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# Proposed Amendments to the Sentencing Guidelines (Preliminary)

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**January 12, 2023**

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 12, 2023. 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](http://www.ussc.gov) and will be available in a forthcoming edition of the Federal Register. In addition, an updated “reader-friendly” version of the proposed amendments as submitted will be posted on the Commission’s website at [www.ussc.gov](http://www.ussc.gov).

The proposed amendments and issues for comment will be subject to a public comment period running through March 14, 2023. 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](http://www.ussc.gov).

## PROPOSED AMENDMENTS

1. **FIRST STEP ACT—REDUCTION IN TERM OF IMPRISONMENT UNDER 18 U.S.C. § 3582(c)(1)(A)**
2. **FIRST STEP ACT—DRUG OFFENSES**
3. **FIREARMS OFFENSES**
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10. **ALTERNATIVES-TO-INCARCERATION PROGRAMS**
11. **FAKE PILLS**
12. **MISCELLANEOUS**
13. **TECHNICAL**

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## SUPPLEMENTARY INFORMATION

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Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. *See* Rules 2.2 and 4.4 of the Commission’s Rules of Practice and Procedure. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. *See* Rule 2.2; 28 U.S.C. § 994(p).

The proposed amendments in this document are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission’s part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In addition to the issues for comment set forth in the proposed amendments, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), any proposed amendment published in this document should be included in subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The background commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

**PROPOSED AMENDMENT: FIRST STEP ACT—REDUCTION IN TERM OF IMPRISONMENT UNDER 18 U.S.C. § 3582(c)(1)(A)**

**Synopsis of Proposed Amendment:** This proposed amendment responds to the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018) (“First Step Act” or “Act”), which contains numerous provisions related to sentencing, prison programming, recidivism reduction efforts, and reentry procedures. Specifically, the sentencing reform provisions of the Act (1) amended the sentencing modification procedures set forth in 18 U.S.C. § 3582(c)(1)(A) to allow a defendant to file a motion seeking a reduction in the defendant’s term of imprisonment under certain circumstances; (2) reduced certain enhanced penalties imposed pursuant to 21 U.S.C. § 851 for some repeat offenders and changed the prior offenses that qualify for such enhanced penalties; (3) broadened the eligibility criteria of the “safety valve” provision at 18 U.S.C. § 3553(f); (4) limited the “stacking” of certain mandatory minimum penalties imposed under 18 U.S.C. § 924(c) for multiple offenses that involve using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence or drug trafficking offense; and (5) allowed for retroactive application of the Fair Sentencing Act of 2010. Revisions to the *Guidelines Manual* may be appropriate to implement the Act’s changes to 18 U.S.C. § 3582(c)(1)(A).

The Sentencing Reform Act of 1984 (“SRA”) established a system of determinate sentencing, prohibiting a court from modifying a term of imprisonment once it had been imposed except in certain instances specified in section 3582(c) of title 18, United States Code. One of those instances is set forth in 18 U.S.C. § 3582(c)(1)(A), which authorizes a court to reduce the term of imprisonment of a defendant, after considering the factors in 18 U.S.C. § 3553(a) to the extent they are applicable, 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).

Prior to the First Step Act, a court was authorized to grant a reduction in a defendant’s term of imprisonment under section 3582(c)(1)(A) only “upon motion of the Director of the Bureau of Prisons.” Section 603(b) of the First Step Act amended 18 U.S.C. § 3582(c)(1)(A) to allow a defendant to file a motion seeking a sentence reduction after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons (“BOP”) to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.

Section 3582(c)(1)(A) does not define the phrase “extraordinary and compelling reasons.” Instead, the SRA directs that “[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, 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.” 28 U.S.C. § 994(t). Section 994(t) also directs that “[r]ehabilitation alone shall not be considered an extraordinary and compelling reason.” *Id.* The SRA provides the Commission with the authority to set the policy regarding what reasons should qualify as “extraordinary and compelling reasons” for a sentence reduction under section 3582(c)(1)(A) and the courts with the authority to find that the “extraordinary and compelling reasons warrant such a reduction . . . and that such reduction is consistent with applicable policy statements issued by

the Sentencing Commission.” See 28 U.S.C. §§ 994(a)(2)(C), 994(t), & 995(b); 18 U.S.C. § 3582(c)(1)(A).

The Commission implemented the section 994(t) directive by promulgating the policy statement at §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)). See U.S. Sent’g Comm’n, *Guidelines Manual*, §1B1.13 (Nov. 2021). Currently, §1B1.13 provides only for motions filed by the Director of the BOP and does not account for motions filed by a defendant under the amended statute. The policy statement describes the circumstances that constitute “extraordinary and compelling reasons” in the Commentary to §1B1.13. Application Note 1(A) through (C) provides for three categories of extraordinary and compelling reasons, *i.e.*, “Medical Condition of the Defendant,” “Age of the Defendant,” and “Family Circumstances.” See USSG §1B1.13, comment. (n.1(A)–(C)). Application Note 1(D) provides that the Director of the BOP may determine whether there exists in a defendant’s case “other reasons” that are extraordinary and compelling “other than, or in combination with,” the reasons described in Application Note 1(A) through (C). USSG §1B1.13, comment. (n.1(D)).

The proposed amendment would implement the First Step Act’s relevant provisions by amending §1B1.13 and its accompanying commentary. Specifically, the proposed amendment would revise the policy statement to reflect that 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act, authorizes a defendant to file a motion seeking a sentence reduction.

The proposed amendment would also revise the list of “extraordinary and compelling reasons” in §1B1.13 in several ways.

First, the proposed amendment would move the list of extraordinary and compelling reasons from the Commentary to the guideline itself as a new subsection (b). The new subsection (b) would set forth the same three categories of extraordinary and compelling reasons currently found in Application Note 1(A) through (C) (with the revisions described below), add two new categories, and revise the “Other Reasons” category currently found in Application Note 1(D). New subsection (b) would also provide that extraordinary and compelling reasons exist under any of the circumstances, or a combination thereof, described in such categories.

Second, the proposed amendment would add two new subcategories to the “Medical Condition of the Defendant” category at new subsection (b)(1). The first new subcategory is for a defendant suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner. The other new subcategory is for a defendant who presents the following circumstances: (1) the defendant is housed at a correctional facility affected or at risk of being affected by an ongoing outbreak of infectious disease or an ongoing public health emergency declared by the appropriate governmental authority; (2) the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or ongoing public health emergency; and (3) such risk cannot be mitigated in a timely or adequate manner.

