is more than one such other offense, the most serious such offense (or group of ~~closely related offenses in the case of offenses that would be grouped together under §3D1.2(d)~~ **to which §3D1.1(a) applies**) is to be used. For example, if a defendant convicted of possession of a firearm by a felon, to which §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) applies, is found to have possessed that firearm during commission of a series of offenses, the cross reference at §2K2.1(c) is applied to the offense resulting in the greatest offense level.

* * *

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

- (a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.
- (b)
 - (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.
 - (2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.
 - (3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

Commentary

Application Notes:

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

Subsection (b)(2) provides that the Guidelines Manual in effect on a particular date shall be applied in its entirety.

Subsection (b)(3) provides that where the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses, even if the revised edition results in an increased penalty for the first offense. Because the defendant completed the second offense after the amendment to the guidelines took effect, the *ex post facto* clause does not prevent determining the sentence for that count based on the amended guidelines. For example, if a defendant

pleads guilty to a single count of embezzlement that occurred after the most recent edition of the Guidelines Manual became effective, the guideline range applicable in sentencing will encompass any relevant conduct (e.g., related embezzlement offenses that may have occurred prior to the effective date of the guideline amendments) for the offense of conviction. The same would be true for a defendant convicted of two counts of embezzlement, one committed before the amendments were enacted, and the second after. In this example, the *ex post facto* clause would not bar application of the amended guideline to the first conviction; a contrary conclusion would mean that such defendant was subject to a lower guideline range than if convicted only of the second offense. Decisions from several appellate courts addressing the analogous situation of the constitutionality of counting pre-guidelines criminal activity as relevant conduct for a guidelines sentence support this approach. See *United States v. Ykema*, 887 F.2d 697 (6th Cir. 1989) (upholding inclusion of pre-November 1, 1987, drug quantities as relevant conduct for the count of conviction, noting that habitual offender statutes routinely augment punishment for an offense of conviction based on acts committed before a law is passed); *United States v. Allen*, 886 F.2d 143 (8th Cir. 1989) (similar); see also *United States v. Cusack*, 901 F.2d 29 (4th Cir. 1990) (similar).

Moreover, the approach set forth in subsection (b)(3) should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under §3D1.2(d) to which §3D1.1(a) applies. The *ex post facto* clause does not distinguish between groupable and nongroupable offenses, and unless that clause would be violated, Congress’s directive to apply the sentencing guidelines in effect at the time of sentencing must be followed. Under the guideline sentencing system, a single sentencing range is determined based on the defendant’s overall conduct, even if there are multiple counts of conviction (see §§3D1.1–3D1.5, 5G1.2). Thus, if a defendant is sentenced in January 1992 for a bank robbery committed in October 1988 and one committed in November 1991, the November 1991 Guidelines Manual should be used to determine a combined guideline range for both counts. See generally *United States v. Stephenson*, 921 F.2d 438 (2d Cir. 1990) (holding that the Sentencing Commission and Congress intended that the applicable version of the guidelines be applied as a “cohesive and integrated whole” rather than in a piecemeal fashion).

Consequently, even in a complex case involving multiple counts that occurred under several different versions of the Guidelines Manual, it will not be necessary to compare more than two manuals to determine the applicable guideline range — the manual in effect at the time the last offense of conviction was completed and the manual in effect at the time of sentencing.

* * *

§2A1.4. Involuntary Manslaughter

* * *

(b) Special Instruction

- (1) If the offense involved the involuntary manslaughter of more than one person, ~~Chapter Three, Part D (Multiple Counts)~~ subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) shall be applied as if the involuntary manslaughter of each person had been contained in a separate count of conviction.

* * *

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

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Commentary

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Application Notes:

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3. **Grouping Multiple Counts.**—For purposes of Chapter Three, Part D (Multiple Counts), do not apply subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) to multiple counts involving making a threatening or harassing communication to the same victim, even if those acts occurred on separate occasions. Multiple acts of making a threatening or harassing communication to the same victim are already taken into account in the specific offense characteristics of this guideline—~~are grouped together under §3D1.2 (Groups of Closely Related Counts).~~ Multiple counts involving different victims are not to be grouped under §3D1.2.

* * *

§2A6.2. Stalking or Domestic Violence

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Commentary

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Application Notes:

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4. For purposes of Chapter Three, Part D (Multiple Counts), do not apply subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) to multiple counts involving stalking, threatening, or harassing the same victim, even if those acts occurred on separate occasions. Multiple acts of stalking, threatening, harassing, or assaulting the same victim are already taken into account in the specific offense characteristics of this guideline—~~are grouped together (and with counts of other offenses involving the same victim that are covered by this guideline) under §3D1.2 (Groups of Closely Related Counts).~~ For example, if the defendant is convicted of two counts of stalking the defendant's ex-spouse under 18 U.S.C. § 2261A and one count of interstate domestic violence involving an assault of the ex-spouse under 18 U.S.C. § 2261, **§3D1.1(b) does not apply to the stalking counts—would be grouped together with the interstate domestic violence count.** This grouping procedure avoids unwarranted “double counting” with the enhancement in subsection (b)(1)(E) (for multiple acts of stalking, threatening, harassing, or assaulting the same victim) and recognizes that the stalking and interstate domestic violence counts are sufficiently related to warrant grouping.

Determine the combined offense level for Multiple multiple counts that are cross referenced to another offense guideline pursuant to subsection (c) ~~are to be grouped together if §3D1.2 (Groups~~

of Closely Related Counts) would require grouping of those counts under that offense guideline by applying §3D1.1. Similarly, multiple counts cross referenced pursuant to subsection (c) are not to be grouped together if §3D1.2 would preclude grouping of the counts under that offense guideline. For example, if the defendant is convicted of multiple counts of threatening an ex-spouse in violation of a court protection order under 18 U.S.C. § 2262 and the counts are cross referenced to §2A6.1 (Threatening or Harassing Communications), the counts would group together because Application Note 3 of §2A6.1 specifically requires grouping. In contrast, if the defendant is convicted of multiple counts of assaulting the ex-spouse in violation of a court protection order under 18 U.S.C. § 2262 and the counts are cross referenced to §2A2.2 (Aggravated Assault), the counts probably would not group together inasmuch as §3D1.2(d) specifically precludes grouping of counts covered by §2A2.2 and no other provision of §3D1.2 would likely apply to require grouping.

Multiple counts involving different victims are not to be grouped under §3D1.2 (Groups of Closely Related Counts).

* * *

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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Commentary

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Application Notes:

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20. **Multiple-Count Indictments.**—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. *See Chapter Three, Part D (Multiple Counts) subsection (a) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts).*

* * *

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources

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Commentary

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Application Notes:

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8. **Multiple Counts.**—For purposes of Chapter Three, Part D (Multiple Counts), apply subsection (a) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) to determine the combined offense level for multiple counts involving offenses covered by this guideline—~~are grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts). Multiple counts involving offenses covered by this guideline and offenses covered by other guidelines are not to be grouped under §3D1.2(d).~~

* * *

§2D1.5. Continuing Criminal Enterprise; Attempt or Conspiracy

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Commentary

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Application Notes:

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3. ~~**Multiple Counts.** Violations of 21 U.S.C. § 848 will be grouped with other drug offenses for the purpose of applying Chapter Three, Part D (Multiple Counts).~~

* * *

§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy

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Commentary

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Application Notes:

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9. **Offenses Involving Immediate Precursors or Other Controlled Substances Covered Under §2D1.1.**—In certain cases, the defendant will be convicted of an offense involving a listed

chemical covered under this guideline, and a related offense involving an immediate precursor or other controlled substance covered under §2D1.1 (Unlawfully Manufacturing, Importing, Exporting, or Trafficking). For example, P2P (an immediate precursor) and methylamine (a listed chemical) are used together to produce methamphetamine. Determine the offense level under each guideline separately. The offense level for methylamine is determined by using §2D1.11. The offense level for P2P is determined by using §2D1.1 (P2P is listed in the Drug Conversion Table under Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)). ~~Under the grouping rules of §3D1.2(b), the counts will be grouped together.~~ Determine the combined offense level for these offenses by applying subsection (a) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts). Note that in determining the scale of the offense under §2D1.1, the quantity of both the controlled substance and listed chemical should be considered (*see* Application Note 5 in the Commentary to §2D1.1).

* * *

§2D2.3. Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs

* * *

(b) Special Instruction:

- (1) If the defendant is convicted of a single count involving the death or serious bodily injury of more than one person, apply ~~Chapter Three, Part D (Multiple Counts)~~ subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) as if the defendant had been convicted of a separate count for each such victim.

* * *

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

* * *

(d) Special Instruction

- (1) If the offense involved more than one victim, ~~Chapter Three, Part D (Multiple Counts)~~ subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

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Application Notes:

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5. **Special Instruction at Subsection (d)(1).**—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are ~~not to be grouped together under §3D1.2 (Groups of Closely Related Counts)~~ subject to the adjustment under subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.

* * *

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

* * *

(d) Special Instruction

- (1) If the offense involved more than one minor, ~~Chapter Three, Part D (Multiple Counts)~~ subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

Commentary

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Application Notes:

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6. **Application of Subsection (d)(1).**—For the purposes of Chapter Three, Part D (Multiple Counts), each minor transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate minor. Consequently, multiple counts involving more than one minor are ~~not to be grouped together under §3D1.2 (Groups of Closely Related Counts)~~ subject to the adjustment under

subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one minor, whether specifically cited in the count of conviction, each such minor shall be treated as if contained in a separate count of conviction.

* * *

§2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

* * *

(d) Special Instruction

- (1) If the offense involved the exploitation of more than one minor, ~~Chapter Three, Part D (Multiple Counts)~~ subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

Commentary

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Application Notes:

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7. **Application of Subsection (d)(1).**—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are ~~not to be grouped together under §3D1.2 (Groups of Closely Related Counts)~~ subject to the adjustment under subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.

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§2H4.1. Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers

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Commentary

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Application Notes:

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2. Under subsection (b)(4), “**any other felony offense**” means any conduct that constitutes a felony offense under federal, state, or local law (other than an offense that is itself covered by this subpart). When there is more than one such other offense, the most serious such offense (or group of closely related offenses in the case of offenses that would be grouped together under §3D1.2(d) to which §3D1.1(a) applies) is to be used. See Application Note 3 of §1B1.5 (Interpretation of References to other Offense Guidelines).

