



Proposed Amendments to the Sentencing Guidelines (Preliminary)

January 8, 2016

This document collects the proposed amendments to the sentencing guidelines, policy statements, and commentary, in the “reader-friendly” form in which they were made available at the public meeting on January 8, 2016. As with all proposed amendments on which a vote to publish for comment has been made but not yet officially submitted to the Federal Register for formal publication, authority to make technical and conforming changes may be exercised and motions to reconsider may be made. Once submitted to the Federal Register, official text of the proposed amendments as submitted will be posted on the Commission’s website at www.ussc.gov and will be available in a forthcoming edition of the Federal Register, and an updated “reader-friendly” version of the proposed amendments as submitted will be posted on the Commission’s website at www.ussc.gov.

Upon publication in the Federal Register, a 60-day period for public comment will begin. Further information on the submission of public comment will be provided in the forthcoming edition of the Federal Register referred to above. Such information will also be available at www.ussc.gov.

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PROPOSED AMENDMENT: MISCELLANEOUS

Synopsis of Proposed Amendment: *This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues.*

A. USA FREEDOM Act of 2015

Part A of the proposed amendment responds to the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act) of 2015, Pub. L. 114–23 (June 2, 2015), which, among other things, set forth changes to statutes related to maritime navigation and provided new and expanded criminal offenses to implement certain provisions in international conventions relating to maritime and nuclear terrorism. The Act also added these new offenses to the list of offenses specifically enumerated at 18 USC § 2332b(g)(5) as federal crimes of terrorism.

The USA FREEDOM Act created a new criminal offense at 18 U.S.C. § 2280a (Violence against maritime navigation and maritime transport involving weapons of mass destruction) to prohibit certain terrorism acts and threats against maritime navigation committed in a manner that causes or is likely to cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. The prohibited acts include (i) the use against or on a ship, or discharge from a ship, of any explosive or radioactive material, biological, chemical, or nuclear weapon or other nuclear explosive device; (ii) the discharge from a ship of oil, liquefied natural gas, or other hazardous or noxious substance; (iii) any use of a ship that causes death or serious injury or damage; and (iv) the transportation aboard a ship of any explosive or radioactive material. Section 2280a also prohibits the transportation on board a ship of any biological, chemical or nuclear weapon or other nuclear explosive device, and any components, delivery means, or materials for a nuclear weapon or other nuclear explosive device, under specified circumstances, but this conduct does not contain a mens rea requirement. Further, section 2280a prohibits the transportation onboard a ship of a person who committed an offense under section 2280 or 2280a, with the intent of assisting that person evade criminal prosecution. The penalties for violations of section 2280a are a fine, imprisonment for no more than 20 years, or both, or, if the death of a person results, imprisonment for any term of years or life. Section 2280a also prohibits threats to commit the offenses not related to transportation on board a ship and provides a penalty of imprisonment of up to five years.

Part A of the proposed amendment addresses these new offenses at section 2280a by referencing them in Appendix A (Statutory Index) to the following Chapter Two guidelines: §§2A1.1 (First Degree Murder); 2A1.2 (Second Degree Murder); 2A1.3 (Voluntary Manslaughter); 2A1.4 (Involuntary Manslaughter); 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder); 2A2.2 (Aggravated Assault), 2A2.3 (Assault); 2A6.1 (Threatening or Harassing Communications); 2B1.1 (Fraud); 2B3.2 (Extortion); 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials); 2K1.4 (Arson); 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License); 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose); 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction); 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants); 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides); 2X1.1 (Conspiracy); 2X2.1 (Aiding and Abetting); and 2X3.1 (Accessory After the Fact).

The USA FREEDOM Act also created a new criminal offense at 18 U.S.C. § 2281a (Additional offenses against maritime fixed platforms) to prohibit certain maritime terrorism acts that occur either on a fixed

platform or to a fixed platform committed in a manner that may cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. Section 2281a prohibits specific conduct, including (i) the use against or discharge from a fixed platform, of any explosive or radioactive material, or biological, chemical, or nuclear weapon and (ii) the discharge from a fixed platform of oil, liquefied natural gas, or another hazardous or noxious substance. The penalties for violations of section 2281a are a fine, imprisonment for no more than 20 years, or both, or, if the death of a person results, imprisonment for any term of years or life. Section 2281a also prohibits threats to commit the offenses related to acts on or against fixed platforms and provides a penalty of imprisonment of up to five years.

Part A of the proposed amendment amends Appendix A (Statutory Index) so the new offenses at 18 U.S.C. § 2281a are referenced to §§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.4, 2M6.1, 2Q1.1, 2Q1.2, and 2X1.1.

In addition, the USA FREEDOM Act created a new criminal offense at 18 U.S.C. § 2332i that prohibits (i) the possession or production of radioactive material or a device with the intent to cause death or serious bodily injury or to cause substantial damage to property or the environment; and (ii) the use of a radioactive material or a device, or the use, damage, or interference with the operation of a nuclear facility that causes the release of radioactive material, radioactive contamination, or exposure to radiation with the intent (or knowledge that such act is likely) to cause death or serious bodily injury or substantial damage to property or the environment, or with the intent to compel a person, international organization or country to do or refrain from doing an act. Section 2332i also prohibits threats to commit any such acts. The penalties for violations of section 2332i are a fine for not more than \$2,000,000 and imprisonment for any term of years or life.

Part A of the proposed amendment amends Appendix A (Statutory Index) to reference the new offenses at 18 U.S.C. § 2332i to §§2A6.1, 2K1.4, 2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities), 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities), and 2M6.1.

Finally, Part A makes clerical changes to Application Note 1 to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction) to reflect the redesignation of a section in the United States Code by the USA FREEDOM Act.

Part A of the proposed amendment also sets forth two issues for comment.

B. Bipartisan Budget Act of 2015

Part B of the proposed amendment responds to the Bipartisan Budget Act of 2015, Pub. L. No. 114–74 (Nov. 2, 2015), which, among other things, amended three existing criminal statutes concerned with fraudulent claims under certain Social Security programs.

The three criminal statutes amended by the Bipartisan Budget Act of 2015 are sections 208 (Penalties [for fraud involving the Federal Old-Age and Survivors Insurance Trust Fund]), 811 (Penalties for fraud [involving special benefits for certain World War II veterans]), and 1632 (Penalties for fraud [involving supplemental security income for the aged, blind, and disabled]) of the Social Security Act (42 U.S.C. §§ 408, 1011, and 1383a, respectively). The three amended statutes are currently referenced in Appendix A (Statutory Index) of the Guidelines Manual to §2B1.1 (Theft, Property Destruction, and Fraud). The Act added new subdivisions criminalizing conspiracy to commit fraud for selected offense conduct already in the three statutes. For each of the three statutes, the new subdivision provides that whoever

“conspires to commit any offense described in any of [the] paragraphs” enumerated shall be imprisoned for not more than five years, the same statutory maximum penalty applicable to the substantive offense.

Part B amends Appendix A (Statutory Index) so that sections 408, 1011, and 1383a of Title 42 are referenced not only to §2B1.1 but also to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)).

Part B of the proposed amendment also includes issues for comment.

C. 18 U.S.C. § 1715 (Firearms as Nonmailable Items)

Section 1715 of title 18, United States Code (Firearms as nonmailable items), makes it unlawful to deposit for mailing or delivery by the mails pistols, revolvers, and other firearms capable of being concealed on the person and declared nonmailable (as prescribed by Postal Service regulations). For any violation of section 1715, the statutory maximum term of imprisonment is two years. The current Guidelines Manual does not provide a guideline reference in Appendix A for offenses under section 1715.

The Department of Justice in its annual letter to the Commission has proposed that section 1715 offenses should be assigned a guideline reference, base offense level, and appropriate specific offense characteristics. The Department indicates that in recent years the United States Attorney’s Office for the Virgin Islands has brought several cases charging section 1715, where firearms were illegally brought onto the islands by simply mailing them from mainland United States.

Part C of the proposed amendment amends Appendix A (Statutory Index) to reference offenses under section 1715 to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). It also adds 18 U.S.C. § 1715 to subsection (a)(8) of §2K2.1, establishing a base offense level of 6 for such offenses.

Part C of the proposed amendment also includes an issue for comment regarding section 1715 offenses and whether other changes to the guidelines are appropriate to address these offenses.

D. Technical Amendment to §2T1.6

The Internal Revenue Code (Title 26, United States Code) requires employers to withhold from their employees’ paychecks money representing the employees’ personal income and Social Security taxes. The Code directs the employer to collect taxes as wages are paid, but only requires a periodic payment of such taxes to the IRS. If an employer willfully fails to collect, truthfully account for, or pay over such taxes, 26 U.S.C. § 7202 provides both civil and criminal remedies. Section 7202 provides as criminal penalty a term of imprisonment with a statutory maximum of five years.

Section 7202 is referenced in Appendix A (Statutory Index) to §2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax). The Background commentary to §2T1.6 states that “[t]he offense is a felony that is infrequently prosecuted.” The Department of Justice in its annual letter to the Commission has proposed that the “infrequently prosecuted” statement should be deleted. The Department points out that while that statement may have been accurate when the relevant commentary was originally written (in 1987), the number of prosecutions under section 7202 have since increased substantially. The use of §2T1.6 increased from three cases in 2002 to 46 cases in 2014. See United States Sentencing Commission, Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based (Fiscal Year 2002), at <http://www.ussc.gov/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/guideline-application-frequencies-2002>; United States Sentencing Commission, Use of Guidelines and Specific Offense Characteristics: Guideline Calculation

Based (Fiscal Year 2014), at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2014/Use_of_SOC_Guideline_Based.pdf.

Part D of the proposed amendment amends the Background Commentary to §2T6.1 to delete the sentence that states “The offense is a felony that is infrequently prosecuted.”

Proposed Amendment:

(A) USA FREEDOM Act of 2015

§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

* * *

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

“Nuclear byproduct material” has the meaning given that term in 18 U.S.C. § 831~~(f)~~(g)(2).

“Nuclear material” has the meaning given that term in 18 U.S.C. § 831~~(f)~~(g)(1).

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APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 2280 2A1.1, 2A1.2, 2A1.3,
 2A1.4, 2A2.1, 2A2.2,
 2A2.3, 2A4.1, 2A6.1,
 2B1.1, 2B3.1, 2B3.2,
 2K1.4, 2X1.1

18 U.S.C. § 2280a 2A1.1, 2A1.2, 2A1.3,
 2A1.4, 2A2.1, 2A2.2,
 2A2.3, 2A6.1, 2B1.1,
 2B3.2, 2K1.3, 2K1.4,
 2M5.2, 2M5.3, 2M6.1,
 2Q1.1, 2Q1.2, 2X1.1,
 2X2.1, 2X3.1

18 U.S.C. § 2281 2A1.1, 2A1.2, 2A1.3,

2A1.4, 2A2.1, 2A2.2,
2A2.3, 2A4.1, 2B1.1,
2B3.1, 2B3.2, 2K1.4,
2X1.1

18 U.S.C. § 2281a 2A1.1, 2A1.2, 2A1.3,
2A1.4, 2A2.1, 2A2.2,
2A2.3, 2A6.1, 2B1.1,
2B3.2, 2K1.4, 2M6.1,
2Q1.1, 2Q1.2, 2X1.1

18 U.S.C. § 2282A 2A1.1, 2A1.2, 2B1.1,
2K1.4, 2X1.1

* * *

18 U.S.C. § 2332h 2M6.1

18 U.S.C. § 2332i 2A6.1, 2K1.4, 2M2.1,
2M2.3, 2M6.1

18 U.S.C. § 2339 2M5.3, 2X2.1, 2X3.1

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Issues for Comment:

1. *The USA FREEDOM Act was enacted as a reauthorization of the USA PATRIOT Act, Pub. L. 107–56 (October 26, 2001), relating to the collection of telephone metadata by various national security agencies. Title VII of the Act also amended four existing criminal statutes and created three new criminal statutes to implement certain provisions in international conventions relating to maritime and nuclear terrorism. One of the existing criminal statutes amended by the USA FREEDOM Act was 18 U.S.C. § 2280. Although the Act did not amend the substantive offense conduct in section 2280, it added 19 new definitions and terms to the statute and made them applicable to other criminal statutes, including the new offenses created by the Act.*

The Commission seeks comment on whether the guidelines should be amended to address the changes made by the USA FREEDOM Act. Are the existing provisions in the guidelines adequate to address the changes to existing criminal statutes and the new offenses created by the Act? If not, how should the Commission amend the guidelines to address them?