Third, the proposed amendment would modify the “Family Circumstances” category at new subsection (b)(3) in three ways. First, the proposed amendment would revise the current subcategory relating to the death or incapacitation of the caregiver of a defendant’s minor child by making it also applicable to a defendant’s child who is 18 years of age or older and

incapable of self-care because of a mental or physical disability or a medical condition. Second, the proposed amendment would add a new subcategory to the “Family Circumstances” category for cases where a defendant’s parent is incapacitated and the defendant would be the only available caregiver for the parent. Third, the proposed amendment brackets the possibility of adding a more general subcategory applicable if the defendant presents circumstances similar to those listed in the other subcategories of “Family Circumstances” involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member.

Fourth, the proposed amendment brackets the possibility of adding two new categories: (1) Victim of Assault (“The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody.”); and (2) Changes in Law (“The defendant is serving a sentence that is inequitable in light of changes in the law.”).

Fifth, the proposed amendment would revise the provision currently found in Application Note 1(D) of §1B1.13. Three options are provided. All three options would redesignate this category as “Other Circumstances” and expand the scope of the category to apply to all motions filed under 18 U.S.C. § 3582(c)(1)(A), regardless of whether such motion is filed by the Director of the BOP or the defendant. Option 1 would provide that this category of extraordinary and compelling reasons applies in cases where a defendant presents any other circumstance or a combination of circumstances *similar in nature and consequence* to any of the circumstances described in new subsection (b)(1) through [(3)][(4)][(5)] of §1B1.13. Option 2 would provide that that this category applies if, as a result of changes in the defendant’s circumstances [or intervening events that occurred after the defendant’s sentence was imposed], it would be inequitable to continue the defendant’s imprisonment or require the defendant to serve the full length of the sentence. Option 3 would track the language in current Application Note 1(D) of §1B1.13 and apply if the defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)].

Finally, the proposed amendment would move current Application Note 3 (stating that, pursuant to 28 U.S.C. § 994(t), rehabilitation of a defendant is not, by itself, an extraordinary and compelling reason for purposes of §1B1.13) into the guideline as a new subsection (c). In addition, as conforming changes, the proposed amendment would delete application notes 2 (concerning the foreseeability of extraordinary and compelling reasons), 4 (concerning a motion by the Director of the Bureau of Prisons), and 5 (concerning application of subdivision 3), and make a minor technical change to the Background commentary.

Issues for comment are also provided.

**Proposed Amendment:**

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

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(a) **IN GENERAL.**—Upon motion of the Director of the Bureau of Prisons **or the defendant** ~~under~~ pursuant to 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

- (1) (A) extraordinary and compelling reasons warrant the reduction; or
- (B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
- (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
- (3) the reduction is consistent with this policy statement.

(b) **EXTRAORDINARY AND COMPELLING REASONS.**—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

(1) **MEDICAL CIRCUMSTANCES OF THE DEFENDANT.**—

(A) {The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.}\*

(B) {The defendant is—

- (i) suffering from a serious physical or medical condition,
- (ii) suffering from a serious functional or cognitive impairment, or
- (iii) experiencing deteriorating physical or mental health because of the aging process,

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\* The text in braces currently appears in the Commentary to §1B1.13. The proposed amendment would place the text here.

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.}\*

(C) The defendant is suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner.

(D) The defendant presents the following circumstances—

(i) the defendant is housed at a correctional facility affected or at risk of being affected by (I) an ongoing outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;

(ii) the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and

(iii) such risk cannot be mitigated in a timely or adequate manner.

(2) {AGE OF THE DEFENDANT.—The defendant (A) is at least 65 years old; (B) is experiencing a serious deterioration in physical or mental health because of the aging process; and (C) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.}\*

(3) FAMILY CIRCUMSTANCES OF THE DEFENDANT.—

(A) {The death or incapacitation of the caregiver of the defendant's minor child or ~~minor children~~ the defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.}\*<sup>\*\*</sup>

(B) {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.}\*

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\* The text in braces currently appears in the Commentary to §1B1.13. The proposed amendment would place the text here.

\*\* The text in braces currently appears in the Commentary to §1B1.13. The proposed amendment would place the text here with the changes shown in revision marks.

(C) The incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

[(D) The defendant presents circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member.]

[(4) VICTIM OF ASSAULT.—The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody.]

[(5) CHANGES IN LAW.—The defendant is serving a sentence that is inequitable in light of changes in the law.]

**[Option 1:**

(6) OTHER CIRCUMSTANCES.—The defendant presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described in paragraphs (1) through [(3)][(4)][(5)].]

**[Option 2:**

(6) OTHER CIRCUMSTANCES.—As a result of changes in the defendant's circumstances [or intervening events that occurred after the defendant's sentence was imposed], it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence.]

**[Option 3:**

(6) OTHER CIRCUMSTANCES.—The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)].]

(c) {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 this policy statement.}\*

**Commentary**

**Application Notes:**

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

(A) ~~Medical Condition of the Defendant.~~—

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\* The text in braces currently appears in the Commentary to §1B1.13. The proposed amendment would place the text here.



~~(i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid tumor cancer, amyotrophic lateral sclerosis (ALS), end stage organ disease, and advanced dementia.~~

~~(ii) The defendant is —~~

~~(I) suffering from a serious physical or medical condition,~~

~~(II) suffering from a serious functional or cognitive impairment, or~~

~~(III) 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 from which he or she is not expected to recover.~~

~~(B) **Age of the Defendant.** The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.~~

~~(C) **Family Circumstances.** —~~

~~(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.~~

~~(ii) 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.~~

~~(D) **Other Reasons.** 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 (A) through (C).~~

~~2. **Foreseeability of Extraordinary and Compelling Reasons.** For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.~~

~~3. **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 this policy statement.~~

~~4. **Motion by the Director of the Bureau of Prisons.** A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(e)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the~~

~~defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.~~

~~This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.~~

- ~~5. **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:** The Commission is required by 28 U.S.C. § 994(a)(2) to develop 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). In doing so, the Commission is ~~authorized~~ **required** by 28 U.S.C. § 994(t) 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.” This policy statement implements 28 U.S.C. § 994(a)(2) and (t).