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§2J1.2. Obstruction of Justice

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Commentary

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Application Notes:

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3. ~~**Convictions for the Underlying Offense.** In the event that the defendant is convicted of an offense sentenced under this section as well as for the underlying offense (i.e., the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction and Related Adjustments), and to §3D1.2(c) (Groups of Closely Related Counts).~~

[The proposed amendment would renumber the rest of the application notes accordingly]

* * *

§2J1.3. Perjury or Subornation of Perjury; Bribery of Witness

* * *

(d) Special Instruction

- (1) In the case of counts of perjury or subornation of perjury arising from testimony given, or to be given, in separate proceedings, ~~do not group the counts together under §3D1.2 (Groups of Closely Related Counts)~~ apply subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) to the counts.

Commentary

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Application Notes:

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3. ~~In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which he committed perjury, subornation of perjury, or witness bribery), see the Commentary to §3C1.1, and to §3D1.2(c) (Groups of Closely Related Counts).~~

[The proposed amendment would renumber the rest of the application notes accordingly]

* * *

§2J1.6. Failure to Appear by Defendant

* * *

Commentary

Statutory Provision: 18 U.S.C. § 3146(b)(1).

Application Notes:

* * *

3. In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. *See* §5G1.3(a). The guideline range for the failure to appear count is to be determined independently and ~~the grouping rules of §§3D1.1–3D1.5~~ **§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) does not apply.**

However, in the case of a conviction on both the underlying offense and the failure to appear, other than a case of failure to appear for service of sentence, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense, and **the combined offense level for the failure to appear count and the count or counts for the underlying offense are grouped together under §3D1.2(e) is determined under §3D1.1.** (Note that 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, ~~the grouping rules of §§3D1.1–3D1.5 apply~~ **§3D1.1 applies.** *See* §3D1.1(b)(1), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a “total punishment” that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30–37 months and the court determines that a “total punishment” of 36 months is appropriate, a

sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. § 3146(b)(2).)

* * *

§2J1.9. Payment to Witness

* * *

Commentary

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Application Notes Note:

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2. ~~In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which the payment was made), see the Commentary to §3C1.1, and to §3D1.2(e) (Groups of Closely Related Counts).~~

* * *

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

* * *

Commentary

* * *

Application Notes:

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4. Non-Applicability of Certain Enhancements.—

- (A) ~~**In General.**~~ If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the

defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under §2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(7)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(7)(B) would not apply.

~~(B) **Impact on Grouping.** If two or more counts would otherwise group under subsection (c) of §3D1.2 (Groups of Closely Related Counts), the counts are to be grouped together under §3D1.2(c) despite the non-applicability of certain enhancements under Application Note 4(A). Thus, for example, in a case in which the defendant is convicted of a felon in possession count under 18 U.S.C. § 922(g) and a drug trafficking count underlying a conviction under 18 U.S.C. § 924(c), the counts shall be grouped pursuant to §3D1.2(c). The applicable Chapter Two guidelines for the felon in possession count and the drug trafficking count each include “conduct that is treated as a specific offense characteristic” in the other count, but the otherwise applicable enhancements did not apply due to the rules in §2K2.4 related to 18 U.S.C. § 924(c) convictions.~~

5. **Chapters Three and Four.**—Except for those cases covered by subsection (c), do not apply Chapter Three (Adjustment), Parts A through E, and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2. In determining the guideline sentence for those cases covered by subsection (c): (A) the adjustment in §3E1.1 (Acceptance of Responsibility) may apply, as provided in §4B1.1(c); and (B) no other adjustments in Chapter Three, Parts A through D, and no provisions of Chapter Four, other than §§4B1.1 and 4B1.2, shall apply.

* * *

§2K2.6. Possessing, Purchasing, or Owning Body Armor by Violent Felons

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Commentary

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Application Notes:

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3. ~~**Grouping of Multiple Counts.** If subsection (b)(1) applies (because the defendant used the body armor in connection with another felony offense) and the instant offense of conviction includes a count of conviction for that other felony offense, the counts of conviction for the 18 U.S.C. § 931 offense and that other felony offense shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely Related Counts).~~

* * *

§2L2.2. Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport

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Commentary

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Application Notes:

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5. ~~**Multiple Counts.** For the purposes of Chapter Three, Part D (Multiple Counts), a count of conviction for unlawfully entering or remaining in the United States covered by §2L1.2 (Unlawfully Entering or Remaining in the United States) arising from the same course of conduct as the count of conviction covered by this guideline shall be considered a closely related count to the count of conviction covered by this guideline, and therefore is to be grouped with the count of conviction covered by this guideline.~~

* * *

§2M6.1. Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

* * *

(d) Special Instruction

- (1) If the defendant is convicted of a single count involving (A) conduct that resulted in the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, ~~Chapter Three, Part D (Multiple Counts)~~ subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) shall be applied as if such conduct in respect to each victim had been contained in a separate count of conviction.

* * *

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

* * *

(d) Special Instruction

- (1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, ~~Chapter Three, Part D (Multiple Counts)~~ subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

Commentary

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Application Note:

1. The special instruction in subsection (d)(1) applies whether the offense level is determined under subsection (b)(1) or by use of a cross reference in subsection (c).

* * *

§2P1.2. Providing or Possessing Contraband in Prison

* * *

Commentary

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Application Notes:

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3. In a case in which the defendant is convicted of the underlying offense and an offense involving providing or possessing a controlled substance in prison, ~~group the offenses together under §3D1.2(c)~~ determine the combined offense level for the offenses under §3D1.1 (Procedure for Determining Offense Level on Multiple Counts). (Note that 18 U.S.C. § 1791(b) does not require a sentence of imprisonment, although if a sentence of imprisonment is imposed on a count involving providing or possessing a controlled substance in prison, section 1791(c) requires that the sentence be imposed to run consecutively to any other sentence of imprisonment for the controlled substance. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, ~~the grouping rules of §§3D1.1–3D1.5~~ §3D1.1 will apply. See §3D1.1(b)(1), comment. (n.1), ~~and §3D1.2, comment. (n.1).~~) The combined sentence will then be constructed to provide a “total punishment” that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 1791(c). For example, if the combined applicable guideline range for both counts is 30–37 months and the court determines a “total punishment” of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months’ sentence for the providing or possessing a controlled substance in prison count would satisfy these requirements.

Pursuant to 18 U.S.C. § 1791(c), a sentence imposed upon an inmate for a violation of 18 U.S.C. § 1791 shall be consecutive to the sentence being served by the inmate at the time of the violation.

* * *

§2Q1.4. Tampering or Attempted Tampering with a Public Water System; Threatening to Tamper with a Public Water System

* * *

(d) Special Instruction

- (1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, ~~Chapter Three, Part D (Multiple Counts)~~ subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

Commentary

* * *

Application Notes:

* * *

2. **Application of Special Instruction.**—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this

guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection (c).

* * *

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

* * *

Commentary

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Application Notes:

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6. ~~**Grouping of Multiple Counts.** In a case in which the defendant is convicted of a count of laundering funds and a count for the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely Related Counts).~~

* * *

§2X6.1. Use of a Minor in a Crime of Violence

* * *

Commentary

* * *

Application Notes:

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3. Multiple Counts.—

(A) ~~In a case in which the defendant is convicted under both 18 U.S.C. § 25 and the underlying crime of violence, the counts shall be grouped pursuant to subsection (a) of §3D1.2 (Groups of Closely Related Counts).~~

(B) ~~Multiple of multiple~~ counts involving the use of a minor in a crime of violence ~~shall not be grouped under §3D1.2, apply subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) to the counts.~~

* * *

§3C1.1. Obstructing or Impeding the Administration of Justice

* * *

Commentary

Application Notes:

* * *

8. ~~**Grouping Under §3D1.2(e).** If the defendant is convicted both of an obstruction offense (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (e) of §3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2 level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.~~

[The proposed amendment would renumber Application Note 9 as Application Note 8]

* * *

§5G1.2. Sentencing on Multiple Counts of Conviction

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Commentary

Application Notes:

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2. **Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Subsection (e)).—**

- (A) **In General.**—Subsection (a) applies if a statute (i) specifies a term of imprisonment to be imposed; and (ii) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.,* 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment) and 18 U.S.C. § 1028A (requiring a mandatory term of imprisonment of either two or five years, based on the conduct involved, and also requiring, except in the circumstances described in subparagraph (B), the sentence imposed to run consecutively to any other term of imprisonment). Except for certain career offender situations in which subsection (c) of §4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is the minimum required by the statute of conviction and is independent of the guideline sentence on any other count. *See, e.g.,* the Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding the determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Subsection (a) also applies in certain other instances in which an independently determined

and consecutive sentence is required. *See, e.g.*, Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

- (B) **Multiple Convictions Under 18 U.S.C. § 1028A.**—Section 1028A of title 18, United States Code, generally requires that the mandatory term of imprisonment for a violation of such section be imposed consecutively to any other term of imprisonment. However, 18 U.S.C. § 1028A(b)(4) permits the court, in its discretion, to impose the mandatory term of imprisonment on a defendant for a violation of such section “concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission . . .”.

In determining whether multiple counts of 18 U.S.C. § 1028A should run concurrently with, or consecutively to, each other, the court should consider the following non-exhaustive list of factors:

- (i) The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S.C. § 1028A in a case in which an underlying offense for one of the 18 U.S.C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. § 2332b(g)(5)(B).
 - (ii) Whether subsection (b) of §3D1.1 (Procedure for Determining Offense Level on Multiple Counts) applies to the underlying offenses ~~are groupable under §3D1.2 (Groups of Closely Related Counts)~~. Generally, multiple counts of 18 U.S.C. § 1028A should run concurrently with one another in cases in which §3D1.1(b) did not apply to the underlying offenses ~~are groupable under §3D1.2~~.
 - (iii) Whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by imposing a concurrent or a consecutive sentence for multiple counts of 18 U.S.C. § 1028A.
- (C) **Imposition of Supervised Release.**—In the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. *See* 18 U.S.C. § 3624(e).

* * *

Exhibit D

PROPOSED AMENDMENT: SIMPLIFICATION

Synopsis of Proposed Amendment: In August 2025, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2026, “[c]ontinued exploration of ways to simplify the *Guidelines Manual*, including . . . evaluating infrequently applied specific offense characteristics and adjustments provisions throughout the *Guidelines Manual*; and . . . possible consideration of amendments that might be appropriate.” U.S. Sent’g Comm’n, “Notice of Final Priorities,” 90 FR 39263, 39264 (Aug. 14, 2025).