2. *The proposed amendment would reference the offenses under 18 U.S.C. § 2280a, 18 U.S.C. § 2281a, and 18 U.S.C. § 2332i to various guidelines. The Commission invites comment on offenses under these new statutes, including in particular the conduct involved in such offenses and the nature and seriousness of the harms posed by such offenses. Do the guidelines covered by the proposed amendment adequately account for these offenses? If not, what revisions to the guidelines would be appropriate to account for these offenses? In particular, should the Commission provide one or more new alternative base offense levels, specific offense characteristics, or departure provisions in one or more of these guidelines to better account for these offenses? If so, what should the Commission provide?*

In addition, the Commission seeks comment on whether the Commission should reference these new offenses to other guidelines instead of, or in addition to, the guidelines covered by the proposed amendment. Alternatively, should the Commission defer action in response to these new offenses this amendment cycle, undertake a broader review of the guidelines pertaining to offenses involving terrorism and weapons of mass destruction, and include responding to the new offenses as part of that broader review?

(B) Bipartisan Budget Act of 2015

APPENDIX A - STATUTORY INDEX

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|------------------------|--------------|
| 42 U.S.C. § 300h-2 | 2Q1.2 |
| 42 U.S.C. § 300i-1 | 2Q1.4 |
| 42 U.S.C. § 408 | 2B1.1, 2X1.1 |
| 42 U.S.C. § 1011 | 2B1.1, 2X1.1 |
| 42 U.S.C. § 1307(a) | 2B1.1 |
| 42 U.S.C. § 1307(b) | 2B1.1 |
| 42 U.S.C. § 1320a-7b | 2B1.1, 2B4.1 |
| 42 U.S.C. § 1320a-8b | 2X5.1, 2X5.2 |
| 42 U.S.C. § 1383(d)(2) | 2B1.1 |
| 42 U.S.C. § 1383a(a) | 2B1.1, 2X1.1 |
| 42 U.S.C. § 1383a(b) | 2B1.1 |

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Issues for Comment:

1. *Part B of the proposed amendment would reference the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)). The Commission invites comment on whether the guidelines covered by the proposed amendment adequately account for these offenses. If not, what revisions to the guidelines would be appropriate to account for these offenses?*
2. *In addition to the amendments to the criminal statutes described above, the Bipartisan Budget Act of 2015 also amended sections 408, 1011, and 1383a of Title 42 to add increased penalties for certain persons who commit fraud offenses under the relevant social security programs. The Act included a provision in all three statutes identifying such persons as:*

a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination

In light of this new provision, a person who meets this criteria and is convicted of a fraud offense under one of the three amended statutes may be imprisoned for not more than ten years, double the otherwise applicable five-year penalty for other offenders. The new increased penalties apply to all of the fraudulent conduct in subsection (a) of the three statutes.

The Commission seeks comment on whether the guidelines should be amended to address cases involving defendants convicted of a fraud offense under one of the three amended statutes and who meet this new criteria set forth by the Bipartisan Budget Act of 2015. Are the existing provisions in the guidelines, such as the provisions at §2B1.1 and the Chapter Three adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill), adequate to address these cases? If not, how should the Commission amend the guidelines to address them?

(C) 18 U.S.C. § 1715 (Firearms as Non-mailable Items)

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

- (a) Base Offense Level (Apply the Greatest):
 - (1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
 - (2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
 - (3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;
 - (4) **20**, if—
 - (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or
 - (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26

U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

- (5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a);
- (6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;
- (7) **12**, except as provided below; or
- (8) **6**, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or § 1715.

(b) Specific Offense Characteristics

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

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

- (2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level **6**.
- (3) If the offense involved—
 - (A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by **15** levels; or
 - (B) a destructive device other than a destructive device referred to in subdivision (A), increase by **2** levels.
- (4) If any firearm (A) was stolen, increase by **2** levels; or (B) had an altered or obliterated serial number, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

- (5) If the defendant engaged in the trafficking of firearms, increase by **4** levels.
- (6) If the defendant—
 - (A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or
 - (B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.

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

(c) Cross Reference

- (1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—
 - (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or
 - (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(i), (k)-(o), 1715, 2332g; 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. Definitions.— For purposes of this guideline:

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

“Controlled substance offense” has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

“Crime of violence” has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

“Destructive device” has the meaning given that term in 26 U.S.C. § 5845(f).

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

“Firearm” has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.—For purposes of subsections (a)(1), (a)(3), and (a)(4), a “semiautomatic firearm that is capable of accepting a large capacity magazine” means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.
3. Definition of “Prohibited Person.”—For purposes of subsections (a)(4)(B) and (a)(6), “prohibited person” means any person described in 18 U.S.C. § 922(g) or § 922(n).
4. Application of Subsection (a)(7).— Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.
5. Application of Subsection (b)(1).—For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.
6. Application of Subsection (b)(2).—Under subsection (b)(2), “lawful sporting purposes or collection” as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant’s criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1) - (a)(5), subsection (b)(2) is not applicable.

7. Destructive Devices.—A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. See also §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).

8. Application of Subsection (b)(4).—

(A) Interaction with Subsection (a)(7).—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, if the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).

(B) Knowledge or Reason to Believe.—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

9. Application of Subsection (b)(7).— Under subsection (b)(7), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).
10. Prior Felony Convictions.—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

11. Upward Departure Provisions.—An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (*e.g.*, machineguns, destructive devices), military type assault rifles, non-detectable (“plastic”) firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (*see* Application Note 7).
12. Armed Career Criminal.—A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. *See* §4B1.4.
13. Application of Subsection (b)(5).—
 - (A) In General.—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—
 - (i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and
 - (ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—
 - (I) whose possession or receipt of the firearm would be unlawful; or
 - (II) who intended to use or dispose of the firearm unlawfully.
 - (B) Definitions.—For purposes of this subsection:

“Individual whose possession or receipt of the firearm would be unlawful” means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. “Crime of violence” and “controlled substance offense” have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). “Misdemeanor crime of domestic violence” has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term “defendant”, consistent with §1B1.3 (Relevant Conduct), 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.
 - (C) Upward Departure Provision.—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.
 - (D) Interaction with Other Subsections.—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or

transferred one of such firearms in connection with another felony offense (*i.e.*, an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.

14. Application of Subsections (b)(6)(B) and (c)(1).—

- (A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.
- (B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.
- (C) Definitions.—
- “Another felony offense”, for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.
- “Another offense”, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.
- (D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.
- (E) Relationship Between the Instant Offense and the Other Offense.—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See §1B1.3(a)(1)–(4) and accompanying commentary.

In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.

For example:

- (i) Firearm Cited in the Offense of Conviction. Defendant A’s offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.

Ordinarily, the unlawful possession of the shotgun on February 10 will be “part of the same course of conduct or common scheme or plan” as the unlawful possession of the same shotgun on October 15. *See* §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3). The use of the shotgun “in connection with” the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). *See* §1B1.3(a)(4) (“any other information specified in the applicable guideline”).

- (ii) Firearm Not Cited in the Offense of Conviction. Defendant B’s offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were “part of the same course of conduct or common scheme or plan”. *See* §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3).

If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun “in connection with” the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). *See* §1B1.3(a)(4) (“any other information specified in the applicable guideline”). Accordingly, subsection (b)(6)(B) applies.

On the other hand, if the court determines that the two unlawful possession offenses were not “part of the same course of conduct or common scheme or plan,” then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.

Subsection (c)(1). Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.

- 15. Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A).—In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) 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, and (C) the defendant received no monetary compensation from the offense.

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APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 1716C 2B1.1

* * *

Issue for Comment:

1. *Part C of the proposed amendment would reference offenses under 18 U.S.C. § 1715 to §2K2.1. The Commission invites comment on offenses under section 1715, including in particular the conduct involved in such offenses and the nature and seriousness of the harms posed by such offenses. What guideline or guidelines are appropriate for these offenses? Does §2K2.1 adequately account for these offenses? To the extent the Commission does provide a reference to one or more guidelines, what revisions, if any, to those guidelines would be appropriate to account for offenses under section 1715?*

(D) Technical Amendment to §2T1.6

§2T1.6. Failing to Collect or Truthfully Account for and Pay Over Tax

- (a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax not collected or accounted for and paid over.
- (b) Cross Reference
 - (1) Where the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it, apply §2B1.1 (Theft, Property Destruction, and Fraud) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 26 U.S.C. § 7202.

Application Note:

1. *In the event that the employer not only failed to account to the Internal Revenue Service and pay over the tax, but also collected the tax from employees and did not account to them for it, it is both tax evasion and a form of embezzlement. Subsection (b)(1) addresses such cases.*

Background: ~~The offense is a felony that is infrequently prosecuted.~~ *The failure to collect or truthfully account for the tax must be willful, as must the failure to pay. Where no effort is made to defraud the employee, the offense is a form of tax evasion, and is treated as such in the guidelines.*

* * *

PROPOSED AMENDMENT: COMPASSIONATE RELEASE

In August 2015, the Commission indicated that one of its policy priorities would be “possible consideration of amending the policy statement pertaining to ‘compassionate release,’ §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).” See United States Sentencing Commission, “Notice of Final Priorities,” 80 Fed. Reg. 48957 (Aug. 14, 2015). The Commission is publishing this proposed amendment to inform the Commission’s consideration of the issues related to this policy priority.

The proposed amendment contains two parts. Part A sets forth a detailed request for comment on whether any changes should be made to the Commission’s policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). Part B illustrates one possible set of changes to the policy statement at §1B1.13.

(A) Request for Public Comment on Whether Any Changes Should Be Made to the Commission’s Policy Statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons)

Issue for Comment:

1. *Statutory Provisions Related to Compassionate Release.* Section 3582(c)(1)(A) of title 18, United States Code, authorizes a federal court, upon motion of the Director of the Bureau of Prisons, to reduce the term of imprisonment of a defendant in certain circumstances, *i.e.*, if “extraordinary and compelling reasons” warrant such a reduction or the defendant is at least 70 years of age and meets certain other criteria. Such a reduction must be consistent with applicable policy statements issued by the Sentencing Commission. *See* 18 U.S.C. § 3582(c)(1); *see also* 28 U.S.C. § 994(t) (stating that the Commission, in promulgating any such policy statements, “shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples”).

Policy Statement at §1B1.13. The Commission’s policy statement, §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), provides that “extraordinary and compelling reasons” exist if (1) the defendant is suffering from a terminal illness; (2) the defendant is suffering from certain permanent physical or medical conditions, or experiencing deteriorating physical or mental health because of the aging process; or (3) the defendant has a minor child and the defendant’s only family member capable of caring for the child has died or is incapacitated. *See* §1B1.13, comment. (n.1(A)(i)–(iii)). In addition, the policy statement provides that extraordinary and compelling reasons exist if, as determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described above. *See* §1B1.13, comment. (n.1(A)(iv)). The policy statement was last amended in 2007 to provide the current criteria to be applied and a list of the specific circumstances which constitute “extraordinary and compelling reasons” for compassionate release consideration.