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### Issues for Comment:

1. The proposed amendment would revise the list of “extraordinary and compelling reasons” in §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)) in several ways. The Commission invites comment on whether the proposed amendment—in particular proposed subsections (b)(5) and (6)—exceeds the Commission’s authority under 28 U.S.C. § 994(a) and (t), or any other provision of federal law.
2. The proposed amendment would make changes to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)) and its corresponding commentary to implement the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018). The Commission seeks general comment on the proposed changes and whether the Commission should make any different or additional changes to implement the Act.
3. The proposed amendment would revise the categories of circumstances in which “extraordinary and compelling reasons” exist under the Commission’s policy statement at §1B1.13. 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 the authority to promulgate general policy statements regarding the 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 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).

The Commission seeks comment on whether the proposed categories of circumstances are appropriate and provide clear guidance to the courts and the Bureau of Prisons.

Should the Commission further define and expand the categories? Should the Commission provide additional or different criteria or examples of circumstances that constitute “extraordinary and compelling reasons”? If so, what specific criteria or examples should the Commission provide? Should the Commission consider an altogether different approach for describing “what should be considered extraordinary and compelling reasons for sentence reduction”?

4. The proposed amendment brackets the possibility of adding a new category of “extraordinary and compelling reasons” to §1B1.13 relating to defendants who are victims of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody. The Commission seeks comment on whether this provision should be expanded to include defendants who have been victims of sexual assault or physical abuse resulting in serious bodily injury committed by another inmate.
5. Section 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) sets forth the applicable policy statement for determining in what circumstances and to what extent a reduction in a term of imprisonment as a result of an amended guideline range may be granted. In *Dillon v. United States*, 560 U.S. 817 (2010), the Supreme Court held that proceedings under 18 U.S.C. § 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and that §1B1.10 remains binding on courts in such proceedings.

The Commission seeks comment on whether the proposed amendment—in particular proposed subsections (b)(5) and (6)—is in tension with the Commission’s determinations regarding retroactivity of guideline amendments under §1B1.10. If so, how should the Commission resolve this tension? Should the Commission clarify the interaction between §1B1.10 and §1B1.13? If so, how?

## PROPOSED AMENDMENT:

## FIRST STEP ACT—DRUG OFFENSES

**Synopsis of Proposed Amendment:** This proposed amendment responds to the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018) (“First Step Act” or “Act”), which contains numerous provisions related to sentencing, prison programming, recidivism reduction efforts, and reentry procedures. Although Commission action is not necessary to implement most of the First Step Act, revisions to the *Guidelines Manual* may be appropriate to implement the Act’s changes to the eligibility criteria of the “safety valve” provision at 18 U.S.C. § 3553(f), and the recidivist penalties for drug offenders at 21 U.S.C. §§ 841(b) and 960(b). The proposed amendment contains two parts (Parts A and B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

### (A) Safety Valve

Section 3553(f) of title 18, United States Code, allows a court to impose a sentence without regard to any statutory minimum penalty if it finds that a defendant meets certain criteria. As originally enacted, the safety valve applied only to offenses under 21 U.S.C. §§ 841, 844, 846, 960, and 963 and to defendants who, among other things, had not more than one criminal history point, as determined under the guidelines. When it first enacted the safety valve, Congress directed the Commission to promulgate or amend guidelines and policy statements to “carry out the purposes of [section 3553(f)].” See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 80001(b). The Commission implemented the directive by incorporating the statutory text of section 3553(f) into the guidelines at §5C1.2 (Limitation of Applicability of Statutory Minimum Sentences in Certain Cases). Two other guidelines provisions, subsection (b)(18) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and subsection (b)(6) of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), each currently provide a 2-level reduction in a defendant’s offense level if the defendant meets the criteria in paragraphs (1) through (5) of §5C1.2(a).

Section 402 of the First Step Act expanded the safety valve provision at 18 U.S.C. § 3553(f) in two ways. First, the Act extended the applicability of the safety valve to maritime offenses under 46 U.S.C. §§ 70503 and 70506. Second, the Act amended section 3553(f)(1) to broaden the eligibility criteria of the safety valve to include defendants who do not have: (1) “more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines”; (2) a “prior 3-point offense, as determined under the sentencing guidelines”; and (3) a “prior 2-point violent offense, as determined under the sentencing guidelines.” The Act defines “violent offense” as a “crime of violence,” as defined in 18 U.S.C. § 16, that is punishable by imprisonment. In addition, the First Step Act incorporated into section 3553(f) a provision instructing that “[i]nformation disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.”

Following the enactment of the First Step Act, circuit courts have disagreed about how the word “and” connecting subsections (A) through (C) in section 3553(f)(1) operates. The Fifth, Sixth, Seventh, and Eighth Circuits have held that section 3553(f)(1) should be read to exclude a defendant who meets any single disqualifying condition listed in subsections (A) through (C).

See *United States v. Palomares*, 52 F.4th 640, 642 (5th Cir. 2022) (“To be eligible for safety valve relief, a defendant must show that she does not have more than 4 criminal history points, does not have a 3-point offense, and does not have a 2-point violent offense.”); *United States v. Haynes*, 55 F.4th 1075 (6th Cir. 2022); *United States v. Pace*, 48 F.4th 741, 756 (7th Cir. 2022) (“[A] defendant who meets any one of subsections (A), (B), or (C) does not qualify for safety-valve relief.”); *United States v. Pulsifer*, 39 F.4th 1018, 1022 (8th Cir. 2022) (“A court will find that § 3553(f)(1) is satisfied only when the defendant (A) does not have more than four criminal history points, (B) does not have a prior three-point offense, and (C) does not have a prior two-point violent offense.”). Specifically, the Eighth Circuit concluded that the word “and” is conjunctive in a “distributive” sense rather than in a “joint” sense. Thus, the phrase “does not have” is distributed across all three subsections (*i.e.*, should be read as repeated before each of the three conditions) such that a defendant is ineligible for safety valve relief if the defendant meets any one of the three conditions. *Pulsifer*, 39 F.4th at 1022 (“The distributive reading therefore gives meaning to each subsection in § 3553(f)(1), and we conclude that it is the better reading of the statute.”); see also *Palomares*, 52 F.4th at 642 (“We agree with the Eighth Circuit that Congress’s use of an em-dash following ‘does not have’ is best interpreted to ‘distribute’ that phrase to each following subsection.”); *Haynes*, 55 F.4th at \*4 (“We agree with the Eighth Circuit that, of the interpretations on offer here, [o]nly the distributive interpretation avoids surplusage.”).