The initiative of simplifying the *Guidelines Manual* has persisted almost since the guidelines’ inception and has taken various forms over time. For example, in 1993, the Commission deleted “25 offense guidelines by consolidating them with other offense guidelines that cover similar offense conduct and have identical or very similar base offense levels and adjustments” for various reasons, including that “it shortens and simplifies the *Guidelines Manual*.” See USSG App. C, amend. 481 (effective Nov. 1, 1993).

The *Guidelines Manual* includes 155 Chapter Two offense guidelines, 86 of which have at least one specific offense characteristic, for a total of 298 specific offense characteristics. Application rates for the 298 specific offense characteristics vary widely, both in terms of number of times used each year and frequency of use within the underlying guideline.

The Commission is considering deleting 26 specific offense characteristics that courts did not apply at all in the last five fiscal years. These 26 specific offense characteristics applied a small number of times—if at all—even using a 25-year lookback window. For some of these specific offense characteristics, low usage mirrored low usage of the underlying guideline. For others, the underlying guideline was applied a relatively large number of times, but the specific offense characteristic was infrequently applied.

The proposed amendment would delete certain specific offense characteristics in the following guidelines: §2A5.1 (Aircraft Piracy or Attempted Aircraft Piracy); §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources); §2B2.3 (Trespass); §2B6.1 (Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers); §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy); §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy); §2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy); §2D1.14 (Narco-Terrorism); §2G3.2 (Obscene Telephone Communications for a Commercial Purpose; Broadcasting Obscene Material); §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information); §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness); §2J1.6 (Failure to Appear by Defendant); §2J1.9 (Payment to Witness); §2K1.5 (Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft); §2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons); §2M4.1 (Failure to Register and Evasion of Military Service); §2P1.1 (Escape, Instigating or Assisting Escape); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides;

Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce); §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification); §2Q1.4 (Tampering or Attempted Tampering with a Public Water System; Threatening to Tamper with a Public Water System); and §2T1.9 (Conspiracy to Impede, Impair, Obstruct, or Defeat Tax).

Proposed Amendment:

§2A5.1. Aircraft Piracy or Attempted Aircraft Piracy

(a) Base Offense Level: **38**

~~(b) Specific Offense Characteristic~~

~~(1) If death resulted, increase by **5** levels.~~

* * *

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources

* * *

(b) Specific Offense Characteristics

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~~(6) If a dangerous weapon was brandished or its use was threatened, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.~~

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Commentary

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Application Notes:

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7. ~~**Dangerous Weapons Enhancement Under Subsection (b)(6).**~~ For purposes of subsection (b)(6), “~~*brandished*~~” and “~~*dangerous weapon*~~” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

87. **Multiple Counts.**—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving offenses covered by this guideline are grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts). Multiple counts involving offenses covered by this guideline and offenses covered by other guidelines are not to be grouped under §3D1.2(d).

* * *

§2B2.3. Trespass

* * *

(b) Specific Offense Characteristics

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~~(3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded \$2,500 but did not exceed \$6,500, increase by 1 level; or (ii) exceeded \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.~~

* * *

Commentary

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Application Notes **Note:**

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

* * *

~~“*Protected computer*” means a computer described in 18 U.S.C. § 1030(e)(2)(A) or (B).~~

* * *

2. ~~**Application of Subsection (b)(3).**~~ Valuation of loss is discussed in §2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to §2B1.1.

* * *

§2B6.1. Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers

* * *

(b) Specific Offense Characteristics

* * *

- ~~(3) If the offense involved an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.~~

Commentary

Statutory Provisions: 18 U.S.C. §§ 511, 553(a)(2), 2321.

Application Notes**Note:**

1. ~~Subsection (b)(3), referring to an “organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts,” provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or “chop shop.” “Vehicles” refers to all forms of vehicles, including aircraft and watercraft. See Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).~~
21. The term “*increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount,*” as used in subsection (b)(1), refers to the number of levels corresponding to the retail value of the motor vehicles or parts involved.

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

- ~~(10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by 2 levels.~~
- (1110) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels.

- (~~12~~**11**) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.
- (~~13~~**12**) If the defendant (A) 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 (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, with reckless disregard that such mixture or substance was not the legitimately manufactured drug, increase by **2** levels. The term “**drug**,” as used in subsection (b)(~~13~~**12**)(B), has the meaning given that term in 21 U.S.C. § 321(g)(1).
- (~~14~~**13**) (Apply the greatest):
- (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
 - (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
 - (C) If—
 - (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
 - (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subparagraph (D); or (II) the environment,
 increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.
 - (D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to

the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

(1514) If (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels.

(1615) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

(C) the defendant was directly involved in the importation of a controlled substance;

(D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by **2** levels.

(1716) If the defendant receives the 4-level reduction in §3B1.2(a) and the offense involved all of the following factors:

(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) the defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by **2** levels.

~~(18)~~¹⁷ If the defendant meets the criteria set forth in paragraphs (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

* * *

(e) Special Instructions

* * *

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

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

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

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

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

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

- (C) The mitigating role provisions at subsection (a)(5) and the 2-level reduction at subsection (b)(4716) apply regardless of whether the defendant receives the required adjustment from §3B1.2 (Mitigating Role) by direct application of §3B1.2 or by use of the special instruction in subsection (e)(2)(B).

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Commentary

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Application Notes:

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16. **Application of Subsection (b)(4410).**—Subsection (b)(4410) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant. Such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice) and, if applicable, §2D1.1(b)(4615)(D).
17. **Application of Subsection (b)(4211).**—Subsection (b)(4211) applies to a defendant who knowingly maintains a premises (*i.e.*, a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution.

Among the factors the court should consider in determining whether the defendant “maintained” the premises are (A) whether the defendant held a possessory interest in (*e.g.*, owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.

Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant’s primary or principal uses for the premises, rather than one of the defendant’s incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

18. **Application of Subsection (b)(1413).**—

(A) **Hazardous or Toxic Substances (Subsection (b)(1413)(A)).**—Subsection (b)(1413)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. *See* 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).

(B) **Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine (Subsection (b)(1413)(C)–(D)).**—

(i) **Factors to Consider.**—In determining, for purposes of subsection (b)(1413)(C)(ii) or (D), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:

- (I) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.
- (II) The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.
- (III) The duration of the offense, and the extent of the manufacturing operation.
- (IV) The location of the laboratory (*e.g.*, whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.

(ii) **Definitions.**—For purposes of subsection (b)(1413)(D):

“Incompetent” means an individual who is incapable of taking care of the individual’s self or property because of a mental or physical illness or disability, mental retardation, or senility.

“Minor” has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

19. **Application of Subsection (b)(1514).**—Subsection (b)(1514) applies to offenses that involve the cultivation of marihuana on state or federal land or while trespassing on tribal or private land. Such offenses interfere with the ability of others to safely access and use the area and also pose or risk a range of other harms, such as harms to the environment.

The enhancements in ~~subsection~~ ~~subsections~~ (b)(4413)(A) and (b)(4514) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. See §1B1.1 (Application Instructions), Application Note 4(A).

20. **Application of Subsection (b)(4615).—**

(A) **Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(4615)(B)).**—If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(4615)(B), the individual is not a “vulnerable victim” for purposes of §3A1.1(b).

(B) **Directly Involved in the Importation of a Controlled Substance (Subsection (b)(4615)(C)).**—Subsection (b)(4615)(C) applies if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), *i.e.*, the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.

If subsection (b)(3) or (b)(5) applies, do not apply subsection (b)(4615)(C).

(C) **Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(4615)(E)).**—For purposes of subsection (b)(4615)(E), “*pattern of criminal conduct*” and “*engaged in as a livelihood*” have the meaning given such terms in §4B1.3 (Criminal Livelihood).

21. **Applicability of Subsection (b)(4817).**—The applicability of subsection (b)(4817) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section 5C1.2(b), which provides that the applicable guideline range shall not be less than 24 to 30 months of imprisonment, is not pertinent to the determination of whether subsection (b)(4817) applies.

* * *

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

* * *

Subsection (b)(4410) implements the directive to the Commission in section 6(1) of Public Law 111–220.

Subsection (b)(4211) implements the directive to the Commission in section 6(2) of Public Law 111–220.

Subsection (b)(4413)(A) implements the instruction to the Commission in section 303 of Public Law 104–237.

Subsections (b)(4413)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

Subsection (b)(4615) implements the directive to the Commission in section 6(3) of Public Law 111–220.

Subsection (b)(4716) implements the directive to the Commission in section 7(2) of Public Law 111–220.

* * *

§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

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~~(2) If the defendant is convicted of violating 21 U.S.C. § 841(c)(2) or (f)(1), or § 960(d)(2), (d)(3), or (d)(4), decrease by 3 levels, unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.~~

(2) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(3) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a listed chemical through mass-marketing by means of an interactive computer service, increase by 2 levels.

~~(5) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.~~

(4) If the defendant meets the criteria set forth in paragraphs (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

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Commentary

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Application Notes:

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3. ~~**Application of Subsection (b)(2).**~~ Convictions under 21 U.S.C. §§ 841(e)(2) and (f)(1), and 960(d)(2), (d)(3), and (d)(4) do not require that the defendant have knowledge or an actual belief that the listed chemical was to be used to manufacture a controlled substance unlawfully. In a case in which the defendant possessed or distributed the listed chemical without such knowledge or belief, a 3 level reduction is provided to reflect that the defendant is less culpable than one who possessed or distributed listed chemicals knowing or believing that they would be used to manufacture a controlled substance unlawfully.
43. **Application of Subsection (b)(32).**—Subsection (b)(32) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b), and 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). Any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).
54. **Application of Subsection (b)(43).**—For purposes of subsection (b)(43), “*mass-marketing by means of an interactive computer service*” means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(43) would apply to a defendant who operated a web site to promote the sale of Gamma-butyrolactone (GBL) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. “*Interactive computer service*”, for purposes of subsection (b)(43) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).
65. **Imposition of Consecutive Sentence for 21 U.S.C. § 865.**—Section 865 of title 21, United States Code, requires the imposition of a mandatory consecutive term of imprisonment of not more than 15 years. In order to comply with the relevant statute, the court should determine the appropriate “total punishment” and, on the judgment form, divide the sentence between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 865. For example, if the applicable adjusted guideline range is 151–188 months and the court determines a “total punishment” of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 865 would achieve the “total punishment” in a manner that satisfies the statutory requirement of a consecutive sentence.
76. **Applicability of Subsection (b)(64).**—The applicability of subsection (b)(64) shall be determined without regard to the offense of conviction. If subsection (b)(64) applies, §5C1.2(b) does not apply. See §5C1.2(b)(2)(requiring an applicable guideline range of not less than 24 to 30 months of imprisonment if the “statutorily required minimum sentence is at least five years”).
87. **Application of Subsection (c)(1).**—“*Offense involved unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully,*”

as used in subsection (c)(1), means that the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), completed the actions sufficient to constitute the offense of unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully.