Bureau of Prisons Program Statement on Compassionate Release. On August 12, 2013, the Bureau of Prisons issued a new program statement, 5050.49, that changes how the Bureau implements section 3582(c)(1)(A). Among other things, the new program statement expands and details the range of circumstances that the Bureau may consider “extraordinary and compelling reasons” warranting such a reduction. Under the program statement, a sentence reduction may be based on the defendant’s medical circumstances (*e.g.*, a terminal or debilitating medical condition; *see* 5050.49(3)(a)–(b)) or on certain non-medical circumstances (*e.g.*, an elderly defendant, the death

or incapacitation of the family member caregiver, or the incapacitation of the defendant's spouse or registered partner; see 5050.49(4),(5),(6)).

Report of the Department of Justice's Office of the Inspector General. In May 2015, the Department of Justice's Office of the Inspector General (OIG) released a report on the Bureau of Prisons' implementation of the compassionate release program provisions related to elderly inmates. See U.S. Department of Justice, Office of the Inspector General, *The Impact of the Aging Inmate Population on the Federal Bureau of Prisons, E-15-05* (May 2015), available at <https://oig.justice.gov/reports/2015/e1505.pdf>. The report found that while aging inmates (age 50 years or older) make up a disproportionate share of the inmate population, are more costly to incarcerate (primarily due to medical needs), engage in less misconduct while in prison, and have a lower rate of re-arrest once released than their younger counterparts, "BOP policies limit the number of aging inmates who can be considered for early release and, as a result, few are actually released early." In addition, the report found that the eligibility requirements for both medical and non-medical provisions as applied to inmates 65 years or older are "unclear" and "confusing."

In light of its review, the OIG recommended that the Bureau of Prisons should consider revising its compassionate release program to facilitate the release of appropriate elderly inmates. The report provided the following specific recommendations, among others: (1) revising the inmate age provisions to define an aging inmate as age 50 or above; and (2) revising the time-served provision for those inmates 65 and older without medical conditions to remove the requirement that they serve 10 years, and require only that they serve 75 percent of their sentence. In April 2015, the Bureau of Prisons responded to a draft of the OIG report and concurred with each of the recommendations made by the OIG.

Issue for Comment. The Commission seeks comment whether any changes should be made to the Commission's policy statement at §1B1.13 (*Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons*). Should the Commission amend the current policy statement describing what constitutes "extraordinary and compelling reasons" and, if so, how?

Should the list of extraordinary and compelling reasons in the Guidelines Manual closely track the criteria set forth by the Bureau of Prisons in its program statement? Should the Commission develop further criteria and examples of what circumstances constitute "extraordinary and compelling reasons"? If so, what specific criteria and examples should the Commission provide? Should the Commission further define and expand the medical and non-medical criteria provided in the Bureau's program statement?

In addition, the Commission seeks comment on how, if at all, the policy statement at §1B1.13 should be revised to address the recommendations in the OIG report. Should the Commission adopt the recommendations in the OIG report as part of its revision of the policy statement at §1B1.13? Should the Commission expand upon these recommendations to revise the Bureau's requirements that limit the availability of compassionate release for aging inmates? Alternatively, should the Commission defer action on this issue during this amendment cycle to consider any possible changes that the Bureau of Prisons might promulgate to its compassionate release program statement in response to the OIG report?

Finally, the Commission adopted the policy statement at §1B1.13 to implement the directive in 28 U.S.C. § 994(t). As noted above, the directive requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." The Commission also has authority to promulgate general policy statements regarding application of the guidelines or other aspects of sentencing

that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including, among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). See 28 U.S.C. § 994(a)(2)(C). Under this general authority, should the Commission further develop the policy statement at §1B1.13 to provide additional guidance or limitations regarding the circumstance in which sentences may be reduced as a result of a motion by the Director of the Bureau of Prisons? If so, what should the specific guidance or limitations be? For example, should the Commission provide that the Director of the Bureau of Prisons should not withhold a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as “extraordinary and compelling reasons” in §1B1.13?

(B) Proposed Amendment

***Synopsis of Proposed Amendment:** This part of the proposed amendment illustrates one possible set of changes to the Commission’s policy statement at §1B1.13. The proposed amendment would revise the list of “extraordinary and compelling reasons” for compassionate release consideration in the Commentary to §1B1.13 to reflect the criteria set forth in the Bureau of Prisons’ program statement. The language used in this part parallels the language in the Bureau’s program statement.*

Proposed Amendment:

§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement)

Upon motion of the Director of the Bureau of Prisons under 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.

Commentary

Application Notes:

1. Application of Subdivision (1)(A).—

- (A) Extraordinary and Compelling Reasons.—*Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the following circumstances set forth below:*

- ~~(i) The defendant is suffering from a terminal illness.~~
- ~~(ii) The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.~~
- ~~(iii) The death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children.~~

(i) The defendant (I) has been diagnosed with a terminal, incurable disease; and (II) has a life expectancy of 18 months or less.

(ii) The defendant has an incurable, progressive illness.

(iii) The defendant has suffered a debilitating injury from which he or she will not recover.

(iv) The defendant meets the following criteria—

- (I) the defendant is at least 65 years old;
- (II) the defendant has served at least 50 percent of his or her sentence;
- (III) the defendant suffers from a chronic or serious medical condition related to the aging process;
- (IV) the defendant is experiencing deteriorating mental or physical health that substantially diminishes his or her ability to function in a correctional facility; and
- (V) conventional treatment promises no substantial improvement to the defendant's mental health or physical condition.

(v) The defendant (I) is at least 65 years old; and (II) has served at least 10 years or 75 percent of his or her sentence, whichever is greater.

(vi) The death or incapacitation of the family member caregiver of the defendant's child.

[“Incapacitation” means the family member caregiver suffered a severe injury or suffers from a severe illness that renders the caregiver incapable of caring for the child.
“Child” means an individual who had not attained the age of 18 years.]

(vii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

[“Incapacitation” means the spouse or registered partner (I) has suffered a serious injury or suffers from a debilitating physical illness and the result of the injury or illness is that the spouse or registered partner is completely disabled, meaning that the spouse or registered partner cannot carry on any self-care and is totally confined to a bed or chair; or (II) has a severe cognitive deficit, caused by an illness or injury, that has severely affected the spouse's or registered partner's mental capacity or function but may not be confined to a bed or chair. “Spouse” means an individual in a relationship with the defendant, where that relationship has been legally recognized as a marriage, including a legally-recognized common-law marriage. “Registered partner” means an individual in relationship with the defendant, where the relationship has been legally recognized as a civil union or registered domestic partnership.]

~~(iv)~~^{viii} As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), ~~(ii), and (iii)~~ through (vii).

(B) Rehabilitation of the Defendant.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A).

2. Application of Subdivision (3).—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

Background: This policy statement implements 28 U.S.C. § 994(t).

PROPOSED AMENDMENT: CONDITIONS OF PROBATION AND SUPERVISED RELEASE

Synopsis of Proposed Amendment: *This proposed amendment revises, clarifies, and rearranges the conditions of probation and supervised release. It is a result of the Commission’s multi-year review of federal sentencing practices relating to conditions of probation and supervised release. See United States Sentencing Commission, “Notice of Final Priorities,” 80 Fed. Reg. 48957 (Aug. 14, 2015). It is also informed by a series of opinions issued by the Seventh Circuit in recent years.*

Specifically, the Seventh Circuit has found several of the standard conditions to be unduly vague, overbroad, or inappropriately applied. See, e.g., United States v. Adkins, 743 F.3d 176 (7th Cir. 2014); United States v. Goodwin, 717 F.3d 511 (7th Cir. 2013); United States v. Quinn, 698 F.3d 651 (7th Cir. 2012); United States v. Siegel, 753 F.3d 705 (7th Cir. 2014). The Seventh Circuit has also suggested that the language of the conditions be revised to be more comprehensible to defendants and probation officers, and to contain a stated mens rea requirement where one was lacking. United States v. Kappes, 782 F.3d 828, 848 (7th Cir. 2015) (“We have suggested that sentencing judges define the crucial terms in a condition in a way that provides clear notice to the defendant (preferably through objective rather than subjective terms), and/or includes a mens rea requirement (such as intentional conduct). We have further suggested that the judge make sure that each condition imposed is simply worded, bearing in mind that, with rare exceptions, neither the defendant nor the probation officer is a lawyer and that when released from prison the defendant will not have a lawyer to consult.” (quotation and alteration marks omitted)).

The Statutory and Guidelines Framework

When imposing a sentence of probation, the court is required to impose certain conditions of probation listed by statute. See 18 U.S.C. § 3563(a). In addition, the court has discretion to impose additional conditions of probation “to the extent that such conditions are reasonably related to the factors set forth in sections 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2).” See 18 U.S.C. § 3563(b). Similarly, when imposing a sentence of supervised release, the court is required to impose certain conditions of supervised release listed by statute, and the court has discretion to impose additional conditions of supervised release, to the extent that the additional condition “is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)” and “involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D).” See 18 U.S.C. § 3583(d). The additional condition of supervised release must also be consistent with any pertinent policy statements issued by the Sentencing Commission. See 18 U.S.C. § 3583(d)(3).

In addition, the court is required to direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which he or she is subject, which must be “sufficiently clear and specific to serve as a guide for the defendant’s conduct and for such supervision as is required.” See 18 U.S.C. §§ 3563(d), 3583(f). The Judgment in a Criminal Case Form, AO 245B, sets forth a series of mandatory and “standard” conditions in standardized form and provides space for the court to impose additional “standard” and “special” conditions devised by the court.

The Commission is directed by its organic statute to promulgate policy statements on the appropriate use of the conditions of probation and supervised release. See 28 U.S.C. § 994(a)(2)(B). Sections 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) implement this directive. Subsections (a) and (b) of §5B1.3 set forth the conditions of probation that are required by statute. Subsections (c), (d), and (e) of §5B1.3 provide guidance on discretionary conditions of probation, which are categorized as “standard” conditions, “special” conditions, and “additional” special conditions, respectively. Subsections (a) through (e) of §5D1.3 follow the same structure in setting forth the

mandatory conditions of supervised release and providing guidance on discretionary conditions of supervised release.

The Proposed Changes to §§5B1.3 and 5D1.3

The changes made by the proposed amendment would revise, clarify, and rearrange the provisions in the Guidelines Manual on conditions of probation and supervised release. These changes would not necessarily affect the conditions of probation and supervised release as set forth in the Judgment in a Criminal Case Form, AO 245B. However, in light of the responsibilities of the Judicial Conference of the United States and the Administrative Office of the United States Courts in this area, the Commission works with the Criminal Law Committee and the Probation and Pretrial Services Office on these issues and anticipates that the Commission's work on this proposed amendment may inform their consideration of possible changes to the judgment form.

In general, the changes are intended to make the conditions more focused and precise as well as easier for defendants to understand and probation officers to enforce. For some conditions that do not have a mens rea standard, a "knowing" standard is inserted.

First, the proposed amendment amends the "mandatory" conditions set forth in subsection (a) of §§5B1.3 and 5D1.3. It inserts new language directing that, if there is a court-established payment schedule for making restitution or paying a special assessment, the defendant shall adhere to the schedule. See 18 U.S.C. § 3572(d). This new language is similar to paragraph (14) of the "standard" conditions; accordingly, paragraph (14) of the "standard" conditions is deleted, as described below.

Second, the proposed amendment amends the "standard" conditions set forth in subsection (c) of §§5B1.3 and 5D1.3. Paragraphs (1)-(3), (5)-(6), and (9)-(13) are revised, clarified, and rearranged into a new set of paragraphs (1) through (12). A new paragraph (13) is added, which provides that the defendant "must follow the instructions of the probation officer related to the conditions of supervision."