The Ninth and Eleventh Circuits, in contrast, have held that the “and” connecting subparagraphs (A), (B), and (C) of section 3553(f)(1) is “conjunctive” and joins together the enumerated characteristics in those provisions. *United States v. Lopez*, 998 F.3d 431 (9th Cir. 2021); *United States v. Garcon*, 54 F.4th 1274 (11th 2022) (en banc). Accordingly, a defendant “must have (A) more than four criminal-history points, (B) a prior three-point offense, *and* (C) a prior two-point violent offense, cumulatively,” to be disqualified from safety valve relief under section 3553(f). *Lopez*, 998 F.3d at 433. Unlike the Fifth, Sixth, and Eighth Circuits, the Ninth and Eleventh Circuits interpret the word “and” to be conjunctive in a “joint,” rather than “distributive,” sense.

Using fiscal year 2021 data, Commission analysis estimated that of 17,520 drug trafficking offenders, 11,866 offenders meet the non-criminal history requirements of the safety valve (18 U.S.C. § 3553(f)(2)–(5)). Of those 11,866 offenders, 5,768 offenders have no more than one criminal history point and would be eligible under the unamended pre-First Step Act criminal history requirement. Under a disjunctive interpretation of the expanded criminal history provision, 1,987 offenders would become eligible. The remaining 4,111 offenders would be ineligible. In comparison, under the Ninth Circuit’s conjunctive interpretation of the expanded criminal history provision, 5,778 offenders would become eligible. The remaining 320 offenders would be ineligible.

Part A of the proposed amendment would implement the provisions of the First Step Act expanding the applicability of the safety valve provision by amending §5C1.2 and its corresponding commentary. Specifically, it would revise §5C1.2(a) to reflect the broader class of defendants who are eligible for safety valve relief under the Act. Part A of the proposed amendment would also bracket a possible revision to the minimum offense level that §5C1.2(b) requires for certain offenders. Revision of this provision, which implements a directive to the Commission in section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–222 (Sept. 13, 1994), may be appropriate given the

expanded class of defendants who would qualify for safety valve relief under the proposed revisions to §5C1.2(a).

In addition, Part A of the proposed amendment would make changes to the Commentary to §5C1.2. First, it would revise Application Note 1 by deleting the current language and adding the statutory definition for the term “violent offense.” Second, Part A of the proposed amendment brackets the possibility of adding a new application note stating that “in determining whether the defendant meets the criteria in subsection (a)(1), refer to §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category).” Third, Part A of the proposed amendment would also revise Application Note 7, to implement the new statutory provision stating that information disclosed by a defendant pursuant to 18 U.S.C. § 3553(f) may not be used to enhance the defendant’s sentence unless the information relates to a violent offense. Finally, it would make additional technical changes to the rest of the Commentary by renumbering and inserting headings at the beginning of certain notes.

Part A of the proposed amendment would also make conforming changes to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)), which makes a specific reference to the number of criminal history points allowed by §5C1.2(a)(1).

Finally, Part A of the proposed amendment would also make changes to §2D1.1 and §2D1.11, as the 2-level reductions in both guidelines are tethered to the eligibility criteria of paragraphs (1)–(5) of §5C1.2(a). It provides two options for amending §2D1.1(b)(18) and §2D1.11(b)(6).

**Option 1** would not make any substantive changes to §2D1.1(b)(18) and §2D1.11(b)(6), allowing their 2-level reductions to automatically apply to any defendant who meets the revised criteria of §5C1.2. Because §5C1.2(a)(1) would closely track the language in 18 U.S.C. § 3553(f)(1), as amended by the First Step Act, the “and” used to set forth the criminal history criteria in §5C1.2 might be read by some courts as *disjunctive* (e.g., the courts in the Fifth, Sixth, Seventh, and Eighth Circuits) and by other courts as *conjunctive* (e.g., the courts in the Ninth and Eleventh Circuits). Option 1 would not resolve the circuit conflict for purposes of §2D1.1(b)(18) and §2D1.11(b)(6).

**Option 2** would amend §2D1.1(b)(18) and §2D1.11(b)(6) to provide that their 2-level reductions apply to all defendants who meet the criteria in §5C1.2(a)(2)–(5). It would also incorporate into those provisions the same criminal history criteria from revised §5C1.2(a)(1) but set forth the criteria *disjunctively*, consistent with the approach of the Fifth, Sixth, Seventh, and Eighth Circuits. As a result, a defendant would not be eligible for the 2-level reduction in §2D1.1(b)(18) or §2D1.11(b)(6) if the defendant presents *any* of the disqualifying conditions relating to criminal history.

Both options also would make changes to the Commentary to §§2D1.1 and 2D1.11 that correspond to the applicable provisions of the revised Commentary to §5C1.2.

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

## **(B) Recidivist Penalties for Drug Offenders**

The most common drug offenses that carry mandatory minimum penalties are set forth in 21 U.S.C. §§ 841 and 960. Under both provisions, the mandatory minimum penalties are tied to the quantity and type of controlled substance involved in an offense. Enhanced mandatory minimum penalties are set forth in 21 U.S.C. §§ 841(b) and 960(b) for defendants whose instant offense resulted in death or serious bodily injury, *or* who have prior convictions for certain specified offenses. Greater enhanced mandatory minimum penalties are provided for those defendants whose instant offense resulted in death or serious bodily injury *and* who have a qualifying prior conviction.

Prior to the First Step Act, all of the recidivist penalty provisions within sections 841(b) and 960(b) provided for an enhanced mandatory minimum penalty if a defendant had one or more convictions for a prior “felony drug offense,” which is defined in 21 U.S.C. § 802(44) as “an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.” Section 401 of the Act both narrowed and expanded the type of prior offenses that trigger enhanced mandatory minimum penalties under 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), and 960(b)(2). The Act narrowed the triggering prior offenses for these statutory provisions by replacing the term “felony drug offense” with “serious drug felony.” The term “serious drug felony” is defined in 21 U.S.C. § 802(57) as “an offense described in [18 U.S.C. § 924(e)(2)] for which—(A) the offender served a term of imprisonment of more than 12 months; and (B) the offender’s release from any term of imprisonment was within 15 years of the commencement of the instant offense.” The Act also expanded the class of triggering offenses for the same statutory provisions by adding “serious violent felony.” The term “serious violent felony” is defined in 21 U.S.C. § 802(58) as “(A) an offense described in [18 U.S.C. § 3559(c)(2)] for which the offender served a term of imprisonment of more than 12 months; and (B) any offense that would be a felony violation of [18 U.S.C. § 113], if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months.” The First Step Act did not amend 21 U.S.C. § 841(b)(1)(C), 841(b)(1)(E), 960(b)(3), or 960(b)(5), which still provide for enhanced mandatory minimum penalties if a defendant was convicted of a prior “felony drug offense.”