- 98. Offenses Involving Immediate Precursors or Other Controlled Substances Covered Under §2D1.1.**—In certain cases, the defendant will be convicted of an offense involving a listed chemical covered under this guideline, and a related offense involving an immediate precursor or other controlled substance covered under §2D1.1 (Unlawfully Manufacturing, Importing, Exporting, or Trafficking). For example, P2P (an immediate precursor) and methylamine (a listed chemical) are used together to produce methamphetamine. Determine the offense level under each guideline separately. The offense level for methylamine is determined by using §2D1.11. The offense level for P2P is determined by using §2D1.1 (P2P is listed in the Drug Conversion Table under Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)). Under the grouping rules of §3D1.2(b), the counts will be grouped together. Note that in determining the scale of the offense under §2D1.1, the quantity of both the controlled substance and listed chemical should be considered (*see* Application Note 5 in the Commentary to §2D1.1).

* * *

§2D1.12. Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

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- ~~(4) If the offense involved stealing anhydrous ammonia or transporting stolen anhydrous ammonia, increase by 6 levels.~~

* * *

§2D1.14. Narco-Terrorism

(a) Base Offense Level:

- (1) The offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying offense, except that §2D1.1(a)(5)(A), (a)(5)(B), and (b)(17) shall not apply.

~~(b) Specific Offense Characteristic~~

~~(1) If §3A1.4 (Terrorism) does not apply, increase by 6 levels.~~

* * *

**§2G3.2. Obscene Telephone Communications for a Commercial Purpose;
Broadcasting Obscene Material**

(a) Base Offense Level: **12**

~~(b) Specific Offense Characteristics~~

~~(1) If a person who received the telephonic communication was less than eighteen years of age, or if a broadcast was made between six o'clock in the morning and eleven o'clock at night, increase by 4 levels.~~

~~(2) If 6 plus the offense level from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.~~

Commentary

Statutory Provisions: 18 U.S.C. §§ 1464, 1468; 47 U.S.C. § 223(b)(1)(A).

Background: Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it. Subsection (b)(2) provides an enhancement for large scale “dial a porn” or obscene broadcasting operations that results in an offense level comparable to the offense level for such operations under §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor). The extent to which the obscene material was distributed is approximated by the volume of commerce attributable to the defendant.

* * *

**§2H3.1. Interception of Communications; Eavesdropping; Disclosure of Certain
Private or Protected Information**

* * *

(b) Specific Offense Characteristics **Characteristic**

* * *

~~(2) (Apply the greater) If—~~

~~(A) the defendant is convicted under 18 U.S.C. § 119, increase by 8 levels; or~~

~~(B) the defendant is convicted under 18 U.S.C. § 119, and the offense involved the use of a computer or an interactive computer service to make restricted personal information about a covered person publicly available, increase by 10 levels.~~

* * *

Commentary

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Application Notes:

1. **Satellite Cable Transmissions.**—If the offense involved interception of satellite cable transmissions for purposes of commercial advantage or private financial gain (including avoiding payment of fees), apply §2B5.3 (Criminal Infringement of Copyright) rather than this guideline.
2. **Imposition of Sentence for 18 U.S.C. § 1039(d) and (e).**—Subsections 1039(d) and (e) of title 18, United States Code, require a term of imprisonment of not more than 5 years to be imposed in addition to any sentence imposed for a conviction under 18 U.S.C. § 1039(a), (b), or (c). In order to comply with the statute, the court should determine the appropriate “total punishment” and divide the sentence on the judgment form between the sentence attributable to the conviction under 18 U.S.C. § 1039(d) or (e) and the sentence attributable to the conviction under 18 U.S.C. § 1039(a), (b), or (c), specifying the number of months to be served for the conviction under 18 U.S.C. § 1039(d) or (e). For example, if the applicable adjusted guideline range is 15–21 months and the court determines a “total punishment” of 21 months is appropriate, a sentence of 9 months for conduct under 18 U.S.C. § 1039(a) plus 12 months for 18 U.S.C. § 1039(d) conduct would achieve the “total punishment” in a manner that satisfies the statutory requirement.
3. ~~**Inapplicability of Chapter Three (Adjustments).**—If the enhancement under subsection (b)(2) applies, do not apply §3A1.2 (Official Victim).~~
4. ~~**Definitions.**—For purposes of this guideline:~~

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

~~“Covered person” has the meaning given that term in 18 U.S.C. § 119(b).~~

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

~~“Means of identification” has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).~~

~~“**Personal information**” means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (A) medical records; (B) wills; (C) diaries; (D) private correspondence, including e-mail; (E) financial records; (F) photographs of a sensitive or private nature; or (G) similar information.~~

~~“**Restricted personal information**” has the meaning given that term in 18 U.S.C. § 119(b).~~

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§2J1.3. Perjury or Subornation of Perjury; Bribery of Witness

~~*~~ ~~*~~ ~~*~~

(b) Specific Offense Characteristics **Characteristic**

- ~~(1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to suborn perjury, increase by 8 levels.~~
- (2)** If the perjury, subornation of perjury, or witness bribery resulted in substantial interference with the administration of justice, increase by 3 levels.

~~*~~ ~~*~~ ~~*~~

§2J1.6. Failure to Appear by Defendant

~~*~~ ~~*~~ ~~*~~

(b) Specific Offense Characteristics **Characteristic**

- ~~(1) If the base offense level is determined under subsection (a)(1), and the defendant—~~
- ~~(A) voluntarily surrendered within 96 hours of the time he was originally scheduled to report, decrease by 5 levels; or~~
- ~~(B) was ordered to report to a community corrections center, community treatment center, “halfway house,” or similar facility, and subdivision (A) above does not apply, decrease by 2 levels.~~
- ~~*Provided, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more.*~~

(21) If the base offense level is determined under subsection (a)(2), and the underlying offense is—

- (A) punishable by death or imprisonment for a term of fifteen years or more, increase by **9** levels; or
- (B) punishable by a term of imprisonment of five years or more, but less than fifteen years, increase by **6** levels; or
- (C) a felony punishable by a term of imprisonment of less than five years, increase by **3** levels.

* * *

§2J1.9. Payment to Witness

* * *

(b) ~~Specific Offense Characteristic~~

~~(1) If the payment was made or offered for refusing to testify or for the witness absenting himself to avoid testifying, increase by **4** levels.~~

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§2K1.5. Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft

* * *

(b) Specific Offense Characteristics

(1) (Apply the greater) ~~If more than one applies, use the greatest:~~

(1A) ~~If the offense was committed willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life, increase by **15** levels;~~ or

(2B) ~~If the defendant was prohibited by another federal law from possessing the weapon or material, increase by **2** levels.~~

~~(3) If the defendant's possession of the weapon or material would have been lawful but for 49 U.S.C. § 46505 and he acted with mere negligence, decrease by **3** levels.~~

* * *

Commentary

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Background: This guideline provides an enhancement where the defendant was a person prohibited by federal law from possession of the weapon or material. ~~A decrease is provided in a case of mere negligence where the defendant was otherwise authorized to possess the weapon or material.~~

* * *

§2K2.6. Possessing, Purchasing, or Owning Body Armor by Violent Felons

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

~~(b) Specific Offense Characteristic~~

~~(1) If the defendant used the body armor in connection with another felony offense, increase by 4 levels.~~

Commentary

Statutory Provision: 18 U.S.C. § 931.

Application Notes:

~~1. Application of Subsection (b)(1).~~

~~(A) **Meaning of “Defendant”.** Consistent with §1B1.3 (Relevant Conduct), the term “*defendant*”, for purposes of subsection (b)(1), limits the accountability of the defendant to the defendant’s own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.~~

~~(B) **Meaning of “Felony Offense”.** For purposes of subsection (b)(1), “*felony offense*” means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.~~

~~(C) **Meaning of “Used”.** For purposes of subsection (b)(1), “*used*” means the body armor was (i) actively employed in a manner to protect the person from gunfire; or (ii) used as a means of bartering. Subsection (b)(1) does not apply if the body armor was merely possessed. For example, subsection (b)(1) would not apply if the body armor was found in the trunk of a car but was not being actively used as protection.~~

~~2. **Inapplicability of §3B1.5.** If subsection (b)(1) applies, do not apply the adjustment in §3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence).~~

3. ~~**Grouping of Multiple Counts.** If subsection (b)(1) applies (because the defendant used the body armor in connection with another felony offense) and the instant offense of conviction includes a count of conviction for that other felony offense, the counts of conviction for the 18 U.S.C. § 931 offense and that other felony offense shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely Related Counts).~~

* * *

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

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

~~(b) Specific Offense Characteristic~~

- ~~(1) If the offense occurred at a time when persons were being inducted for compulsory military service, increase by **6** levels.~~

* * *

§2P1.1. Escape, Instigating or Assisting Escape

* * *

(b) Specific Offense Characteristics

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- ~~(4) If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by **2** levels.~~

Commentary

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Application Notes:

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3. ~~If the adjustment in subsection (b)(4) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).~~

- 43.** Criminal history points under Chapter Four, Part A (Criminal History) are to be determined independently of the application of this guideline. For example, in the case of a defendant serving a one-year sentence of imprisonment at the time of the escape, criminal history points from §4A1.1(b) (for the sentence being served at the time of the escape) and §4A1.1(e) (custody status) would be applicable.

54. If the adjustment in subsection (b)(1) applies as a result of conduct that involves an official victim, do not apply §3A1.2 (Official Victim).

* * *

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

* * *

(b) Specific Offense Characteristics

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- (5) ~~If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.~~
- (65) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.
- (76) If the defendant was convicted under 49 U.S.C. § 5124 or § 46312, increase by 2 levels.

Commentary

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Application Notes:

1. ~~“**Recordkeeping offense**” includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.~~
21. “**Simple recordkeeping or reporting violation**” means a recordkeeping or reporting offense in a situation where the defendant neither knew nor had reason to believe that the recordkeeping offense would significantly increase the likelihood of any substantive environmental harm.
32. This section applies to offenses involving pesticides or substances designated toxic or hazardous at the time of the offense by statute or regulation. A listing of hazardous and toxic substances in the guidelines would be impractical. Several federal statutes (or regulations promulgated thereunder) list toxics, hazardous wastes and substances, and pesticides. These lists, such as those of toxic pollutants for which effluent standards are published under the Federal Water Pollution Control Act (e.g., 33 U.S.C. § 1317) as well as the designation of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (e.g., 42 U.S.C. § 9601(14)), are revised from time to time. “Toxic” and “hazardous” are defined differently

in various statutes, but the common dictionary meanings of the words are not significantly different.