Several provisions are moved from the "standard" conditions list to the "special" conditions list, or vice versa. Specifically, paragraph (1) of the "special" conditions list (relating to possession of a firearm or dangerous weapon) is moved to the "standard" conditions list. Paragraphs (4) and (7) of the "standard" conditions list (relating to support of dependents and child support, and alcohol use, respectively) are moved to the "special" conditions list. In addition, as mentioned above, paragraph (14) on the "standard" conditions list (relating to payment of special assessment) is incorporated into the "mandatory" conditions list. Finally, paragraph (8) of the "standard" conditions list (relating to frequenting places where controlled substances are trafficked) is deleted.

Third, the proposed amendment adds two new provisions to the "special" conditions set forth in subsection (d) of §§5B1.3 and 5D1.3. The first new provision, based on paragraph (7) of the "standard" conditions, would specify that the defendant must not use or possess alcohol. The second new provision, based on paragraph (4) of the "standard" conditions, would specify that, if the defendant has one or more dependents, the defendant must support his or her dependents; and if the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child, the defendant must make the payments and comply with the other terms of the order.

Issues for comment are also included.

Proposed Amendment:

§5B1.3. Conditions of Probation

(a) Mandatory Conditions—

- (1) for any offense, the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3563(a));
- (2) for a felony, the defendant shall (A) make restitution, (B) work in community service, or (C) both, unless the court has imposed a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the discretionary conditions set forth under 18 U.S.C. § 3563(b) (see 18 U.S.C. § 3563(a)(2));
- (3) for any offense, the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3563(a));
- (4) for a domestic violence crime as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a public, private, or non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3563(a));
- (5) for any offense, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3563(a));
- (6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule;
- (7) the defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments (see 18 U.S.C. § 3563(a));
- (8) if the court has imposed a fine, the defendant shall pay the fine or adhere to a court-established payment schedule (see 18 U.S.C. § 3563(a));
- (9) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105-119, § 115(a)(8), Nov. 26, 1997) shall report the address where the

defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;

(10) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

(b) Discretionary Conditions ~~The~~

The court may impose other conditions of probation to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (C) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (D) the need to protect the public from further crimes of the defendant; and (E) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve only such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a) (see 18 U.S.C. § 3563(b)).

(c) “Standard” Conditions (Policy Statement) ~~The~~

The following “standard” conditions are recommended for probation. Several of the conditions are expansions of the conditions required by statute:

[The proposed amendment would revise and rearrange subdivisions (1) through (14). To aid the reader in comparing the current language and the revised language, this reader-friendly version of the proposed amendment shows how each subdivision would be revised, and shows the revised subdivisions in the order in which they would appear after revision and rearrangement.]

~~(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;~~

(1) The defendant must report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of the time the defendant was sentenced, unless the probation officer tells the defendant to report to a different probation office or within a different time frame.

- (2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant must report to the probation officer as instructed.
- ~~(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;~~
- (3) The defendant must not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
- ~~(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;~~
- (4) The defendant must [answer truthfully][be truthful when responding to] the questions asked by the probation officer.
- ~~(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;~~
- (5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- ~~(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;~~
- (6) The defendant must allow the probation officer to visit the defendant at his or her home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
- ~~(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;~~
- ~~(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;~~
- (7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the

probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

- ~~(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;~~
- (8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- ~~(11) the defendant shall notify the probation officer within seventy two hours of being arrested or questioned by a law enforcement officer;~~
- (9) If the defendant is arrested or has any official contact with a law enforcement officer, the defendant must notify the probation officer within 72 hours.
- (10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
- ~~(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;~~
- (11) The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- ~~(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;~~
- (12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to tell the person about the risk and the defendant must comply with that instruction. The probation officer may contact the person and confirm that the defendant has told the person about the risk.
- (13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.
- ~~(4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);~~

- ~~(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;~~
- ~~(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;~~
- ~~(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.~~

(d) **“Special” Conditions** (Policy Statement) ~~The~~

The following “special” conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) Possession of Weapons

~~If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense — a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.~~

(1) Support of Dependents

If the defendant —

(A) has one or more dependents — a condition specifying that the defendant must support his or her dependents; and

(B) is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant must make the payments and comply with the other terms of the order.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse ~~Program Participation~~

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant must not use or possess alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release)—

- (A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.
- (B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.
- (C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Additional Conditions (Policy Statement)

The following “special conditions” may be appropriate on a case-by-case basis:

(1) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation. See §5F1.1 (Community Confinement).

(2) Home Detention

Home detention may be imposed as a condition of probation but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of probation. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of probation. See §5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. See §5F1.8 (Intermittent Confinement).

Commentary

Application Note:

1. *Application of Subsection (a)(9)(A) and (B).*—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(9)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(9)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)

* * *

§5D1.3. Conditions of Supervised Release

- (a) Mandatory Conditions—

- (1) the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3583(d));
- (2) the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3583(d));
- (3) the defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3583(d));
- (4) the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3583(d));
- (5) if a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (see 18 U.S.C. § 3624(e));
- (6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule;
- (7) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105-119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;

(8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

(b) Discretionary Conditions ~~The~~

~~The~~ court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

(c) “Standard” Conditions (Policy Statement) ~~The~~

~~The~~ following “standard” conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

[The proposed amendment would revise and rearrange subdivisions (1) through (14). To aid the reader in comparing the current language and the revised language, this reader-friendly version of the proposed amendment shows how each subdivision would be revised, and shows the revised subdivisions in the order in which they would appear after revision and rearrangement.]

~~(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;~~

(1) The defendant must report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer tells the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant must report to the probation officer as instructed.

~~(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;~~

(3) The defendant must not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

~~(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;~~

- (4) The defendant must [answer truthfully][be truthful when responding to] the questions asked by the probation officer.
- ~~(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;~~
- (5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- ~~(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;~~
- (6) The defendant must allow the probation officer to visit the defendant at his or her home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
- ~~(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;~~
- ~~(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;~~
- (7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- ~~(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;~~
- (8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- ~~(11) the defendant shall notify the probation officer within seventy two hours of being arrested or questioned by a law enforcement officer;~~

- (9) If the defendant is arrested or has any official contact with a law enforcement officer, the defendant must notify the probation officer within 72 hours.
- (10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
- ~~(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;~~
- (11) The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- ~~(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;~~
- (12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to tell the person about the risk and the defendant must comply with that instruction. The probation officer may contact the person and confirm that the defendant has told the person about the risk.
- (13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.
- ~~(15)~~ (14) The defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.
- ~~(4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);~~
- ~~(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;~~
- ~~(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;~~
- ~~(14) the defendant shall pay the special assessment imposed or adhere to a court ordered installment schedule for the payment of the special assessment;~~

(d) “Special” Conditions (Policy Statement) ~~The~~

The following “special” conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) ~~Possession of Weapons~~

~~If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense — a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.~~

(1) Support of Dependents

If the defendant—

(A) has one or more dependents — a condition specifying that the defendant must support his or her dependents; and

(B) is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant must make the payments and comply with the other terms of the order.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse ~~Program Participation~~

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant must not use or possess alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) —

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Additional Conditions (Policy Statement)

The following “special conditions” may be appropriate on a case-by-case basis:

(1) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. See §5F1.1 (Community Confinement).

(2) Home Detention

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of supervised release. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of supervised release. See §5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See §5F1.8 (Intermittent Confinement).

Commentary

Application Note:

1. Application of Subsection (a)(7)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(7)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(7)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)

Issues for Comment:

1. The Commission seeks comment on the bracketed options in paragraph (3) of the “special” conditions, which would become (4) under the proposed amendment. Specifically, the proposed amendment brackets whether the defendant should “answer truthfully” the questions of the probation officer or, instead, should “be truthful when responding to” the questions of the probation officer. The Commission seeks comment on the policy implications and the Fifth Amendment implications of each of these bracketed options. Which option, if any, is appropriate? Should the Commission clarify that an offender’s legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer’s question shall not be considered a violation of this special condition?
2. The Commission seeks comment on the standard condition of supervised release in §5D1.3(c)(15), which states that the defendant “shall notify the probation officer of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay any unpaid

amount of restitution, fines, or special assessments.” Under the proposed amendment, this would remain a standard condition and would be redesignated as subsection (c)(14). The Commission seeks comment on whether this condition should be made a special condition rather than a standard condition.

PROPOSED AMENDMENT: ANIMAL FIGHTING

Synopsis of Proposed Amendment: *This proposed amendment revises §2E3.1 (Gambling; Animal Fighting Offenses) to provide higher penalties for animal fighting offenses and to respond to two new offenses, relating to attending an animal fighting venture, established by section 12308 of the Agricultural Act of 2014, Pub. L. 113–79 (Feb. 7, 2014).*

Animal fighting ventures are prohibited by the Animal Welfare Act, 7 U.S.C. § 2156. Under that statute, an “animal fighting venture” is an event that involves a fight between at least two animals for purposes of sport, wagering, or entertainment. See 7 U.S.C. § 2156(g)(1). Section 2156 prohibits a range of conduct relating to animal fighting ventures, including making it unlawful to knowingly—

- *sponsor or exhibit an animal in an animal fighting venture, see § 2156(a)(1);*
- *sell, buy, possess, train, transport, deliver, or receive an animal for purposes of having the animal participate in an animal fighting venture, see § 2156(b);*
- *advertise an animal (or a sharp instrument designed to be attached to the leg of a bird) for use in an animal fighting venture or promoting or in any other manner furthering an animal fighting venture, see § 2156(c); and*
- *sell, buy, transport, or deliver a sharp instrument designed to be attached to the leg of a bird for use in an animal fighting venture, see § 2156(e).*

The criminal penalties for violations of section 2156 are provided in 18 U.S.C. § 49. For any violation of section 2156 listed above, the statutory maximum term of imprisonment is 5 years. See 18 U.S.C. § 49(a).

However, two new types of animal fighting offenses were added by the Agricultural Act of 2014. They make it unlawful to knowingly—

- *attend an animal fighting venture, see § 2156(a)(2)(A); or*
- *cause an individual under 16 to attend an animal fighting venture, see § 2156(a)(2)(B).*

The statutory maximum is 3 years if the offense of conviction is causing an individual under 16 to attend an animal fighting venture, see 18 U.S.C. § 49(c), and 1 year if the offense of conviction is attending an animal fighting venture, see 18 U.S.C. § 49(b).

All offenses under section 2156 are referenced in Appendix A (Statutory Index) to §2E3.1 (Gambling Offenses; Animal Fighting Offenses). Under the penalty structure of that guideline, a defendant convicted of an animal fighting offense receives a base offense level of 12 if the offense involved gambling — specifically, if the offense was engaging in a gambling business, transmitting wagering information, or part of a commercial gambling operation — and a base offense level of 10 otherwise. The guideline contains no specific offense characteristics. There is an upward departure provision if an animal fighting offense involves exceptional cruelty.

Higher Penalties for Animal Fighting Offenses

First, the proposed amendment revises §2E3.1 to provide a base offense level of [14][16] if the offense involved an animal fighting venture.

In addition, it revises the existing upward departure provision to cover not only offenses involving exceptional cruelty but also offenses involving animal fighting on an exceptional scale.

New Offenses Relating to Attending an Animal Fighting Venture

Next, the proposed amendment responds to the two new offenses relating to attendance at an animal fighting venture. It establishes new base offense levels for such offenses. Specifically, a base offense level of [8][10] in §2E3.1 would apply if the defendant was convicted under section 2156(a)(2)(B) (causing an individual under 16 to attend an animal fighting venture). The class A misdemeanor at section 2156(a)(2)(A) (attending an animal fighting venture) would not be referenced in Appendix A (Statutory Index) to §2E3.1; it would receive a base offense level of 6 in §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

Issues for comment are also included.