Part B of the proposed amendment would revise subsection (a) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to make the guideline’s base offense levels consistent with the First Step Act’s changes to the type of prior offenses that trigger enhanced mandatory minimum penalties. Specifically, the proposed amendment would revise subsections (a)(1) and (a)(3) to replace the term “similar offense” used in these guideline provisions with the appropriate terms set forth in the relevant statutory provisions, as amended by the First Step Act.

First, Part B of the proposed amendment would amend §2D1.1(a)(1) and split it into two subparagraphs. Subparagraph (A) would provide for a base offense level of 43 for a defendant convicted under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. § 960(b)(1) or (b)(2), where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a “serious drug felony or serious violent felony.” Subparagraph (B) would provide for a base offense level of 43 for a defendant convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3) where death or serious bodily

injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a “felony drug offense.”

Second, Part B of the proposed amendment would amend §2D1.1(a)(3), which provides for a base offense level of 30 for a defendant convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5) where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a “similar offense.” Specifically, it would replace the term “similar offense” with “felony drug offense,” as provided in the relevant statutory provisions.



**Proposed Amendment:**

**(A) Safety Valve**

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**§5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases**

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(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, or 46 U.S.C. § 70503 or § 70506, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)–(5) set forth below as follows:

(1) the defendant does not have ~~more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);~~

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to

provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

- (b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, [the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17][the applicable guideline range shall not be less than 24 to 30 months of imprisonment].

### Commentary

#### Application Notes:

1. **Definitions.—**

~~“More than 1 criminal history point, as determined under the sentencing guidelines,” as used in subsection (a)(1), means more than one criminal history point as determined under §4A1.1 (Criminal History Category) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category).~~

(A) The term “*violent offense*” means a “crime of violence,” as defined in 18 U.S.C. § 16, that is punishable by imprisonment.

2. (B) “*Dangerous weapon*” and “*firearm*,” as used in subsection (a)(2), and “*serious bodily injury*,” as used in subsection (a)(3), are defined in the Commentary to §1B1.1 (Application Instructions).

3. (C) “*Offense*,” as used in subsection (a)(2)–(4), and “*offense or offenses that were part of the same course of conduct or of a common scheme or plan*,” as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.

2. **Application of subsection (a)(1).**—In determining whether the defendant meets the criteria in subsection (a)(1), refer to §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category).]

- 4.3. **Application of Subsection (a)(2).**—Consistent with §1B1.3 (Relevant Conduct), the term “*defendant*,” as used in subsection (a)(2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.

4. **Application of Subsection (a)(4).**—

5. (A) **“Organizer, leader, manager, or supervisor of others in the offense”.**—~~“Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines,” as used in~~The first prong of subsection (a)(4), ~~means a~~ requires that the defendant who receives was not subject to an adjustment for an aggravating role under §3B1.1 (Aggravating Role).

6. (B) **“Engaged in a continuing criminal enterprise”.**— “*Engaged in a continuing criminal enterprise*,” as used in subsection (a)(4), is defined in 21 U.S.C. § 848(c). As a

practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. § 848, and (ii) any defendant who “engaged in a continuing criminal enterprise” but is convicted of an offense to which this section applies will be an “organizer, leader, manager, or supervisor of others in the offense.”

75. **Use of Information Disclosed under Subsection (a).**—~~Information disclosed by the defendant with respect to subsection (a)(5) may be considered in determining the applicable guideline range, except, where the use of such information is restricted under the provisions of §1B1.8 (Use of Certain Information). That is, subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.~~ Information disclosed by a defendant under subsection (a) may not be used to enhance the sentence of the defendant unless the information relates to a violent offense, as defined in Application Note 1(A).
86. **Government’s Opportunity to Make Recommendation.**—Under 18 U.S.C. § 3553(f), prior to its determination, the court shall afford the government an opportunity to make a recommendation. *See also* Fed. R. Crim. P. 32(f), (i).
97. **Exemption from Otherwise Applicable Statutory Minimum Sentences.**—A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release.

**Background:** This section sets forth the relevant provisions of 18 U.S.C. § 3553(f), as added by section 80001(a) of the Violent Crime Control and Law Enforcement Act of 1994 **and subsequently amended**, which limit the applicability of statutory minimum sentences in certain cases. Under the authority of section 80001(b) of that Act, the Commission has promulgated application notes to provide guidance in the application of 18 U.S.C. § 3553(f). *See also* H. Rep. No. 460, 103d Cong., 2d Sess. 3 (1994) (expressing intent to foster greater coordination between mandatory minimum sentencing and the sentencing guideline system).

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### §4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

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\* \* \*

(b) DOWNWARD DEPARTURES.—

\* \* \*

(3) LIMITATIONS.—

\* \* \*

(B) **LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.**—A defendant ~~whose criminal history category is Category I after receipt of~~ **who receives** a downward departure under this subsection **does not meet the criterion** **criminal history requirement** of subsection (a)(1) of

§5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category) the defendant did not otherwise meet such requirement before receipt of the downward departure.

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

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\* \* \*

(b) Specific Offense Characteristics

\* \* \*

**[Option 1 (includes changes to the Commentary):**

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

**[Option 2 (includes changes to the Commentary):**

(18) If the defendant—

(A) meets the criteria set forth in subdivisions paragraphs (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases); and

(B) does not have any of the following:

(i) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense;

(ii) a prior 3-point offense; or

(iii) a prior 2-point violent offense;

as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);

decrease by 2 levels.]

\* \* \*

### Commentary

\* \* \*

#### Application Notes:

\* \* \*

#### [Option 1 (continued):

21. **Applicability of Subsection (b)(18).**—The applicability of subsection (b)(18) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides [a minimum offense level of level 17][that the applicable guideline range shall not be less than 24 to 30 months of imprisonment], is not pertinent to the determination of whether subsection (b)(18) applies.]

#### [Option 2 (continued):

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

(A) **General Applicability of Subsection (b)(18).**—The applicability of subsection (b)(18) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides [a minimum offense level of level 17][that the applicable guideline range shall not be less than 24 to 30 months of imprisonment], is not pertinent to the determination of whether subsection (b)(18) applies.

(B) **Definition of Violent Offense.**—The term “*violent offense*” means a “crime of violence,” as defined in 18 U.S.C. § 16, that is punishable by imprisonment.]