- 43. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered.
- 54. Subsection (b)(2) applies to offenses where the public health is seriously endangered.
- 65. Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required.
- 76. Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required.

Background: This section applies both to substantive violations of the statute governing the handling of pesticides and toxic and hazardous substances and to recordkeeping offenses. The first four specific offense characteristics provide enhancements when the offense involved a substantive violation. The fifth and sixth specific offense characteristics apply to recordkeeping offenses. Although other sections of the guidelines generally prescribe a base offense level of 6 for regulatory violations, §2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous and toxic substances and pesticides. A decrease of 2 levels is provided, however, for “simple recordkeeping or reporting violations” under §2Q1.2(b)(65).

* * *

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

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(b) Specific Offense Characteristics

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- ~~(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 11 levels.~~
- (32) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.
- (43) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.
- ~~(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.~~

Commentary

* * *

Application Notes:

1. ~~“Recordkeeping offense” includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.~~
21. If the offense involved mishandling of nuclear material, apply §2M6.2 (Violation of Other Federal Atomic Energy Agency Statutes, Rules, and Regulations) rather than this guideline.
32. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered.
4. ~~Subsection (b)(2) applies to offenses where the public health is seriously endangered.~~
53. Subsection (b)(32) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required.
64. Subsection (b)(43) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required.

Background: This section parallels §2Q1.2 but applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic.

* * *

§2Q1.4. Tampering or Attempted Tampering with a Public Water System; Threatening to Tamper with a Public Water System

* * *

(b) ~~Specific Offense Characteristics~~

- (1) ~~If (A) any victim sustained permanent or life threatening bodily injury, increase by 4 levels; (B) any victim sustained serious bodily injury, increase by 2 levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.~~
- (2) ~~If the offense resulted in (A) a substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.~~

- ~~(3) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by 2 levels.~~

(eb) Cross References

- (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) in any other case, if the resulting offense level is greater than that determined above.
- (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above.
- (3) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(dc) Special Instruction

- (1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

Commentary

* * *

Application Notes:

1. **Definitions.**—For purposes of this guideline, “*permanent or life-threatening bodily injury*” and “*serious bodily injury*” have the meaning given those terms in Note 1 of the Commentary to §1B1.1 (Application Instructions).
2. **Application of Special Instruction.**—Subsection **(dc)** applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection **(eb)**.

* * *

§2T1.9. Conspiracy to Impede, Impair, Obstruct, or Defeat Tax

* * *

(b) Specific Offense Characteristics **Characteristic**

~~If more than one applies, use the greater:~~

- ~~(1) If the offense involved the planned or threatened use of violence to impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue, increase by 4 levels.~~
- (2)** If the conduct was intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue, increase by 2 levels. Do not, however, apply this adjustment if an adjustment from §2T1.4(b)(1) is applied.

Commentary

* * *

Application Notes:

* * *

3. ~~Specific offense characteristics from §2T1.9(b) are~~ **Subsection (b)(1) is** to be applied to the base offense level determined under §2T1.9(a)(1) or (2).
4. Subsection (b)**(2)** provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the tax laws (*e.g.*, an offense involving a “tax protest” group that encourages persons to violate the tax laws, or an offense involving the marketing of fraudulent tax shelters or schemes).

Background: This type of conspiracy generally involves substantial sums of money. It also typically is complex and may be far-reaching, making it quite difficult to evaluate the extent of the revenue loss caused. ~~Additional specific offense characteristics are~~ **A specific offense characteristic is** included because of the potential for these tax conspiracies to subvert the revenue system and the danger to law enforcement agents and the public.

* * *

§3B1.4. Using a Minor To Commit a Crime

* * *

Commentary

Application Notes:

* * *

2. Do not apply this adjustment if the Chapter Two offense guideline incorporates this factor. For example, if the defendant receives an enhancement under §2D1.1(b)(16)(B) for involving an individual less than 18 years of age in the offense, do not apply this adjustment.

* * *

§3B1.5. Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence

* * *

Commentary

Application Notes:

* * *

- ~~3. **Interaction with §2K2.6 and Other Counts of Conviction.** If the defendant is convicted only of 18 U.S.C. § 931 and receives an enhancement under subsection (b)(1) of §2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons), do not apply an adjustment under this guideline. However, if, in addition to the count of conviction under 18 U.S.C. § 931, the defendant (A) is convicted of an offense that is a drug trafficking crime or a crime of violence; and (B) used the body armor with respect to that offense, an adjustment under this guideline shall apply with respect to that offense.~~

* * *

§3C1.1. Obstructing or Impeding the Administration of Justice

* * *

Commentary

Application Notes:

* * *

7. **Inapplicability of Adjustment in Certain Circumstances.**—If the defendant is convicted of an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (*e.g.*, if the defendant threatened a witness during the course of the prosecution for the obstruction offense).

Similarly, if the defendant receives an enhancement under §2D1.1(b)(4-15)(D), do not apply this adjustment.

* * *

Exhibit E

PROPOSED AMENDMENT: SENTENCING OPTIONS

Synopsis of Proposed Amendment: In August 2025, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2026, “[e]xamination of how the guidelines can provide courts with additional guidance on selecting the appropriate sentencing option (e.g., imprisonment, probation, or fine), and possible consideration of amendments that might be appropriate.” U.S. Sent’g Comm’n, “Notice of Final Priorities,” 90 FR 39263 (Aug. 14, 2025). As part of this examination, the Commission held a Sentencing Options Roundtable in December 2025, which was attended by a wide range of stakeholders. Participants expressed varying views on how the Commission should proceed with the sentencing options priority, ranging from no or very limited action to fundamental restructuring of the sentence type determination. Informed by feedback received from stakeholders, the proposed amendment would revise Part A of Chapter Five to add Introductory Commentary and a new guideline that clearly delineates the sentencing options available under the guidelines before proceeding to the Sentencing Table.

In General

Chapter Five (Determining the Sentencing Range and Options Under the Guidelines) of the *Guidelines Manual* sets forth the steps used to determine the applicable sentencing range and sentencing options based upon the guideline calculations made in Chapters Two through Four. It also sets forth “zones” in the Sentencing Table that authorize different sentencing options. The chapter is divided into several parts that set forth the sentencing requirements and options under the guidelines related to probation, imprisonment, supervision conditions, fines, and restitution for the particular guideline range.

The zones of the Sentencing Table generally provide the sentencing options that courts consider in determining the appropriate sentence. The zones are allocated in the Sentencing Table in Part A of Chapter Five. However, the provisions describing the sentencing options available within each zone are distributed throughout several parts of Chapter Five. In general, each zone provides for different sentencing options, as follows:

Zone A.—All sentencing ranges within Zone A, regardless of the underlying offense level or criminal history category, are zero to six months. Zone A provides for a sentence that is probation-only, probation with a confinement condition (home detention, community confinement, or intermittent confinement), a “split sentence” (a term of imprisonment followed by a term of supervised release with a condition of confinement), or imprisonment. Zone A is the only zone that authorizes probation without any conditions of confinement.

Zone B.—Sentencing ranges in Zone B are from 1–7 to 9–15 months of imprisonment. Zone B provides for a probation term to be substituted for imprisonment, contingent upon the probation term including conditions of confinement sufficient to satisfy the minimum term specified in the guideline range. Zone B also provides for a “split sentence,” with at least one month of the term served as imprisonment, or a term of imprisonment only.

Zone C.—Sentencing ranges in Zone C are 10–16 or 12–18 months of imprisonment. Zone C provides for a “split sentence,” which must include a term of imprisonment equivalent to at least half of the minimum of the applicable guideline range. The remaining half of the term requires supervised release with a condition of community

confinement or home detention. Alternatively, the court has the option of imposing a term of imprisonment only.

Zone D.— Sentencing ranges in Zone D extend from 15–21 months to life imprisonment. Zone D provides for imprisonment sentences only.

Changes to Part A of Chapter Five

The proposed amendment would generally amend Part A of Chapter Five to make two changes. First, it would add new Introductory Commentary to Part A of Chapter Five. Second, the proposed amendment moves the Sentencing Table into a new §5A1.1, that also contains provisions describing the structure and operation of the Sentencing Table.

The proposed Introductory Commentary explains that Part A of Chapter Five clearly delineates the sentencing options available under the guidelines before proceeding to the Sentencing Table, to assist courts in making this critical decision. It highlights the broad range of sentencing options that are statutorily provided and the requirement that a sentence imposed be “sufficient, but not greater than necessary to comply with the purposes set forth in [18 U.S.C. § 3553(a)(2)].” It also recognizes that each of the available sentencing options—imprisonment, probation, and fines—serves a punitive function.

The proposed provisions included in §5A1.1 would provide an overview of the Sentencing Table. New §5A1.1 would contain the three subsections.

Subsection (a) would include the provision currently set out in Application Note 1 of the Commentary to the Sentencing Table, which describes the axes of the Table and how to determine the guideline range.

Subsection (b) would describe the sentencing options that are available under the guidelines based on the defendant’s applicable guideline range and zone in the Sentencing Table. Paragraphs (1) through (4) summarize the sentencing options available in each of Zones A through D with cross-references to the relevant provisions of Chapter Five.

Subsection (c) sets forth the Sentencing Table.

Proposed Amendment:

CHAPTER FIVE

DETERMINING THE SENTENCING RANGE AND OPTIONS UNDER THE GUIDELINES

Introductory Commentary

Chapter Five sets forth the steps used to determine the applicable sentencing range and sentencing options based upon the guideline calculations made in Chapters Two through Four. Additionally, the provisions in this chapter set forth the sentencing requirements and options under the guidelines related to probation, imprisonment, supervision conditions, fines, and restitution for the particular guideline range. For example, for certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. After applying the provisions of this chapter to determine the sentencing options recommended under the guidelines pursuant to subsection (a) of §1B1.1 (Application Instructions), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine the length and type of sentence that is sufficient but not greater than necessary. A sentence is within the guidelines if it complies with each applicable section of this chapter.