Proposed Amendment:

§2E3.1. Gambling Offenses; Animal Fighting Offenses

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

- (1) [14][16], if the offense involved an animal fighting venture, except as provided in subdivision (3) below;
- (2) 12, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation; or
- (2) 10, if the offense involved an animal fighting venture; or
- (3) [8][10], if the defendant was convicted under 7 U.S.C. § 2156(a)(2)(B); or
- (3) 6, otherwise.

Commentary

Statutory Provisions: 7 U.S.C. § 2156 (felony provisions only); 15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953, 1955; 31 U.S.C. § 5363. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definition.—For purposes of this guideline: “Animal fighting venture” has the meaning given that term in 7 U.S.C. § 2156(g).
2. Upward Departure Provision.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) If the offense involved extraordinary cruelty to an animal that resulted in, for example, maiming or death to an animal, an upward departure may be warranted; or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).

* * *

APPENDIX A - STATUTORY INDEX

* * *

7 U.S.C. § 2156 (felony provisions only) 2E3.1

Issues for Comment:

1. *The Commission seeks comment on offenses involving animal fighting. How prevalent are these offenses, and do the guidelines adequately address these offenses? If not, how should the Commission revise the guidelines to provide appropriate penalties in such cases?*

What, if any, aggravating and mitigating factors are involved in these offenses that the guidelines should take into account? Should the Commission provide new departure provisions, enhancements, adjustments, or minimum offense levels to account for such aggravating or mitigating factors? If so, what should the Commission provide, and with what penalty levels?

For example, should the Commission provide an enhancement if the defendant possessed a dangerous weapon (including a firearm)? Should the Commission provide an enhancement if the defendant was in the business of breeding, selling, buying, possessing, training, transporting, delivering, or receiving animals for use in animal fighting ventures, or brokering such activities?

2. *The proposed amendment includes an upward departure provision if the offense involved animal fighting “on an exceptional scale (such as an offense involving an unusually large number of animals).” What additional guidance, if any, should the Commission provide on what constitutes animal fighting on an exceptional scale?*

Under the proposed amendment, the factors of exceptional cruelty and exceptional scale are departure provisions. Should the Commission provide enhancements, rather than departure provisions, for these factors? If so, what penalty levels should be provided?

3. *The Commission seeks comment on how the multiple count rules should operate when the defendant is convicted of multiple counts of animal fighting offenses. How, if at all, should the guideline calculation be affected by the presence of multiple counts of conviction? For example, should the Commission specify that multiple counts involving animal fighting ventures are to be grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts)? Should the Commission specify that multiple counts involving animal fighting ventures are not to be grouped together?*

PROPOSED AMENDMENT: CHILD PORNOGRAPHY CIRCUIT CONFLICTS

Synopsis of Proposed Amendment: *This proposed amendment addresses circuit conflicts and application issues that have arisen when applying the guidelines to child pornography offenses. One of the issues typically arises under both the child pornography production guideline and the child pornography distribution guideline when the offense involves victims who are unusually young and vulnerable. The other two issues typically arise when the offense involves a peer-to-peer file-sharing program or network. These issues were noted by the Commission in its 2012 report to Congress on child pornography offenses. See United States Sentencing Commission, “Report to the Congress: Federal Child Pornography Offenses” at 33-35 (2012), available at <http://www.ussc.gov/news/congressional-testimony-and-reports/sex-offense-topics/report-congress-federal-child-pornography-offenses>.*

Offenses Involving Unusually Young and Vulnerable Minors

First, the proposed amendment responds to differences among the circuits in cases in which the offense involves minors who are unusually young and vulnerable (such as infants or toddlers). The production guideline provides a 4-level enhancement if the offense involved a minor who had not attained the age of 12 years and a 2-level enhancement if the minor had not attained the age of 16 years. See §2G2.1(b)(1). A similar tiered enhancement is contained in §2G2.6 (Child Exploitation Enterprises). See §2G2.6(b)(1). The non-production guideline provides a 2-level enhancement if the material involved a prepubescent minor or a minor who had not attained the age of 12 years. See §2G2.2(b)(2).

These three guidelines do not provide a further enhancement for cases in which the victim was unusually young and vulnerable. However, the adjustment at §3A1.1(b)(1) provides a 2-level increase if the defendant knew or should have known that the victim was a “vulnerable victim,” i.e., a victim “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.” See §3A1.1, comment. (n.2). The Commentary further provides:

Do not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

See §3A1.1, comment. (n.2).

There are differences among the circuits over whether the vulnerable victim adjustment applies when the victim is extremely young, such as an infant or toddler. The Ninth Circuit has indicated that the under-12 enhancement “does not take especially vulnerable stages of childhood into account” and that, “[t]hrough the characteristics of being an infant or toddler tend to correlate with age, they can exist independently of age, and are not the same thing as merely not having ‘attained the age of twelve years.’” United States v. Wright, 373 F.3d 935, 943 (9th Cir. 2004). Accordingly, it held, a vulnerable victim adjustment may be applied based on extreme youth and small physical size, such as when the victim is in the infant or toddler stage. Id. Similarly, the Fifth Circuit has stated, “we do not see any logical reason why a ‘victim under the age of twelve’ enhancement should bar application of the ‘vulnerable victim’ enhancement when the victim is especially vulnerable, even as compared to most children under twelve.” United States v. Jenkins, 712 F.3d 209, 214 (5th Cir. 2013).

The Fourth Circuit, in contrast, has indicated that the vulnerable victim adjustment may not be applied based solely on extreme youth or on factors that are for conditions that “necessarily are related to ... age.” United States v. Dowell, 771 F.3d 162, 175 (4th Cir. 2014). The line drawn by the under-12

enhancement “implicitly preclude[s] courts from drawing additional lines below that point,” and “once the offense involves a child under twelve, any additional considerations based solely on age simply are not appropriate to the Guidelines calculation.” *Id.*

The proposed amendment generally adopts the approach of the Fifth and Ninth Circuits. It amends the Commentary in the child pornography guidelines to provide that application of the age enhancement does not preclude application of the vulnerable victim adjustment. Specifically, if the minor’s extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, §3A1.1(b) applies, assuming the mens rea requirement of §3A1.1(b) is also met (*i.e.*, the defendant knew or should have known of this vulnerability).

Two Issues Relating to the Tiered Enhancement for Distribution in §2G2.2

Second, the proposed amendment responds to differences among the circuits in applying the tiered enhancement for distribution in §2G2.2(b)(3), which provides an enhancement ranging from 2 levels to 7 levels depending on specific factors.

There are two related issues that typically arise in child pornography cases when the offense involves a peer-to-peer file-sharing program or network. The first issue is when a participant’s use of a peer-to-peer file sharing program or network warrants at minimum a 2-level enhancement under subsection (b)(3)(F). The second issue is when, if at all, the use of a peer-to-peer file sharing program or network warrants a 5-level enhancement under (b)(3)(B) instead.

(1) The 2-Level Distribution Enhancement at Subsection (b)(3)(F)

The Fifth, Tenth, and Eleventh Circuits have each held that the 2-level distribution enhancement applies if the defendant used a file sharing program, regardless of whether he did so purposefully, knowingly, or negligently. *See, e.g., United States v. Baker*, 742 F.3d 618, 621 (5th Cir. 2014) (the enhancement applies “regardless of the defendant’s mental state”); *United States v. Ray*, 704 F.3d 1307, 1312 (10th Cir. 2013) (the enhancement “does not require that a defendant know about the distribution capability of the program he is using”; the enhancement “requires no particular state of mind”); *United States v. Creel*, 783 F.3d 1357, 1360 (11th Cir. 2015) (“No element of *mens rea* is expressed or implied ... The definition requires only that the ‘act . . . relates to the transfer of child pornography.’”).

The Second, Fourth, and Fifth Circuits, in contrast, have held that the 2-level distribution enhancement requires a showing that the defendant knew, or at least acted in reckless disregard of, the file sharing properties of the program. *See, e.g., United States v. Baldwin*, 743 F.3d 357, 361 (2nd Cir. 2015) (requiring knowledge); *United States v. Robinson*, 714 F.3d 466, 468 (7th Cir. 2013) (knowledge); *United States v. Layton*, 564 F.3d 330, 335 (4th Cir. 2009) (knowledge or reckless disregard).

Other circuits appear to follow somewhat different approaches. The Eighth Circuit has stated that knowledge is required, but knowledge may be inferred from the fact that a file sharing program was used, absent “concrete evidence” of ignorance. *United States v. Dodd*, 598 F.3d 449, 452 (8th Cir. 2010). The Sixth Circuit has stated in an unpublished opinion that there is a “presumption” that “users of file-sharing software understand others can access their files.” *United States v. Conner*, 521 Fed. App’x 493, 499 (6th Cir. 2013).

The proposed amendment generally adopts the approach of the Second, Fourth, and Fifth Circuits. It amends subsection (b)(3)(F) to provide that the 2-level enhancement requires “knowing” distribution by the defendant.

As a conforming change, the proposed amendment also revises the 2-level distribution enhancement at §2G2.1(b)(3) to provide that the enhancement requires that the defendant knowingly distributed.

(2) The 5-Level Distribution Enhancement at Subsection (b)(3)(B)

The 5-level distribution enhancement at subsection (b)(3)(B) applies if the offense involved distribution “for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain.” The Commentary provides, as one example, that in a case involving the bartering of child pornographic material, the “thing of value” is the material received in exchange.

The circuits have taken different approaches to this issue. The Fifth Circuit has indicated that when the defendant knowingly uses file sharing software, the requirements for the 5-level enhancement are generally satisfied. *See United States v. Groce*, 784 F.3d 291, 294 (5th Cir. 2015) (“Generally, when a defendant knowingly uses peer-to-peer file sharing software . . . he engages in the kind of distribution contemplated by” the 5-level enhancement).

The Fourth Circuit appears to have a higher standard. It has required the government to show that the defendant (1) “knowingly made child pornography in his possession available to others by some means”; and (2) did so “for the specific purpose of obtaining something of valuable consideration, such as more pornography.” *United States v. McManus*, 734 F.3d 315, 319 (4th Cir. 2013).

The proposed amendment revises subsection (b)(3)(B) to clarify that the enhancement applies if the defendant distributed in exchange for any valuable consideration. Specifically, this means that the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

Proposed Amendment:

§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

- (a) Base Offense Level: **32**
- (b) Specific Offense Characteristics
 - (1) If the offense involved a minor who had (A) not attained the age of twelve years, increase by **4** levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by **2** levels.
 - (2) (Apply the greater) If the offense involved—
 - (A) the commission of a sexual act or sexual contact, increase by **2** levels; or
 - (B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by **4** levels.

- (3) If the offense involved distribution ~~defendant knowingly distributed~~, increase by **2** levels.
 - (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.
 - (5) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.
 - (6) If, for the purpose of producing sexually explicit material or for the purpose of transmitting such material live, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by **2** levels.
- (c) Cross Reference
- (1) If the victim was killed in circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.
- (d) Special Instruction
- (1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1591, 2251(a)-(c), 2251(d)(1)(B), 2260(a).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

“Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

“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)).

“Material” includes a visual depiction, as defined in 18 U.S.C. § 2256.

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

“Sexually explicit conduct” has the meaning given that term in 18 U.S.C. § 2256(2).

2. Interaction of Age Enhancement (Subsection (b)(1)) and Vulnerable Victim (§3A1.1(b)).—If subsection (b)(1) applies, §3A1.1(b) ordinarily would not apply unless the minor was unusually vulnerable for reasons unrelated to age. See §3A1.1, comment. (n.2). However, if the minor’s extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, and the defendant knew or should have known this, apply §3A1.1(b).