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

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\* \* \*

(b) Specific Offense Characteristics

\* \* \*

#### [Option 1 (includes changes to the Commentary):

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

**[Option 2 (includes changes to the Commentary):**

(6) If the defendant—

(A) meets the criteria set forth in subdivisions paragraphs (12)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases); and

(B) does not have any of the following:

(i) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense;

(ii) a prior 3-point offense; or

(iii) a prior 2-point violent offense;

as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);

decrease by 2 levels.]

\* \* \*

**Commentary**

\* \* \*

**Application Notes:**

\* \* \*

**[Option 1 (continued):**

7. **Applicability of Subsection (b)(6).**— The applicability of subsection (b)(6) shall be determined without regard to the offense of conviction. If subsection (b)(6) applies, §5C1.2(b) does not apply. See §5C1.2(b)(2)(requiring [a minimum offense level of level 17][an applicable guideline range of not less than 24 to 30 months of imprisonment] if the “statutorily required minimum sentence is at least five years”).]

**[Option 2 (continued):**

7. **Application of Subsection (b)(6).**—

(A) **General Applicability of Subsection (b)(6).**— The applicability of subsection (b)(6) shall be determined without regard to the offense of conviction. If subsection (b)(6) applies, §5C1.2(b) does not apply. See §5C1.2(b)(2)(requiring [a minimum offense level of level 17][an applicable guideline range of not less than 24 to 30 months of imprisonment] if the “statutorily required minimum sentence is at least five years”).

(B) **Definition of Violent Offense.**—The term “*violent offense*” means a “crime of violence,” as defined in 18 U.S.C. § 16, that is punishable by imprisonment.]

\* \* \*

### Issues for Comment:

1. As described above, Part A of the proposed amendment would make changes to §5C1.2 (Limitation of Applicability of Statutory Minimum Sentences in Certain Cases) and its corresponding commentary to implement the First Step Act of 2018, Pub. L. 115–391 (Dec. 21, 2018). The Commission seeks general comment on whether the Commission should make any different or additional changes to implement the Act.
2. Section 3553(f)(1) of title 18, United States Code, sets forth the criminal history criteria for the safety valve in subparagraphs (A) through (C). Each subparagraph sets forth the specific criminal history condition followed by the phrase “as determined by the guidelines.” Circuit courts have reached different conclusions about what constitutes a “1-point,” “2-point,” or “3-point” offense, and also seem to disagree on whether such interpretation arises from the statute itself or from proper guideline operation. *Compare, e.g.,* United States v. Garcon, 54 F.4th 1274, 1280–84 (11th Cir. 2022) (en banc) (concluding that criminal history events are considered differently for purposes of subsection 3553(f)(1)(B) and (C) than subsection (A), and articulating that interpretation as primarily stemming from the statute), *with* United States v. Haynes, 55 F.4th 1075, at \*4 (6th Cir. 2022) (“[Section] 3553(f)(1) refers only to ‘prior 3-point’ and ‘prior 2-point violent’ offenses ‘as determined under the sentencing guidelines’—which means all the Guidelines, including §4A1.2(e).”). The Commission seeks comment on whether it should provide guidance on what constitutes a “1-point,” “2-point,” or “3-point” offense, “as determined under the sentencing guidelines,” for purposes of §5C1.2.
3. Part A of the proposed amendment provides two options for amending subsection (b)(18) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and subsection (b)(6) of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) in light of the proposed revisions to §5C1.2(a), which reflect the changes to 18 U.S.C. § 3553(f) enacted by the First Step Act.

Option 1 would leave the text of §2D1.1(b)(18) and §2D1.11(b)(6) unchanged, so that their offense-level reductions would apply to all defendants who meet the criteria in revised §5C1.2(a)(1)–(5). As discussed above, a circuit conflict has arisen as to whether the “and” connecting the subparagraphs that set forth the criminal history criteria in 18 U.S.C. § 3553(f)(1) operates *disjunctively* or *conjunctively*.

Option 2 of the proposed amendment would amend §2D1.1(b)(18) and §2D1.11(b)(6) to provide that their 2-level reductions would apply to all defendants who meet the criteria in §5C1.2(a)(2)–(5). It would also incorporate into those provisions the same criminal history criteria from revised §5C1.2(a)(1) but set forth the criteria

*disjunctively*, so that the reductions would be available only to defendants who do not present any of the listed disqualifying conditions.

The Commission seeks comment on each of these options. Which option, if any, is appropriate? In the alternative, should the Commission incorporate into §2D1.1(b)(18) and §2D1.11(b)(6) the same criminal history criteria from revised §5C1.2(a)(1) but set forth the criteria *conjunctively*, so that defendants must present all of the listed disqualifying conditions to be ineligible for their reductions? Should the Commission consider an altogether different approach? If so, what approach should the Commission provide and why?



**(B) Recidivist Penalties for Drug Offenders**

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

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

(1) **43**, if—

(A) the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), or (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), or (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a ~~similar offense~~ **serious drug felony or serious violent felony**; or

(B) the defendant is convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a **felony drug offense**; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a ~~similar offense~~ **felony drug offense**; or

(4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the **4**-level (“minimal participant”) reduction in §3B1.2(a), decrease to level **32**.

\* \* \*

## Commentary

\* \* \*

### Application Notes:

#### 1. **Definitions.**—

{For purposes of the guidelines, a “*plant*” is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).}\*  
}

For purposes of subsection (a), “*serious drug felony*,” “*serious violent felony*,” and “*felony drug offense*” have the meaning given those terms in 21 U.S.C. § 802.

- ±2. “**Mixture or Substance**”.—“*Mixture or substance*” as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

2. —“**Plant**”. For purposes of the guidelines, a “*plant*” is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).

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\* The text in braces currently appears in Application Note 2 of §2D1.1. The proposed amendment would place the text here without making any changes.

## **PROPOSED AMENDMENT: FIREARMS OFFENSES**

**Synopsis of Proposed Amendment:** This proposed amendment is a result of the Commission’s consideration of possible amendments to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to (A) implement the Bipartisan Safer Communities Act (Pub. L. 117–159); and (B) make any other changes that may be warranted to appropriately address firearms offenses. *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022). The proposed amendment contains three parts (Parts A through C). The Commission is considering whether to promulgate any or all these parts, as they are not mutually exclusive.

**Part A** of the proposed amendment would amend §2K2.1 to respond to the Bipartisan Safer Communities Act. Two options are presented. Issues for comment are also provided.

**Part B** of the proposed amendment addresses concerns expressed by some commenters about firearms that are not marked by a serial number (*i.e.*, “ghost guns”). An issue for comment is also provided.