PART A — SENTENCING TABLE DETERMINATION OF SENTENCING RANGE AND SENTENCING OPTIONS

Introductory Commentary

By statute, sentencing courts must consider and balance a broad range of factors when determining the appropriate sentence to impose in each individual case. Among these factors, courts are required to consider “all available sentencing options.” 18 U.S.C. § 3553(a)(3). Each of the available sentencing options—imprisonment, probation, and fines—serves a punitive function, and the sentencing court must determine the option, or combination of options, that best achieve a sentence “sufficient, but not greater than necessary to comply with the purposes set forth in [18 U.S.C. § 3553(a)(2)].” 18 U.S.C. § 3553(a).

Congress charged the Commission with promulgating guidelines for sentencing courts to use in determining “whether to impose a sentence to probation, a fine, or a term of imprisonment” (see 28 U.S.C. § 994(a)(1)(A)). The provisions within Chapter Five, in combination, guide all aspects of determining the appropriate sentence under the guidelines, including the initial determination of sentence type. By clearly delineating the sentencing options available under the guidelines, the Commission intends for Part A of this chapter to assist courts in making this critical decision.

§5A1.1. Sentencing Table

The Sentencing Table is used to determine the applicable sentencing range and sentencing options based upon the guideline calculations made in Chapters Two through Four.

- (a) The Offense Level (1–43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I–VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24–30 months of imprisonment. For purposes of the Sentencing Table, “*Life*” means life imprisonment.
- (b) The Sentencing Table is divided into Zones A, B, C, and D. Each zone provides for different sentencing options for the court’s consideration. Subject to any statutory limitations in an individual case (*see, e.g.*, §5B1.1(b) (statutory eligibility for probation), §§5G1.1, 5G1.2 (statutory minima and maxima)), the sentencing options in each zone are as follows:

SENTENCING OPTIONS	
Zone A	• probation; • probation with a period of intermittent confinement, community confinement, or home detention; • a “split sentence” (<i>i.e.</i>, part of the term satisfied by imprisonment and the remainder satisfied by a term of supervised release with a condition that substitutes community confinement or home detention for imprisonment, according to the schedule in §5C1.1(e)); or • imprisonment. <i>See</i> §5B1.1(a)(1); §5C1.1(a)–(b), (e); §5C1.1, comment. (n.2).
Zone B	• probation with the minimum term of imprisonment satisfied by a period of intermittent confinement, community confinement, or home detention, according to the schedule in §5C1.1(e); • a “split sentence” (with at least one month satisfied by imprisonment); or • imprisonment. <i>See</i> §5B1.1(a)(2); §5C1.1(c), (e); §5C1.1, comment. (n.3).
Zone C	• a “split sentence” (with at least one-half of the minimum term satisfied by imprisonment); or • imprisonment. <i>See</i> §5C1.1(d), (e); §5C1.1, comment. (n.4).
Zone D	• imprisonment. <i>See</i> §5C1.1(f).

(c)

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points)					
		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
Zone B	9	4–10	6–12	8–14	12–18	18–24	21–27
	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
Zone D	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

Commentary to Sentencing Table

Application Notes:

- ~~1. The Offense Level (1–43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I–VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. “Life” means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24–30 months of imprisonment.~~
- 21. Total Offense Level.**—In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.
- 22. Criminal History Category.**—The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.
- 3. Fine-Only Sentence.**—A fine may be the sole sanction if the guidelines do not require a term of imprisonment. *See* §5E1.2, comment. (n.1).

* * *

Exhibit F

PROPOSED AMENDMENT:

MISCELLANEOUS

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation. *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 90 FR 39263 (Aug. 14, 2025) (identifying as a priority “[i]mplementation of any legislation warranting Commission action”).

The proposed amendment contains two parts (Parts A and B). The Commission is considering whether to promulgate either or both these parts, as they are not mutually exclusive.

Part A responds to the Protecting Americans’ Data from Foreign Adversaries Act, Pub. L. 118–50 (2024), by amending Appendix A and §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

Part B responds to the Foreign Extortion Prevention Technical Corrections Act, Pub. L. 118–78 (2024), by amending Appendix A and §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).

(A) Protecting Americans’ Data from Foreign Adversaries Act

Synopsis of Proposed Amendment: Part A of the proposed amendment responds to the Protecting Americans’ Data from Foreign Adversaries Act, Pub. L. 118–50 (2024), by amending Appendix A and §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). The act codified a new offense at 15 U.S.C. § 9901 prohibiting the transfer of personally identifiable sensitive data of United States individuals to foreign adversaries.

Section 9901 (Prohibition on transfer of personally identifiable sensitive data of United States individuals to foreign adversaries) prohibits data brokers from selling, licensing, trading, disclosing, or providing access to personally identifiable sensitive data of an individual of the United States to any foreign adversary country or any entity controlled by a foreign adversary.

Section 9901(b)(2)(B) provides that the penalties for a violation are the same as provided in the Federal Trade Commission Act (15 U.S.C. §§ 41–58). Section 50 (Offenses and penalties) of title 15 provides, in turn, a statutory maximum of one year, for anyone who refuses to attend, testify or answer any lawful inquiry or produce documentary evidence “in obedience to an order of a district court . . . directing compliance with the subpoena or lawful requirement” of the Federal Trade Commission, and for officers or employees of the Commission who make any information obtained by the Commission public without authority. Section 50 also provides a statutory maximum of three years, for willfully making any false entry or statement of fact in certain reports, accounts or records of any person, partnership, or corporation subject to the Act, or removing from the jurisdiction or mutilating, altering, or otherwise falsifying any documentary evidence.

Part A of the proposed amendment would amend Appendix A (Statutory Index) to reference 15 U.S.C. § 9901 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) because the prohibited conduct appears most similar to the offenses currently referenced to that guideline.

Part A of the proposed amendment would also amend the commentary to §2H3.1 to reflect the reference.

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

* * *

15 U.S.C. § 7704(d) 2G2.5

15 U.S.C. § 9901 2H3.1

16 U.S.C. § 114 2B1.1

* * *

§2H3.1. Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information

* * *

Commentary

Statutory Provisions: 8 U.S.C. § 1375a(d)(5)(B)(i), (ii); 15 U.S.C. § 9901; 18 U.S.C. §§ 119, 1039, 1905, 2511; 26 U.S.C. §§ 7213(a)(1)–(3), (a)(5), (d), 7213A, 7216; 42 U.S.C. §§ 16962, 16984; 44 U.S.C. § 3572; 47 U.S.C. § 605. For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

(B) Foreign Extortion Prevention Technical Corrections Act

Synopsis of Proposed Amendment: Part B of the proposed amendment responds to the Foreign Extortion Prevention Technical Corrections Act, Pub. L. 118–78 (2024).

The Foreign Extortion Prevention Technical Corrections Act repealed and replaced the Foreign Extortion Prevention Act, which in 2023 established criminal liability for foreign officials who solicit or accept bribes from United States entities or while within United States territory. By criminalizing the “demand side” of bribery by foreign officials, the Act was a new counterpart to the Foreign Corrupt Practices Act, which criminalizes the “supply side” by prohibiting the paying of bribes to foreign officials to influence an act or decision of such official in his official capacity, at 15 U.S.C. §§ 78dd-2 and 78dd-3.

The Foreign Extortion Prevention Act had added subsection 201(f) (Bribery of public officials and witnesses) to title 18 of the United States Code. Section 201(f) prohibited foreign officials (or those selected to be foreign officials) from corruptly demanding, receiving, or accepting anything of value from any “person” while located in the United States, or from a “domestic concern” (as those terms are defined in sections 78dd-2 and 78dd-3 of the Foreign Corrupt Practices Act), or from an issuer, in return for being influenced or induced, or conferring any improper advantage in connection with obtaining or retaining business for or with any person. The Foreign Extortion Prevention Technical Corrections Act replaced subsection 201(f) with a substantively similar prohibition against bribery by foreign officials, at a new section 1352 (Demands by foreign officials for bribes) of title 18 of the United States Code. Both the repealed subsection 201(f) and section 1352 have a statutory maximum of 15 years.

Part B of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 1352 to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions), because the complementary bribery offenses under the Foreign Corrupt Practices Act at 15 U.S.C. §§ 78dd-2 and 78dd-3 are referenced to §2C1.1

Part B of the proposed amendment would also amend the commentary to §2C1.1 to reflect the reference.

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

		*	*	*
18 U.S.C. § 1351	2B1.1			
18 U.S.C. § 1352	2C1.1			
18 U.S.C. § 1361	2B1.1, 2B1.5			

* * *

§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

* * *

Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 226, 227, 371 (if conspiracy to defraud by interference with governmental functions), 872, 1341 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1342 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1352, 1951. For additional statutory provision(s), *see* Appendix A (Statutory Index).

* * *

Exhibit G

PROPOSED AMENDMENT: TECHNICAL

Synopsis of Proposed Amendment: This proposed amendment would make technical and other non-substantive changes to the *Guidelines Manual*.

First, the proposed amendment makes clerical changes to several guidelines to replace references to the “Bureau of Prisons” with more accurate references to the “Federal Bureau of Prisons.” It makes changes to the following guidelines: §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)); §5E1.2 (Fines for Individual Defendants); §5F1.7 (Shock Incarceration Program (Policy Statement)); §5F1.8 (Intermittent Confinement); and §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment).

Second, the proposed amendment makes technical changes to update the references to the Communications Act of 1934 in the context of the definition of the term “interactive computer service,” which is used by several guidelines. It makes changes to the following guidelines: §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse); §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts); §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts; Criminal Sexual Abuse of an Individual in Federal Custody); §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact); §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy); §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy); §2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy); §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor); §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production); §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor); §2G2.6 (Child Exploitation Enterprises); §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names); and §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). The proposed amendment also makes other non-substantive changes to some of these guidelines to provide stylistic consistency in how subdivisions are designated and to correct some typographical errors.

Third, the proposed amendment makes technical changes to §7B1.4 (Term of Imprisonment—Probation (Policy Statement)) and §7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)), to clarify statutory references regarding a court’s

authority to provide an exception to mandatory revocation of probation or supervised release in the case of a defendant who fails a drug test.

Fourth, the proposed amendment makes a technical change to §7C1.1 (Classification of Violations (Policy Statement)) to correct an inaccurate reference to “four” grades of supervised release violations.

Fifth, the proposed amendment makes technical changes to §8A1.2 (Application Instructions — Organizations) and §8C2.8 (Determining the Fine Within the Range (Policy Statement)), to replace references to the “guideline range” with more accurate references to the “guideline fine range.”

Finally, the proposed amendment would make clerical changes to Appendix A (Statutory Index) to reflect the editorial reclassification of certain sections in the United States Code.