3. Application of Subsection (b)(2).—For purposes of subsection (b)(2):

“Conduct described in 18 U.S.C. § 2241(a) or (b)” is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

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

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

4. Application of Subsection (b)(5).—

(A) In General.—Subsection (b)(5) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement in subsection (b)(5) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

5. Application of Subsection (b)(6).—

(A) Misrepresentation of Participant’s Identity.—The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant’s identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant’s name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) Use of a Computer or an Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live or otherwise to solicit participation by a minor in such conduct for such purposes. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

56. 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). 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.

67. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than 10 minors.

* * *

§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

(a) Base Offense Level:

- (1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).
 - (2) **22**, otherwise.
- (b) Specific Offense Characteristics
- (1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.
 - (2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.
 - (3) (Apply the greatest) ~~If the offense involved:~~
 - (A) ~~If the offense involved distribution~~ **Distribution** for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.
 - (B) ~~Distribution for the receipt, or expectation of receipt, of a thing of value,~~ ~~If the defendant distributed in exchange for any valuable consideration,~~ but not for pecuniary gain, increase by **5** levels.
 - (C) ~~If the offense involved distribution~~ **Distribution** to a minor, increase by **5** levels.
 - (D) ~~If the offense involved distribution~~ **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 subdivision (E), increase by **6** levels.
 - (E) ~~If the offense involved distribution~~ **Distribution** to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.
 - (F) ~~If the defendant knowingly distributed,~~ **Distribution** other than distribution described in subdivisions (A) through (E), increase by **2** levels.
 - (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.
 - (5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.
 - (6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by **2** levels.

- (7) If the offense involved—
 - (A) at least 10 images, but fewer than 150, increase by 2 levels;
 - (B) at least 150 images, but fewer than 300, increase by 3 levels;
 - (C) at least 300 images, but fewer than 600, increase by 4 levels; and
 - (D) 600 or more images, increase by 5 levels.

(c) Cross Reference

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A(a)-(b), 2260(b).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

“Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

“Distribution for pecuniary gain” means distribution for profit.

~~“Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain” means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. “Thing of value” means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the “thing of value” is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received. “The defendant distributed in exchange for any valuable consideration” means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.~~

“Distribution to a minor” means the knowing distribution to an individual who is a minor at the time of the offense.

“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)).

“Material” includes a visual depiction, as defined in 18 U.S.C. § 2256.

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

“Pattern of activity involving the sexual abuse or exploitation of a minor” means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

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

“Sexual 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 (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.

2. *Interaction of Age Enhancement (Subsection (b)(2)) and Vulnerable Victim (§3A1.1(b)).—If subsection (b)(2) applies, §3A1.1(b) ordinarily would not apply unless the minor was unusually vulnerable for reasons unrelated to age. See §3A1.1, comment. (n.2). However, if the minor’s extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, and the defendant knew or should have known this, apply §3A1.1(b).*
23. *Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute such materials.*
34. *Application of Subsection (b)(5).—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*
45. *Application of Subsection (b)(7).—*
 - (A) *Definition of “Images”.—“Images” means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).*

(B) Determining the Number of Images.—For purposes of determining the number of images under subsection (b)(7):

- (i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.
- (ii) Each video, video-clip, movie, or similar visual depiction shall be considered to have 75 images. If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.

56. Application of Subsection (c)(1).—

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

67. Cases Involving Adapted or Modified Depictions.—If the offense involved material that is an adapted or modified depiction of an identifiable minor (e.g., a case in which the defendant is convicted under 18 U.S.C. § 2252A(a)(7)), the term “material involving the sexual exploitation of a minor” includes such material.

78. Upward Departure Provision.—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

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

* * *

§2G2.6. Child Exploitation Enterprises

- (a) Base Offense Level: **35**
- (b) Specific Offense Characteristics
 - (1) If a victim (A) had not attained the age of 12 years, increase by **4** levels; or (B) had attained the age of 12 years but had not attained the age of 16 years, increase by **2** levels.

- (2) If (A) the defendant was a parent, relative, or legal guardian of a minor victim; or (B) a minor victim was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.
- (3) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by 2 levels.
- (4) If a computer or an interactive computer service was used in furtherance of the offense, increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. § 2252A(g).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

2. Interaction of Age Enhancement (Subsection (b)(1)) and Vulnerable Victim (§3A1.1(b)).—If subsection (b)(1) applies, §3A1.1(b) ordinarily would not apply unless the minor was unusually vulnerable for reasons unrelated to age. See §3A1.1, comment. (n.2). However, if the minor’s extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, and the defendant knew or should have known this, apply §3A1.1(b).

3. Application of Subsection (b)(2).—

(A) Custody, Care, or Supervisory Control.—Subsection (b)(2) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement under subsection (b)(2) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

34. *Application of Subsection (b)(3).*—For purposes of subsection (b)(3), “conduct described in 18 U.S.C. § 2241(a) or (b)” is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

* * *

Issues for Comment:

1. *With respect to the interaction of the age enhancements and the vulnerable victim adjustment, the proposed amendment would respond to the circuit conflict by clarifying the circumstances under which the vulnerable victim adjustment would also apply. Should the Commission use a different approach to resolving the circuit conflict? If so, what approach should the Commission use to clarify how the age enhancements interact with the vulnerable victim adjustment? For example, should the Commission revise the tiered age enhancements to provide an additional tier, 2 levels higher than the existing tiers, for cases involving unusually young and vulnerable victims, such as infants or toddlers? In the alternative, should the Commission provide an upward departure provision to address this factor?*

Application Note 2 to §3A1.1 provides that, “if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.” Should the Commission revise this provision to change or clarify how age enhancements in the guidelines (whether for child pornography offenses or otherwise) interact with the vulnerable victim adjustment? For example, should the Commission change “unless the victim was unusually vulnerable for reasons unrelated to age” to “unless the victim was unusually vulnerable for reasons not based on age per se”?

2. *With respect to the 2-level distribution enhancement, the proposed amendment generally adopts the approach of the circuits that require “knowing” distribution. The Commission seeks comment on whether a different approach should be used, particularly in cases involving a file sharing program or network. For example, should the Commission provide a bright-line rule that use of a file sharing program qualifies for the 2-level enhancement, even in cases where the defendant was in fact ignorant that use of the program would result in files being shared to others?*
3. *With respect to the 5-level distribution enhancement, the proposed amendment would generally require an agreement with another person in which the defendant trades child pornography for other child pornography or another thing of value, such as access to a child. The Commission seeks comment on whether a different approach should be used, particularly in cases involving a file sharing program or network. For example, should the Commission provide a bright-line rule that use of a file sharing program qualifies for the 5-level enhancement?*
4. *The proposed amendment amends §2G2.2 to provide that the 2-level enhancement at subsection (b)(3) requires “knowing” distribution by the defendant. Should the Commission change any other enhancements in subsection (b) from an “offense involved” approach to a “defendant-based” approach? If so, should the Commission include a culpable state of mind requirement, such as, for example, requiring “knowing” distribution by the defendant?*

5. *The guideline for obscenity offenses, §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), contains a tiered distribution enhancement similar to the tiered distribution enhancement in §2G2.2. If the Commission were to make revisions to the tiered distribution enhancement in §2G2.2, should the Commission make similar revisions to §2G3.1?*

PROPOSED AMENDMENT: IMMIGRATION

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission’s multi-year study of the guidelines applicable to immigration offenses and related criminal history rules. See United States Sentencing Commission, “Notice of Final Priorities,” 80 Fed. Reg. 48957 (Aug. 14, 2015). The Commission is publishing this proposed amendment to inform the Commission’s consideration of these issues.*

The proposed amendment contains two parts. The Commission is considering whether to promulgate any one or both of these parts, as they are not necessarily mutually exclusive. They are as follows—

Part A *revises the alien smuggling guideline at §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). An issue for comment is also provided.*

Part B *revises the illegal reentry guideline at §2L1.2 (Unlawfully Entering or Remaining in the United States). Issues for comment are also included.*

(A) Alien Smuggling

Synopsis of Proposed Amendment: *This part of the proposed amendment revises the alien smuggling guideline at §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). The Commission has received comment expressing concern that the guideline provides for inadequate sentences for alien smugglers, particularly those who smuggle unaccompanied minors. See, e.g., Annual Letter from the Department of Justice to the Commission (July 24, 2015), at <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/DOJ.pdf>.*

First, the proposed amendment revises the alternative base offense levels at §2L1.1(a). Two options are provided. Option 1 would raise the base offense level at subsection (a)(3) from 12 to [16]. Option 2 adds an alternative base offense level of [16] if the defendant smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization.

Second, the proposed amendment addresses offenses involving unaccompanied minors in alien smuggling offenses. The Department of Justice in its annual letter to the Commission has suggested that the enhancement for smuggling, transporting, or harboring unaccompanied minors under §2L1.1(b)(4) is inadequate in light of the serious nature of such offenses. The Department states that “[t]hese smugglers often treat children as human cargo and subject them to a multitude of abuses throughout a long and dangerous journey, including sexual assault, extortion, and other crimes.” The proposed amendment would amend §2L1.1 to address the issue of unaccompanied minors. The proposed amendment first amends §2L1.1(b)(4) to make the enhancement offense-based (with a mens rea requirement) as opposed to exclusively defendant-based. The proposed amendment would also amend the commentary to §2L1.1 to clarify that the term “serious bodily injury” included in subsection (b)(7)(B) has the meaning given to that term in the Commentary to §1B1.1 (Application Instructions), which states that “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

Finally, the proposed amendment would revise the definition of “minor” for purposes of the “unaccompanied minor” enhancement at §2L1.1(b)(4) and change it from minors under the age of 16 to minors under the age of [18]. The proposed amendment also brackets the possibility of including a new departure provision in the commentary to §2L1.1 for cases in which the offense involved the smuggling, transporting, or harboring of six or more unaccompanied minors.

Proposed Amendment:

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

(a) Base Offense Level:

- (1) **25**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);
- (2) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or

[Option 1:

- (3) ~~12~~**[16]**, otherwise.]

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

(3) **[16]**, if the defendant smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization; or

(34) **12**, otherwise.]

(b) Specific Offense Characteristics

(1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), and (B) the base offense level is determined under subsection (a)(3), decrease by **3** levels.

(2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

| | <u>Number of Unlawful Aliens Smuggled, Transported, or Harbored</u> | <u>Increase in Level</u> |
|-----|---|--------------------------|
| (A) | 6-24 | add 3 |
| (B) | 25-99 | add 6 |
| (C) | 100 or more | add 9 . |

(3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.

(4) ~~If the defendant smuggled, transported, or harbored~~ If the offense involved the smuggling, transporting, or harboring of a minor who ~~the defendant knew [or had reason to believe]~~ was unaccompanied by the minor's parent or grandparent, increase by **2** levels.

(5) (Apply the Greatest):

(A) If a firearm was discharged, increase by **6** levels, but if the resulting offense level is less than level **22**, increase to level **22**.

(B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by **4** levels, but if the resulting offense level is less than level **20**, increase to level **20**.

(C) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

- (6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.
- (7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

| <u>Death or Degree of Injury</u> | <u>Increase in Level</u> |
|--|--------------------------|
| (A) Bodily Injury | add 2 levels |
| (B) Serious Bodily Injury | add 4 levels |
| (C) Permanent or Life-Threatening Bodily Injury | add 6 levels |
| (D) Death | add 10 levels. |

- (8) (Apply the greater):
 - (A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by **2** levels. If the resulting offense level is less than level **18**, increase to level **18**.
 - (B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by **6** levels.
- (9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by **2** levels.