**Part C** of the proposed amendment provides issues for comment on possible further revisions to §2K2.1.

## (A) Bipartisan Safer Communities Act

**Synopsis of Proposed Amendment:** The Bipartisan Safer Communities Act (the “Act”), among other things, created two new firearms offenses, amended definitions, increased penalties for certain firearms offenses, and contained a directive to the Commission relating to straw purchases and trafficking of firearms offenses.

Specifically, the Act created two new offenses at 18 U.S.C. §§ 932 and 933. Section 932 prohibits knowingly purchasing, or conspiring to purchase, any firearm on behalf of, or at the request or demand of, another person with knowledge or reasonable cause to believe that such other person: (1) meets at least one of the criteria set forth in 18 U.S.C. § 922(d); (2) intends to use, carry, possess, sell, or otherwise dispose of the firearm in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking crime; or (3) intends to sell or otherwise dispose of the firearms to a person who meets either of the previous criteria. *See* 18 U.S.C. § 932(b). Section 933 prohibits: (1) shipping, transporting, transferring, causing to be transported, or otherwise disposing of, any firearm to another person with knowledge or reasonable cause to believe that the use, carrying, or possession of a firearm by the recipient would constitute a felony; (2) receiving from another person any firearm with knowledge or reasonable cause to believe that such receipt would constitute a felony; or (3) attempt or conspiracy to commit either of the acts described before. *See* 18 U.S.C. § 933(a).

Both new offenses carry a statutory maximum term of imprisonment of 15 years. The statutory maximum term of imprisonment for offenses under section 932 increases to 25 years if the offense was committed with knowledge or reasonable cause to believe that any firearm involved will be used to commit a felony, a Federal crime of terrorism, or a drug trafficking crime. *See* 18 U.S.C. § 932(c)(2).

In addition, the Act increased the statutory maximum term of imprisonment for the offenses under 18 U.S.C. §§ 922(d), 922(g), 924(h), and 924(k) from ten to 15 years. The Act also made changes to the elements of some of these offenses. First, the Act expanded the scope of section 922(d) by adding two additional categories of persons to whom it is unlawful to sell or otherwise dispose of any firearm or ammunition: (1) persons who intend to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking offense; and (2) persons who intend to sell or otherwise dispose of the firearm or ammunition to a person to whom sale or disposition is prohibited under the other categories in section 922(d). *See* 18 U.S.C. § 922(d)(10)–(11).

Second, the Act broadly amended section 924(h). Prior to the Act, section 924(h) prohibited knowingly transferring a firearm with knowledge that such firearm will be used to commit a crime of violence or drug trafficking crime. As amended by the Act, section 924(h) prohibits knowingly receiving or transferring a firearm or ammunition, or attempting or conspiring to do so, with knowledge or reasonable cause to believe that such firearm or ammunition will be used to commit a felony, a Federal crime of terrorism, a drug trafficking crime, or a crime under the Arms Export Control Act (22 U.S.C. § 2751 et seq.), the Export Control Reform Act of 2018 (50 U.S.C. § 4801 et seq.), the International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.), or the Foreign Narcotics Kingpin Designation Act (21 U.S.C. § 1901 et seq.). *See* 18 U.S.C. § 924(h).

Third, the Act also broadly amended section 924(k). Prior to the Act, section 924(k) prohibited smuggling or knowingly bringing into the United States a firearm, or attempting to do so, with intent to engage in or to promote conduct that: (1) is punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or chapter 705 of title 46, United States Code; (2) violates any law of a State relating to any controlled substance; or (3) constitutes a crime of violence. Section 924(k), as amended by the Act, prohibits smuggling or knowingly bringing into the United States a firearm or ammunition, or attempting or conspiring to do so, with intent to engage in or to promote conduct that: (1) is punishable under the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or chapter 705 of title 46, United States Code; or (2) constitutes a felony, a Federal crime of terrorism, or a drug trafficking crime. *See* 18 U.S.C. § 924(k)

The Act also expanded the definition of “misdemeanor crime of domestic violence” at 18 U.S.C. § 921(a)(33), to include offenses against a person in “a current or recent former dating relationship.” *See* 18 U.S.C. § 921(a)(33)(A). In addition, the Act added a new provision to section 921(a)(33) indicating that a person is not disqualified from shipping, transporting, possessing, receiving, or purchasing a firearm under chapter 44 of title 18, United States Code, by reason of a conviction for a misdemeanor crime of domestic violence against an individual in a dating relationship if certain criteria are met. *See* 18 U.S.C. § 921(a)(33)(C).

Finally, the Act includes a directive requiring the Commission, pursuant to its authority under 28 U.S.C. § 994, to

review and amend its guidelines and policy statements to ensure that persons convicted of an offense under section 932 or 933 of title 18, United States Code, and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines and policy statements for such straw purchasing and trafficking of firearms offenses. In its review, the Commission shall consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant’s role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors. The Commission shall also review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.

Pub. L. 117–159, §12004(a)(5) (2022).

*New Offenses and Increased Penalties for Straw Purchasing and Firearms Trafficking Offenses*

Part A of the proposed amendment implements part of the directive of the Bipartisan Safer Communities Act by addressing the new offenses at 18 U.S.C. § 932 and 933 and increasing

penalties for other offenses applicable to straw purchases and trafficking of firearms. First, Part A of the proposed amendment would amend Appendix A (Statutory Index) to reference the new offenses at 18 U.S.C. §§ 932 and 933 to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). Offenses involving firearms trafficking and straw purchases are generally referenced to this guideline.

Second, Part A of the proposed amendment would amend §2K2.1 to address the new offenses and increase penalties for straw purchases and trafficking of firearms, as required by the directive. Two options are presented.

**Option 1** addresses the new offenses at 18 U.S.C. §§ 932 and 933 and increases penalties for straw purchasing offenses and trafficking offenses. It would accomplish this by adding references to the new offenses in §2K2.1(a) and revising the firearms trafficking enhancement at §2K2.1(b)(5) to apply to straw purchase and other trafficking offenses.