Proposed Amendment:

§1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)

- (a) IN GENERAL.—Upon motion of the Director of the Federal Bureau of Prisons or the defendant pursuant to 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—
- (1) (A) extraordinary and compelling reasons warrant the reduction; or
- (B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
- (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
- (3) the reduction is consistent with this policy statement.
- (b) EXTRAORDINARY AND COMPELLING REASONS.—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

* * *

- (4) VICTIM OF ABUSE.—The defendant, while in custody serving the term of imprisonment sought to be reduced, was a victim of:

- (A) sexual abuse involving a “sexual act,” as defined in 18 U.S.C. § 2246(2) (including the conduct described in 18 U.S.C. § 2246(2)(D) regardless of the age of the victim); or
- (B) physical abuse resulting in “serious bodily injury,” as defined in the Commentary to §1B1.1 (Application Instructions);

that was committed by, or at the direction of, a correctional officer, an employee or contractor of the Federal Bureau of Prisons, or any other individual who had custody or control over the defendant.

* * *

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

* * *

- (b) Specific Offense Characteristics

* * *

- (4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions subparagraphs (A) and (B), increase by 3 levels.

* * *

Commentary

* * *

Application Notes:

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

* * *

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

* * *

§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

* * *

Commentary

* * *

Application Notes:

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

* * *

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

* * *

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts; Criminal Sexual Abuse of an Individual in Federal Custody

* * *

Commentary

* * *

Application Notes:

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

* * *

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

* * *

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

* * *

Commentary

* * *

Application Notes:

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

* * *

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

* * *

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

* * *

Commentary

* * *

Application Notes:

* * *

13. **Application of Subsection (b)(7).**—For purposes of subsection (b)(7), “*mass-marketing by means of an interactive computer service*” means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(7) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. “*Interactive computer service*”, for purposes of subsection (b)(7) and this note, has the meaning given that term in section 230(e)(2)(f)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

* * *

§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy

* * *

(c) Cross Reference

- (1) If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking) if the resulting offense level is greater than that determined above.

* * *

Commentary

* * *

Application Notes:

1. Cases Involving Multiple Chemicals.—

- (A) **Determining the Base Offense Level for Two or More Chemicals.**—Except as provided in subdivision ~~subparagraph~~ (B), if the offense involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (*i.e.*, list I or list II) under this guideline.

Example: The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. The base offense level for each chemical is calculated separately and the chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of level 36; 300 grams of hydriodic acid result in a base offense level of level 24. In this case, the base offense level would be level 36.

- (B) **Determining the Base Offense Level for Offenses involving Ephedrine, Pseudoephedrine, or Phenylpropanolamine.**—If the offense involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.

Example: The defendant was in possession of 80 grams of ephedrine and 50 grams of phenylpropanolamine, an aggregate quantity of 130 grams of such chemicals. The base offense level corresponding to that aggregate quantity is level 30.

* * *

5. **Application of Subsection (b)(4).**—For purposes of subsection (b)(4), “*mass-marketing by means of an interactive computer service*” means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(4) would apply to a defendant who operated a web site to promote the sale of Gamma-butyrolactone (GBL) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. “*Interactive computer service*”, for purposes of subsection (b)(4) and this note, has the meaning given that term in section 230(e)(2)(f)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

* * *

8. **Application of Subsection (c)(1).**—“*Offense involved unlawfully manufacturing a controlled substance—~~or, or attempting to manufacture a controlled substance unlawfully,~~*” as used in subsection (c)(1), means that the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), completed the actions

sufficient to constitute the offense of unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully.

* * *

§2D1.12. Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy

* * *

(c) Cross Reference

- (1) If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) if the resulting offense level is greater than that determined above.

* * *

Commentary

* * *

Application Notes:

1. “*Offense involved unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully*,” as used in subsection (c)(1), means that the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), completed the actions sufficient to constitute the offense of unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully.

* * *

3. **Application of Subsection (b)(3).**—For purposes of subsection (b)(3), “*mass-marketing by means of an interactive computer service*” means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(3) would apply to a defendant who operated a web site to promote the sale of prohibited flasks but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. “*Interactive computer service*”, for purposes of subsection (b)(3) and this note, has the meaning given that term in section 230(e)(2)(f)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

* * *

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

* * *

Commentary

* * *

Application Notes:

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

* * *

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

* * *

§2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

* * *

Commentary

* * *

Application Notes:

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

* * *

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

* * *

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

* * *

(b) Specific Offense Characteristics

* * *

(3) (Apply the greatest):

* * *

- (D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivisions **subparagraph** (E), increase by **6** levels.

* * *

- (F) If the defendant knowingly engaged in distribution, other than distribution described in subdivisions **subparagraphs** (A) through (E), increase by **2** levels.

* * *

Commentary

* * *

Application Notes:

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

* * *

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

* * *

“**Sexual abuse or exploitation**” means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)–(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under

~~subdivisions~~subparagraphs (A) or (B). “Sexual abuse or exploitation” does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

* * *

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add ~~subdivision~~paragraph (7), effective April 30, 2003.

* * *

§2G2.6. Child Exploitation Enterprises

* * *

Commentary

* * *

Application Notes:

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

* * *

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

* * *

§2G3.1. Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names

* * *

(b) Specific Offense Characteristics

- (1) (Apply the Greatest):

* * *

- (D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under ~~subdivisions~~subparagraph (E), increase by 6 levels.

* * *

- (F) If the defendant knowingly engaged in distribution, other than distribution described in subdivisions (A) through (E), increase by 2 levels.

* * *

Commentary

* * *

Application Notes:

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

* * *

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

* * *

§2H3.1. Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information

* * *

Commentary

* * *

Application Notes:

* * *

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

* * *

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

* * *

§5E1.2. Fines for Individual Defendants

* * *

Commentary

Application Notes:

* * *

6. In considering subsection (d)(7), the court may be guided by reports published by the Federal Bureau of Prisons and the Administrative Office of the United States Courts concerning average costs.

* * *

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

* * *

Commentary

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

- “(a) the Bureau of Prisons may place in a shock incarceration program any person who is sentenced to a term of more than 12, but not more than 30 months, if such person consents to that placement.
- (b) For such initial portion of the term of imprisonment as the Bureau of Prisons may determine, not to exceed 6 months, an inmate in the shock incarceration program shall be required to—
- (1) adhere to a highly regimented schedule that provides the strict discipline, physical training, hard labor, drill, and ceremony characteristic of military basic training; and
 - (2) participate in appropriate job training and educational programs (including literacy programs) and drug, alcohol, and other counseling programs.
- (c) An inmate who in the judgment of the Director of the Bureau of Prisons has successfully completed the required period of shock incarceration shall remain in the custody of the Bureau for such period (not to exceed the remainder of the prison term otherwise required by law to be served by that inmate), and under such conditions, as the Bureau deems appropriate.” 18 U.S.C. § 4046.

In 1990, the Federal Bureau of Prisons issued an operations memorandum (174-90 (5390), November 20, 1990) that outlined eligibility criteria and procedures for the implementation of a shock incarceration program (which the Federal Bureau of Prisons titled the “intensive confinement program”). In 2008, however, the Federal Bureau of Prisons terminated the program and removed the rules governing its operation. *See* 73 FR 39863 (July 11, 2008).

* * *

§5F1.8. Intermittent Confinement

* * *

Commentary

Application Note:

1. “*Intermittent confinement*” means remaining in the custody of the Federal Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release. *See* 18 U.S.C. § 3563(b)(10).

* * *

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

* * *

- (b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:
 - (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Federal Bureau of Prisons; and
 - (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

* * *

Commentary

Application Notes:

* * *

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

* * *

- (C) **Imposition of Sentence.**—If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgment in a Criminal Case Order (i) the applicable subsection (*e.g.*, §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given and the relevant case information (including docket number); and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Federal Bureau of Prisons.

* * *

§7B1.4. Term of Imprisonment—Probation (Policy Statement)

* * *

Commentary

Application Notes:

* * *

3. In the case of a defendant who fails a drug test, the court shall consider whether the availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, warrants an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. § 3565(b). 18 U.S.C. § 3563(~~ee~~).

* * *

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

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

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

* * *

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

* * *

Commentary

Application Notes:

* * *

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

* * *

§8A1.2. Application Instructions — Organizations

* * *

- (b) Determine from Part C (Fines) the sentencing requirements and options relating to fines:

* * *

- (2) Otherwise, apply §8C2.1 (Applicability of Fine Guidelines) to identify the counts for which the provisions of §§8C2.2 through 8C2.9 apply. For such counts:

* * *

- (F) Apply §8C2.7 (Guideline Fine Range — Organizations) to determine the minimum and maximum of the guideline fine range.

- (G) Refer to §8C2.8 (Determining the Fine Within the Range) to determine the amount of the fine within the applicable guideline fine range.

* * *

- (4) Determine whether a sentence below the otherwise applicable guideline fine range is appropriate upon motion of the government pursuant to §8C4.1 (Substantial Assistance to Authorities — Organizations (Policy Statement)).

* * *

§8C2.8. Determining the Fine Within the Range (Policy Statement)

- (a) In determining the amount of the fine within the applicable guideline fine range, the court should consider:

* * *

Commentary

Application Notes:

* * *

2. Subsection (a)(3) provides that the court, in setting the fine within the guideline fine range, should consider any collateral consequences of conviction, including civil obligations arising from the organization's conduct. As a general rule, collateral consequences that merely make victims whole provide no basis for reducing the fine within the guideline fine range. If criminal and civil sanctions are unlikely to make victims whole, this may provide a basis for a higher fine within the guideline fine range. If punitive collateral sanctions have been or will be imposed on the organization, this may provide a basis for a lower fine within the guideline fine range.

* * *

APPENDIX A

STATUTORY INDEX

* * *

7 U.S.C. § 6b(Aa)	2B1.1
7 U.S.C. § 6b(Bb)	2B1.1
7 U.S.C. § 6b(Cc)	2B1.1

* * *

46 U.S.C. § 70036(b)	2A2.4
46 U.S.C. § 70503	2D1.1
46 U.S.C. § 70506(a)	2D1.1
46 U.S.C. § 70506(b)	2D1.1

46 U.S.C. App. §
1707a(f)(2) 2B1.1

~~46 U.S.C. App. §~~
~~1903(a) 2D1.1~~

~~46 U.S.C. App. §~~
~~1903(g) 2D1.1~~

~~46 U.S.C. App. §~~
~~1903(j) 2D1.1~~

* * *

Exhibit H

PROPOSED AMENDMENT: UNMANNED AIRCRAFT

Synopsis of Proposed Amendment: This proposed amendment responds to the SAFER SKIES Act (title LXXXVI of the National Defense Authorization Act for Fiscal Year 2026, Pub. L. 119–60) (the “Act”), which contains several provisions relating to criminal penalties for offenses involving aircraft. *See* Pub. L. 119–60, § 8605 (2025).