(c) Cross Reference

- (1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

[Option 2 (continued):

“As part of an ongoing commercial organization” means that the defendant participated (A) in a continuing organization or enterprise of five or more persons that had as one of its primary purposes the smuggling, transporting, or harboring of unlawful aliens for profit, and (B) with

knowledge [or reason to believe] that the members of the continuing organization or enterprise smuggled, transported, or harbored different groups of unlawful aliens on more than one occasion.]

“The offense was committed other than for profit” means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

“Number of unlawful aliens smuggled, transported, or harbored” does not include the defendant.

“Aggravated felony” is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).

“Child” has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

“Spouse” has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

“Immigration and naturalization offense” means any offense covered by Chapter Two, Part L.

“Minor” means an individual who had not attained the age of ~~16~~[18] years.

“Parent” means (A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father.

“Bodily injury,” “serious bodily injury,” and “permanent or life-threatening bodily injury” have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

2. Application of Subsection (b)(7) to Conduct Constituting Criminal Sexual Abuse.—Consistent with Application Note 1(L) of §1B1.1 (Application Instructions), “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.
23. Interaction with §3B1.1.—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.
34. Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:
 - (A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.
 - (B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).
 - (C) The offense involved substantially more than 100 aliens.

[(D) The offense involved the smuggling, transporting, or harboring of six or more minors who were unaccompanied by their parents or grandparents.]

4. *Prior Convictions Under Subsection (b)(3).*—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).
5. *Application of Subsection (b)(6).*—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements). If subsection (b)(6) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(5).
6. *Inapplicability of §3A1.3.*—If an enhancement under subsection (b)(8)(A) applies, do not apply §3A1.3 (Restraint of Victim).

Background: This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986.

Issue for Comment:

1. *The Department of Justice has stated that alien smuggling offenses often involved sexual abuse of the aliens smuggled, transported, or harbored, particularly of unaccompanied minors. The proposed amendment would amend the commentary to §2L1.1 to clearly state that the term “serious bodily injury” included in subsection (b)(7)(B) has the meaning given to that term in the Commentary to §1B1.1 (Application Instructions), which is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law. The Commission invites comment on whether the 4-level enhancement at §2L1.1(b)(7)(B) adequately accounts for cases in which the offense covered by this guideline involved sexual abuse of an alien who was smuggled, transported, or harbored. If not, what revisions to §2L1.1 would be appropriate to account for this conduct? For example, should the Commission provide one or more specific offense characteristics or departure provisions to better account for this conduct? If so, what should the Commission provide?*

(B) Illegal Reentry

Synopsis of the Proposed Amendment: *This part of the proposed amendment is also informed by the Commission’s recent report on offenders sentenced under §2L1.2 (Unlawfully Entering or Remaining in the United States). See United States Sentencing Commission, Illegal Reentry Offenses (2015), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.*

The key findings from the report include—

- *the average sentence for illegal reentry offenders was 18 months;*
- *all but two of the 18,498 illegal reentry offenders — including the 40 percent with the most serious criminal histories triggering a statutory maximum penalty of 20 years under 8 U.S.C. § 1326(b)(2) — were sentenced at or below the ten-year statutory maximum under 8 U.S.C. § 1326(b)(1) for offenders with less serious criminal histories (i.e., those without “aggravated felony” convictions);*
- *the rate of within-guideline range sentences was significantly lower among offenders who received 16-level enhancements pursuant to §2L1.2(b)(1)(A) for predicate convictions (31.3%), as compared to the within-range rate for those who received no enhancements under §2L1.2(b) (92.7%);*
- *significant differences in the rates of application of the various enhancements in §2L1.2(b) appeared among the districts where most illegal reentry offenders were prosecuted;*
- *the average illegal reentry offender was deported 3.2 times before his instant illegal reentry prosecution, and over one-third (38.1%) were previously deported after a prior illegal entry or illegal reentry conviction;*
- *61.9 percent of offenders were convicted of at least one criminal offense after illegally reentering the United States;*
- *4.7 percent of illegal reentry offenders had no prior convictions and not more than one prior deportation before their instant illegal reentry prosecutions; and*
- *most illegal reentry offenders were apprehended by immigration officials at or near the border.*

The statutory penalty structure for illegal reentry offenses is based on whether the defendant had a criminal conviction before he or she was deported. The offense of illegal reentry, set forth in 8 U.S.C. § 1326, applies to defendants who previously were deported from, or unlawfully remained in, the United States. Specifically, the statutory maximum term of imprisonment is—

- **two years**, in general (*see* 8 U.S.C. § 1326(a)); but
- **10 years**, if the defendant was deported after sustaining (A) three misdemeanor convictions involving drugs or crimes against the person, or both, or (B) one felony conviction (*see* 8 U.S.C. § 1326(b)(1)); or
- **20 years**, if the defendant was deported after sustaining an “aggravated felony” — a term that covers a range of offense types, listed in 8 U.S.C. § 1101(a)(43), that includes such different offense types as murder and tax evasion (*see* 8 U.S.C. § 1326(b)(2)).

The penalty structure of the guideline is similar to the statutory penalty structure. The guideline provides a base offense level of 8 and a tiered enhancement based on whether the defendant had a criminal conviction before he or she was deported. Specifically, the enhancement is—

- **4 levels**, for (A) three misdemeanor convictions for crimes of violence or drug trafficking offenses, or (B) any felony (*see* §2L1.2(b)(1)(D),(E));

- **8 levels**, for an “aggravated felony” (see §2L1.2(b)(1)(C));
- **12 levels**, for a felony drug trafficking offense for which the sentence imposed was 13 months or less (see §2L1.2(b)(1)(B)); and
- **16 levels**, for specific types of felonies: a drug trafficking offense for which the sentence imposed was more than 13 months, a crime of violence, a firearms offense, a child pornography offense, a national security or terrorism offense, a human trafficking offense, or an alien smuggling offense (see §2L1.2(b)(1)(A)).

The penalties in the illegal reentry statute apply based on the criminal convictions the defendant had before he or she was deported, regardless of the age of the prior conviction. Likewise, until 2011, the enhancements in §2L1.2 applied regardless of the age of the prior conviction. In 2011, the Commission revised the guideline to provide that the 16- and 12-level enhancements would be reduced to 12 and 8 levels, respectively, if the conviction was too remote in time (too “stale”) to receive criminal history points under the timing limits set forth in Chapter Four (Criminal History and Criminal Livelihood). See USSG App. C, Amend. 754 (effective Nov. 1, 2011). The other enhancements continue to apply regardless of the age of the prior conviction (*i.e.*, without regard to whether the conviction receives criminal history points). See §2L1.2, comment. (n.1(C)).

Part B of the proposed amendment amends §2L1.2 to lessen the emphasis on pre-deportation convictions by providing new enhancements for more recent, post-reentry convictions and a corresponding reduction in the enhancements for past, pre-deportation convictions. The enhancements for these convictions would be based on the sentence imposed rather than on the type of offense (*e.g.*, “crime of violence”) — in other words, the proposed amendment would eliminate the use of the “categorical approach” for predicate felony convictions in §2L1.2. Also, the proposed amendment accounts for prior convictions for illegal reentry separately from other types of convictions.

First, the proposed amendment amends subsection (a) of §2L1.2 to provide alternative base offense levels of [14] and [12] if the defendant had one or more prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. For defendants without such prior convictions, the proposed amendment increases the otherwise applicable base offense level from 8 to [10]. The alternative base offense levels at subsection (a) apply without regard to whether the prior conviction receives criminal history points.

Second, the proposed amendment changes how subsection (b)(1) accounts for pre-deportation convictions — basing them not on the type of offense (*e.g.*, “crime of violence”) but on the length of the sentence imposed for a felony conviction. The proposed amendment incorporates these new enhancements in subdivision (A) through (C) at subsection (b)(1). Specifically, if the defendant had a felony conviction and the sentence imposed was [24] months or more, an enhancement of [8] levels would apply. If the defendant had a felony conviction and the sentence imposed was at least [12] months but less than [24] months, an enhancement of [6] levels would apply. If the defendant had a felony conviction and the sentence imposed was less than [12] months, an enhancement of [4] levels would apply. Finally, an enhancement of [2] levels would apply if the defendant had three or more convictions for misdemeanors involving drugs or crimes against the person. If more than one of these enhancements apply, the court is instructed to apply the greatest.

Third, the proposed amendment would permit prior convictions to be considered under subsection (b)(1) only if they receive criminal history points under Chapter Four.

To account for post-reentry criminal activity, the proposed amendment inserts a new subsection (b)(2) to provide a tiered enhancement for a defendant who engaged in criminal conduct resulting in a conviction for one or more felony offenses after the defendant’s first deportation or first order of removal. The

structure of the new subsection (b)(2) parallels the proposed changes to subsection (b)(1), both in the sentence length required and the level of enhancement to be applied. As with subsection (b)(1), prior convictions would be considered under subsection (b)(2) only if they receive criminal history points under Chapter Four.

Finally, the proposed amendment provides a new departure provision for cases in which the defendant was previously deported on multiple occasions not reflected in prior convictions under 8 U.S.C. § 1253, § 1325(a), or § 1326. It also revises the departure provision based on seriousness of a prior conviction to bring it more into parallel with §4A1.3 (Adequacy of Criminal History Category) and provide examples related to: (1) cases in which serious offenses do not qualify for an adjustment under subsection (b)(1) and the new subsection (b)(2) because they did not receive criminal history points; and (2) for cases in which a defendant committed one or more felony offenses but no conviction resulted from the commission of such offense or offenses. The proposed amendment also brackets the possibility of deleting the departure based on time served in state custody.

In addition, the proposed amendment would make conforming changes to the application notes, including the consolidation of all guideline definitions in one place.

Issues for comment are also included.

Proposed Amendment:

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

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

- (1) **[14]**, if the defendant committed the instant offense of conviction after sustaining two or more convictions for illegal reentry offenses;
- (2) **[12]**, if the defendant committed the instant offense of conviction after sustaining a conviction for an illegal reentry offense;
- (3) **[10]**, otherwise.

(b) Specific Offense Characteristics

(1) Apply the Greatest:

~~If the defendant previously was deported, or unlawfully remained in the United States, after~~ If, before the defendant's first deportation or first order of removal, the defendant sustained—

~~(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;~~

- ~~(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points;~~
- ~~(C) a conviction for an aggravated felony, increase by 8 levels;~~
- ~~(D) a conviction for any other felony, increase by 4 levels; or~~
- ~~(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.~~

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was [24] months or more, increase by [8] levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was at least [12] months but less than [24] months, increase by [6] levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was less than [12] months, increase by [4] levels; or

(D) three or more convictions for misdemeanors involving drugs, crimes against the person, or both, increase by [2] levels.

(2) Apply the Greatest:

If, at any time after the defendant's first deportation or first order of removal, the defendant engaged in criminal conduct resulting in—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was [24] months or more, increase by [8] levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was at least [12] months but less than [24] months, increase by [6] levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was less than [12] months, increase by [4] levels; or

(D) three or more convictions for misdemeanors involving drugs, crimes against the person, or both, increase by [2] levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1253, § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsections (b)(1) and (b)(2).—

(A) In General.—For purposes of subsection (b)(1) this guideline:

- (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
- (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.
- (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.
- (iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Interaction of Subsections (b)(1) and (b)(2).—Subsections (b)(1) and (b)(2) are intended to divide the defendant’s criminal history into two time periods. Subsection (b)(1) reflects the convictions, if any, that the defendant sustained before his first deportation or order of removal (whichever event occurs first). Subsection (b)(2) reflects the convictions, if any, that the defendant sustained after that event (when the criminal conduct that resulted in the conviction took place after that event).

2. (B)—Definitions.—For purposes of subsection (b)(1) this guideline:

- (i) —“Alien smuggling offense” has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).
- (ii) —“Child pornography offense” means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.
- (iii) —“Crime of violence” means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

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

~~“Felony” means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.~~

~~“Illegal reentry offense” means (A) an offense under 8 U.S.C. § 1253 or § 1326, or (B) a second or subsequent offense under 8 U.S.C. § 1325(a) (regardless of whether the conviction was designated a felony or misdemeanor).~~

~~“Misdemeanor” means any federal, state, or local offense punishable by a term of imprisonment of one year or less.~~

~~(v) — “Firearms offense” means any of the following:~~

~~(I) — An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(e).~~

~~(II) — An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(e).~~

~~(III) — A violation of 18 U.S.C. § 844(h).~~

~~(IV) — A violation of 18 U.S.C. § 924(e).~~

~~(V) — A violation of 18 U.S.C. § 929(a).~~

~~(VI) — An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~

~~(vi) — “Human trafficking offense” means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~

~~(vii) — “Sentence imposed” has the meaning given the term “sentence of imprisonment” in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.~~

- (viii) ~~“Terrorism offense” means any offense involving, or intending to promote, a “Federal crime of terrorism”, as that term is defined in 18 U.S.C. § 2332b(g)(5).~~
- (C) ~~Prior Convictions.~~ *In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.*
2. ~~Definition of “Felony”.~~ *For purposes of subsection (b)(1)(A), (B), and (D), “felony” means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*
3. ~~Application of Subsection (b)(1)(C).~~
- (A) ~~Definitions.~~ *For purposes of subsection (b)(1)(C), “aggravated felony” has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.*
- (B) ~~In General.~~ *The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).*
4. ~~Application of Subsection (b)(1)(E).~~ *For purposes of subsection (b)(1)(E):*
- (A) ~~“Misdemeanor” means any federal, state, or local offense punishable by a term of imprisonment of one year or less.~~
- (B) ~~“Three or more convictions” means at least three convictions for offenses that are not treated as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).~~
5. ~~Aiding and Abetting, Conspiracies, and Attempts.~~ *Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.*
63. ~~Computation of Criminal History Points.~~ *The alternative base offense levels at subsection (a) apply without regard to whether a conviction for an illegal reentry offense receives criminal history points. However, for purposes of applying subsections (b)(1) and (b)(2), use only those convictions that receive criminal history points under §4A1.1(a), (b), or (c), and that are counted separately under §4A1.2(a)(2).*
- A conviction taken into account under subsection (a) or (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*
4. ~~Departure Based on Multiple Prior Deportations not Reflected in Prior Convictions.~~ *There may be cases in which the alternative base offense levels at subsections (a)(1) and (a)(2) do not apply and the defendant was previously deported (voluntarily or involuntarily) on multiple occasions not reflected in prior convictions under 8 U.S.C. § 1253, § 1325(a), or § 1326. In such a case, an upward departure may be warranted to reflect both the increased culpability of a defendant with multiple prior deportations, as well as the increased risk of future illegal reentry (as reflected in the*

defendant's record of multiple prior deportations). For example, an upward departure may be warranted for a defendant who is convicted under 8 U.S.C. § 1326 for the first time but was deported five times prior to the instant offense of illegal reentry.

75. Departure Based on Seriousness of a Prior Conviction Criminal History.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction defendant's criminal history. In such a case, a departure may be warranted. See §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which the 12-level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted. In a case in which an adjustment under subsection (b)(1) or (b)(2) does not apply because a prior serious conviction (e.g., murder) is not within the time limits set forth in §4A1.2(e) and did not receive criminal history points, an upward departure may be warranted to reflect the serious nature of the defendant's prior conviction. (B) In a case in which a defendant committed one or more felony offenses but subsections (b)(1) and (b)(2) do not apply because no conviction resulted from the commission of such offense or offenses, an upward departure may be warranted.

[8. Departure Based on Time Served in State Custody.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). See §5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.]

96. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

Issues for Comment:

1. *Some commentators have expressed concern about the operation of the illegal reentry guideline and the severity of the enhancements available in subsection (b) for some offenders. The Commission's recent report found that the rate of within-range sentences differed substantially depending on the level of enhancement under §2L1.2(b)(1). The rate of within-guideline range sentences was significantly lower among defendants who received the 16-level enhancement (31.3%) as compared to the within-range rate for those who received no enhancements (92.7%). The report showed that the greater enhancements result in the lowest within-range sentences (52.5% within range for 4-level enhancement, 46.7% within range for 8-level enhancement, 32.8% within range for 12-level enhancement).*

The Commission seeks comment on whether illegal reentry offenses are adequately addressed by the guidelines. Should the Commission consider amending §2L1.2 and, if so, how?

2. *Currently, §2L1.2 requires the court to classify the defendant's prior convictions by type (e.g., is it a "crime of violence" or is it an "aggravated felony"?), a task that involves the Supreme Court's "categorical approach." In recent years, the Commission has received commentary from stakeholders in the federal criminal justice system — including district and circuit judges, federal probation officers, the Department of Justice, and some defense counsel — that the use of a "categorical approach" to determine if a predicate conviction qualifies for an enhancement under §2L1.2(b) requires a cumbersome, overly detailed, and resource-intensive legal analysis that often is under- or over-inclusive regarding the actual seriousness of offenders' predicate convictions. See, e.g., Comment Received by the Commission in Response to Request for Public Comment on Proposed Priorities from 2010 to 2015 (available on the Commission's web site at www.ussc.gov/amendment-process/public-comment). Cf. *Almanza-Arenda v. Lynch*, ___ F.3d ___, 2015 WL 9462976 at *8-*9 (9th Cir. Dec. 28, 2015) (Owens, J., concurring, joined by Tallman, Bybee & Callahan) ("The bedeviling . . . ['categorical approach'] will continue to spit out intra- and inter-circuit splits and confusion, which are inevitable when we have hundreds of federal judges reviewing thousands of criminal state laws and certain documents to determine if an offense is 'categorically['] [a predicate offense]. . . . A better mousetrap is long overdue. Rather than compete with Rube Goldberg, we instead should look to a more objective standard, such as the length of the underlying sentence [to determine what is a predicate offense].").*

The proposed amendment would eliminate the use of the "categorical approach" for predicate felony convictions and provide for enhancements based on the sentence imposed rather than on the type of offense. What are the advantages and disadvantages of basing the enhancement on the type of the prior conviction? What are the advantages and disadvantages of basing the enhancement on the length of the sentence imposed on the prior conviction? If the Commission were to adopt the sentence-imposed model, are the 24- and 12-month gradations included in the proposed

amendment appropriate? Should the Commission adopt different gradations, such as the ones currently used in Chapter Four of the Guidelines Manual (i.e., “exceeding one year and one month” and “at least sixty days”), or more or fewer gradations? If the Commission were to provide a different approach to apply the enhancements at §2L1.2, what should that different approach be?

3. As noted in the Commission’s recent report, both the illegal reentry statute and §2L1.2 provide enhanced penalties only if the defendant sustained a conviction before being deported. A defendant receives at most a single enhancement under §2L1.2 — based on the most serious conviction. Additional convictions that occurred before the defendant’s most recent deportation, and convictions that occurred after the defendant’s most recent illegal reentry, are not taken into account in the calculation of the offense level (although they may be taken into account in the criminal history score).

Should the Commission amend how the enhancements at §2L1.2 work and, if so, how? Should the Commission amend §2L1.2 to account not only for pre-deportation convictions but also for other aggravating factors relevant to a defendant’s culpability and need for incapacitation and deterrence?

For example, the proposed amendment would amend subsection (a) of §2L1.2 to provide alternative base offense levels if the defendant had one or more prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. What are the advantages and disadvantages of basing alternative base offense levels on illegal reentry convictions? Should the Commission use a different approach for such alternative base offense levels? Should the Commission use deportations and orders of removal instead to apply the base offense levels?

If the Commission provided additional enhancements to account for aggravating factors relevant to a defendant’s culpability other than pre-deportation convictions, how should these enhancements interact? How much weight should be given to pre-deportation convictions in relation to prior illegal reentry convictions or post-reentry convictions in driving the guideline range? Should the guideline provide greater emphasis on one or more of these factors? For example, should the guideline give more weight to post-reentry convictions and less weight to pre-deportation convictions (e.g., a 10-level enhancement for a post-reentry conviction for which the sentence imposed was 24 months or more with a corresponding 6-level enhancement for a pre-deportation conviction for which the sentence imposed was 24 months or more)?

What other aggravating factors, if any, should the Commission incorporate into §2L1.2, and how should the Commission incorporate them? Should the factor be an enhancement, an alternative base offense level, a minimum offense level, an upward departure provision, or some combination of these? If so, what level of enhancement should apply?

What mitigating factors, if any, should the Commission incorporate into §2L1.2, and how should the Commission incorporate them? For example, should the Commission provide a new departure provision for cases in which the defendant’s predicate felony conviction is based on an offense that was classified by the laws of the state as a misdemeanor?

4. Currently, §2L1.2 provides enhanced penalties based on convictions sustained prior to the defendant’s most recent deportation from the United States. The proposed amendment would modify how the enhancements work in the illegal reentry guideline. Specifically, it would divide the defendant’s criminal history into two time periods. Subsection (b)(1) would reflect the convictions that the defendant sustained before his or her first deportation or order of removal (whichever

event occurs first). Subsection (b)(2) would then reflect the convictions that the defendant sustained after that event (when the criminal conduct that resulted in the conviction took place after that event).

What are the advantages and disadvantages of using a particular deportation or order of removal as the determining event for whether a prior conviction qualifies for an enhancement under subsection (b)(1) or subsection (b)(2)? Should the Commission use a different approach to distinguish pre-deportation convictions from post-reentry convictions? For example, should the Commission provide instead that a prior conviction sustained before any deportation would qualify for an enhancement for pre-deportation convictions? If so, how should such enhancement interact with an enhancement based on post-reentry convictions as provided in the proposed amendment?

5. In 2014, the Commission amended the Commentary to §2L1.1 to add a departure provision for cases in which the defendant is located by immigration authorities while the defendant is in state custody for a state offense unrelated to the federal illegal reentry offense. In such a case, the time served is not covered by adjustment under §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). Under the current guideline, the departure allows courts to depart to reflect all or part of the time served in state custody for the unrelated offense, from the time federal immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. The proposed amendment brackets the possibility of deleting the departure provision at Application Note 8 to §2L1.2.

If the Commission were to promulgate the proposed amendment revising how the enhancements at the illegal reentry guideline work, should the Commission delete the departure based on time served in state custody? If not, how should the new enhancements at §2L1.2 interact with the departure provision? For example, should the Commission limit the applicability of the departure provision?

6. The Commission recently promulgated an amendment that amends the definition of “crime of violence” in subsection (a) of §4B1.2 (Definitions of Terms Used in Section 4B1.1), effective August 1, 2016 (to be published in a forthcoming edition of the Federal Register). The changes made by that amendment include revising the list of enumerated offenses and adding definitions for the enumerated offenses of extortion and a forcible sex offense. Finally, the amendment includes a downward departure provision in §4B1.1 for cases in which the defendant’s prior “crime of violence” or “controlled substance offense” is based on an offense that was classified by the laws of the state as a misdemeanor.

The proposed amendment would eliminate the use of the term “crime of violence” in §2L1.2. In the event that the Commission does not promulgate the proposed amendment, and retains the term “crime of violence” in §2L1.2, should the Commission incorporate all or part of the definition of “crime of violence” provided in the recently amended §4B1.2 into §2L1.2? If the Commission were to conform §2L1.2 to the new definition in §4B1.2(a), are there any particular offenses that would no longer qualify as a “crime of violence” but that nonetheless should receive an enhancement under subsection (b)(1) (e.g., statutory rape or burglary of a dwelling)?