The Act creates a felony offense for repeated convictions for violating national defense airspace under 49 U.S.C. § 46307. Section 46307 establishes a criminal offense when an individual knowingly and willfully violates an order issued pursuant to 49 U.S.C. § 40103(b)(3) that restricts or prohibits civil aircraft in certain navigable airspace “in the interest of national defense.” An offense under section 46307 constitutes a Class A misdemeanor, punishable by up to one year in prison. The Act adds to section 46307 a five-year-maximum penalty if a person is convicted of a second or subsequent offense under the section.

The Act also amends the statutory penalties for providing contraband to imprisoned individuals, in violation of 18 U.S.C. § 1791. Section 1791 sets out statutory maximum terms of imprisonment ranging from six months to twenty years depending on the type of contraband object provided to the imprisoned individual. The Act increases the maximum penalties by five years for individuals convicted under section 1791 who “knowingly used an unmanned aircraft to provide a prohibited object to an inmate of a prison.” 6 U.S.C. § 124n-1(d).

In addition to these specific statutory increases, the Act provides more generally that “[i]f a person who is convicted of a felony offense (other than an offense based solely on the operation of an unmanned aircraft) knowingly operated an unmanned aircraft during, in relation to, or in furtherance of such offense,” the maximum penalty for that offense is doubled or increased by five years, whichever is less. *Id.* § 124n-1(c).

The Act also directs the Sentencing Commission to “promulgate guidelines, or amendments to guidelines, that substantially increase the sentencing range for all offenses involving the use of an unmanned aircraft.” *Id.* § 124n-1(e)(1)(A). Specifically, for offenses in which the enhanced penalties under 6 U.S.C. § 124n-1(c) apply—that is, where the individual knowingly operated an unmanned aircraft during, in relation to, or in furtherance of a felony offense (other than an offense based solely on the operation of an unmanned aircraft)—the guidelines “shall call for an increase of at least 6 levels in the base offense level,” and “in all other cases, the base offense level shall be increased by at least 4 levels.” *Id.* § 124n-1(e)(2).

The proposed amendment would implement these provisions of the Act.

First, the proposed amendment would create a new guideline at §3B1.6 (Use of Unmanned Aircraft) providing a tiered adjustment for offenses involving the use of an unmanned aircraft. The proposed amendment provides two options for the adjustment. Under **Option 1**, an offense would receive a [6]-level increase if the statutory sentencing

enhancement under 6 U.S.C. § 124n-1(c) applies. Under **Option 2**, an offense would receive a [6]-level increase if the defendant is convicted of a felony offense that is not based solely on the operation of an unmanned aircraft, and the defendant knowingly operated an unmanned aircraft during, in relation to, or in furtherance of that offense. Under both options, all other offenses involving the use of an unmanned aircraft would receive a [4]-level increase.

Second, the proposed amendment would address the new felony offense for repeated violations of 49 U.S.C. § 46307. Section 46307 is not currently referenced in Appendix A (Statutory Index) to a specific guideline, so a preexisting misdemeanor offense under this section is sentenced under §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The proposed amendment would amend Appendix A to reference 49 U.S.C. § 46307 to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle; Unsafe Operation of Unmanned Aircraft) and §2X5.2. Accordingly, courts would continue to use §2X5.2 for misdemeanor violations of section 46307 and would use §2A5.2 for the new felony violation.

Issues for comment are also provided.

Proposed Amendment:

CHAPTER THREE

ADJUSTMENTS

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PART B — ROLE IN THE OFFENSE

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§3B1.6. Use of Unmanned Aircraft

[Option 1 (6-level increase if statutory enhancement applies):

(a) (Apply the greater):

- (1) If a statutory sentencing enhancement under 6 U.S.C. § 124n-1(c) applies, increase by [6] levels.**
- (2) If the offense involved the use of an unmanned aircraft, increase by [4] levels.**

(b) For purposes of this guideline:

(1) ***“Unmanned aircraft”*** has the meaning given that term in 49 U.S.C. § 44801.

[(2) ***“Use”*** does not include mere possession.]]

[Option 2 (6-level increase regardless of whether statutory enhancement applies):

(a) (Apply the greater):

(1) If the defendant (1) is convicted of a felony offense that is not based solely on the operation of an unmanned aircraft; and (2) knowingly operated an unmanned aircraft during, in relation to, or in furtherance of that offense, increase by **[6]** levels.

(2) If the offense involved the use of an unmanned aircraft, increase by **[4]** levels.

(b) For purposes of this guideline:

(1) ***“Unmanned aircraft”*** has the meaning given that term in 49 U.S.C. § 44801.

[(2) ***“Use”*** does not include mere possession.]]

Commentary

Background: This guideline implements the directive in the SAFER SKIES Act (section 8605(e) of the National Defense Authorization Act for Fiscal Year 2026, Pub. L. 119–60).

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APPENDIX A

STATUTORY INDEX

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49 U.S.C. § 32709(b) 2N3.1

49 U.S.C. § 46307 2A5.2, 2X5.2

49 U.S.C. § 46308 2A5.2

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

- (a) Base Offense Level (Apply the greatest):
- (1) **30**, if the offense involved intentionally endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility or a mass transportation vehicle;
 - (2) **18**, if the offense involved recklessly endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility or a mass transportation vehicle;
 - (3) if an assault occurred, the offense level from the most analogous assault guideline, §§2A2.1–2A2.4; or
 - (4) **9**.
- (b) Specific Offense Characteristic
- (1) If (A) subsection (a)(1) or (a)(2) applies; and (B)(i) a firearm was discharged, increase by **5** levels; (ii) a dangerous weapon was otherwise used, increase by **4** levels; or (iii) a dangerous weapon was brandished or its use was threatened, increase by **3** levels. If the resulting offense level is less than level **24**, increase to level **24**.
- (c) Cross References
- (1) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.
 - (2) If the offense involved possession of, or a threat to use (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 39B, 1992(a)(1), (a)(4), (a)(5), (a)(6); 49 U.S.C. §§ **46307**, 46308, 46503, 46504 (formerly 49 U.S.C. § 1472(c), (j)). For additional statutory provision(s), see Appendix A (Statutory Index).

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

(a) Base Offense Level: 6

Commentary

Statutory Provisions: 10 U.S.C. § 2733a(g)(2); 18 U.S.C. §§ 39B, 1365(f), 1801, 2259(d)(4); 34 U.S.C. § 12593; 49 U.S.C. §§ 31310, 46307. For additional statutory provision(s), *see* Appendix A (Statutory Index).

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Issues for Comment

1. The SAFER SKIES Act (the “Act”) directs the Commission to “substantially increase the sentencing range for all offenses involving the use of an unmanned aircraft.” 6 U.S.C. § 124n-1(e)(1)(A). The directive specifically calls for “an increase of at least 6 levels” for cases in which the sentencing enhancements under 6 U.S.C. § 124n-1(c) apply and an increase of “at least 4 levels” in all other cases. *See id.* § 124n-1(e)(2). The proposed amendment would implement this directive by creating an adjustment in new §3B1.6 (Use of an Unmanned Aircraft). The Commission seeks comment on whether this is the appropriate approach to implement the directive or whether the Commission should adopt an alternative approach. If so, what should that approach be? Are there any different or additional approaches that would address cases subject to the minimum 4-level increase while ensuring compliance with the directive?
2. In the Act, Congress directs the Commission to provide for “an increase of *at least* 6 levels” for cases in which the sentencing enhancements under 6 U.S.C. § 124n-1(c) apply and an increase of “*at least* 4 levels” in all other cases involving the use of an unmanned aircraft. *See* 6 U.S.C. § 124n-1(e) (emphasis added). The proposed amendment responds to this directive by providing a tiered adjustment, bracketed at 6 and 4 levels, for offenses involving unmanned aircraft. The Commission seeks comment on whether the levels of the adjustment are appropriate or whether the Commission should increase the levels above those required by the directive. If so, at what levels should the Commission set the adjustment?
3. The Commission seeks comment on how the proposed new Chapter Three adjustment should interact with other guidelines that may also account for conduct involving the use of unmanned aircraft. For example, the specific offense characteristic at §2D1.1(b)(3)(A) (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applies if the defendant unlawfully imported or exported a controlled substance under circumstances in which “an aircraft other than a

regularly scheduled commercial air carrier was used to import or export the controlled substance.” In addition, in some circumstances, the use of an unmanned aircraft could be considered indicative of sophisticated means, *see, e.g.*, §§2B1.1(b)(10)(C) (Theft, Property Destruction, and Fraud), 2T3.1(b)(1) (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property), or the use of a special skill, *see* §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Are there other guidelines provisions that may apply based on the same conduct as the proposed new Chapter Three adjustment? How should the new adjustment interact with these provisions while ensuring compliance with the congressional directive to “substantially increase the sentencing range for all offenses involving the use of an unmanned aircraft”? Should the proposed amendment preclude or limit the application of any other specific offense characteristic or Chapter Three adjustment if the new §3B1.6 also applies?

4. The Act increases the statutory maximum penalty for an individual convicted under 18 U.S.C. § 1791 who “knowingly used an unmanned aircraft to provide a prohibited object to an inmate of a prison.” 6 U.S.C. § 124n-1(d). Offenses under section 1791 are referenced to §2P1.2 (Providing or Possessing Contraband in Prison), which provides a range of base offense levels depending on the type of contraband at issue. Under the newly created §3B1.6, an individual subject to the enhanced statutory penalty would be subject to a [6]-level or [4]-level adjustment for the use of an unmanned aircraft. Should the Commission take any additional action to implement the enhanced statutory penalty under 18 U.S.C. § 1791? If so, what action should the Commission take? For example, should the Commission amend §2P1.2 to address cases in which the enhanced statutory penalty under 18 U.S.C. § 1791 applies, or should it provide a special instruction on the application of the new §3B1.6 in such cases?
5. To address the new felony offense under the Act for repeated violations of 49 U.S.C. § 46307, the proposed amendment would amend Appendix A to reference 49 U.S.C. § 46307 to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle; Unsafe Operation of Unmanned Aircraft) and §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The Commission seeks comment on whether the proposed references are appropriate and whether any additional changes to the guidelines are required to account for the new felony offense created by the Act.