Specifically, Option 1 would add references to 18 U.S.C. §§ 932 and 933 in subsections (a)(4)(B)(ii)(II) and (a)(6)(B). In addition, Option 1 would revise the 4-level enhancement for firearms trafficking at §2K2.1(b)(5) to make it a tiered-enhancement applicable to defendants who transferred or intended to transfer firearms or ammunition to certain individuals, which would provide the requisite increase for a defendant convicted of violating 18 U.S.C. § 922(d), § 932, or § 933(a)(1), as well as other offenses, including violations of 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) committed with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. The revised enhancement would also apply to defendants convicted under 18 U.S.C. § 933(a)(2) or (a)(3). Specifically, a [1][2]-level enhancement would apply if the defendant was convicted under 18 U.S.C. § 933(a)(2) or (a)(3). A [1][2]-level increase would apply if the defendant (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i). A [5][6]-level enhancement would apply if the defendant (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence; or (III) intended to use or dispose of the firearms unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i).

In addition, Option 1 would amend Application Note 13 to conform its content with the revised version of §2K2.1(b)(5). It would also include a new provision in response to the changes that the Act made to section 921(a)(33). Specifically, the new provision states that new subsection (b)(5)(C)(i) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual [had no prior conviction for a crime of violence or controlled substance offense and had not more than one conviction of a misdemeanor crime of domestic violence against a person in a

dating relationship, but 5 years had elapsed from the later of the judgment of conviction or the completion of the individual's custodial or supervisory sentence for such an offense and the individual had not subsequently been convicted of another such offense; a misdemeanor under federal, state, tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; or any other offense covered 18 U.S.C. § 922(g)[met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C)]. In addition, Option 1 would amend the departure provision in Application Note 13 to provide that if the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms [or an unusually large amount of ammunition], an upward departure may be warranted.

**Option 2** would restructure the base offense level provisions at §2K2.1(a) by providing references to specific statutes with a statutory maximum term of imprisonment of 15 years or more. Option 2 identifies the “other offenses applicable” to trafficking and straw purchasing as those for which Congress increased penalties in the Act. As mentioned, the Act increased the maximum term of imprisonment from ten to 15 years for four offenses: 18 U.S.C. §§ 922(d) (transferring a firearm or ammunition to a prohibited person); 922(g) (possession, receipt, or transfer of a firearm or ammunition by a prohibited person); 924(h) (transferring a firearm or ammunition to commit a felony); and 924(k) (smuggling a firearm or ammunition to commit a felony). The 15-year statutory maximum for these four offenses is the same as the new section 932 (without aggravating circumstances) and section 933 offenses. Three of the offenses with the amended statutory penalties (sections 922(g), 922(d), and 924(h)) share core elements with the new straw purchase (section 932) and trafficking (section 933) statutes: the transfer of a firearm to a felon or knowing it would be used to commit a felony; and the receipt of a firearm by a felon or knowing it would be used to commit a felony. The third (section 924(k)) similarly concerns itself with the intent to engage in or promote a further felony (after smuggling a firearm or ammunition into or out of the United States). Because the penalties and elements of these four offenses are similar to those of the new offenses, and they were modified by the same Act, Option 2 applies the increase to defendants convicted of those four offenses in addition to defendants convicted under 18 U.S.C. §§ 932 and 933.

First, Option 2 would increase by [1][2] levels the base offense levels at subsections (a)(1) through (a)(3). Second, Option 2 would add a new provision at (a)(4) that sets forth a base offense level of [21][22] 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) (i) the defendant is convicted under 18 U.S.C. § 922(d), § 922(g), § 924(h), § 924(k), § 932, or § 933; and (ii) 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). Third, Option 2 would delete current subsection (a)(4)(A) and make conforming changes to current subsection (a)(4)(B). Fourth, Option 2 would add a new provision at §2K2.1(a)(7) that would set forth a new base offense level of [15][16] if the defendant was convicted under 18 U.S.C. §§ 922(d), 922(g), 924(h), 924(k), 932, and 933. Fifth, Option 2 would delete current subsection (a)(6)(B). Sixth, Option 2 would amend the provision that follows §2K2.1(b)(4) containing a cumulative impact “cap,” to increase such limit from level 29 to level [30][31]. Finally, Option 2 would add a new [1][2]-level reduction at §2K1.1(b)(9) applicable if (A) the base offense level is determined under new subsection (a)(7); (B) none of the enhancements in subsection (b) apply; and (C) the offense of conviction established only the possession or receipt of firearms or ammunition.

Option 2 would also amend current Application Note 13(B) in response to the changes that the Act made to section 921(a)(33). The note currently provides that “misdemeanor crime of violence” has the meaning given that term in 18 U.S.C. § 921(a)(33)(A). Option 2 would amend Application Note 13(B) to expressly provide that an individual shall not be considered an “individual whose possession or receipt of the firearm would be unlawful” [if, at the time of the instant offense, the individual was not otherwise covered by such definition and has not more than one conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, but 5 years had elapsed from the later of the judgment of conviction or the completion of the individual’s custodial or supervisory sentence for such an offense and the individual had not subsequently been convicted of: another such offense; a misdemeanor under federal, state, tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; or any other offense covered by the definition of “individual whose possession or receipt of the firearm would be unlawful”][based upon a conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, if the individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C) at the time of the instant offense].

*“Straw Purchasers” with Mitigating Factors*

Part A of the proposed amendment also addresses the part of the directive that requires the Commission to “consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant’s role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors.” See Pub. L. 117–159, §12004(a)(5) (2022).

In response to the directive, Options 1 and 2 of Part A of the proposed amendment would add a new [1][2]-level reduction based on certain mitigating factors.

**Option 1** would set forth the new [1][2]-level reduction at subsection (b)(9). The reduction would be applicable if the defendant (A) [receives an enhancement under subsection (b)(5)][ is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 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]; (B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and (C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity].

**Option 2** would set forth the new [1][2]-level reduction at subsection (b)(10). The reduction would be applicable if subsection (b)(9) does not apply and the defendant (A) is convicted under 18 U.S.C. § 922(d), § 924(h), § 924(k), § 932, or § 933; (B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before



application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and (C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity].

In relation to this part of the directive, both options in Part A of the proposed amendment brackets the deletion of the departure provision at Application Note 15 of §2K2.1.

### *Enhancement for Defendants with Criminal Affiliations*

Finally, Part A of the proposed amendment addresses the part of the directive that requires the Commission to “review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.” See Pub. L. 117–159, §12004(a)(5) (2022). Options 1 and 2 of Part A of the proposed amendment would provide a new [2][3][4]-level enhancement in response to this part of the directive.

**Option 1** would set forth the new [2][3][4]-level enhancement at subsection (b)(8). The enhancement would be applicable if the defendant (A) [receives an enhancement under subsection (b)(5)][ is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 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]; (B) participated, at the time of the offense, in a group, club, organization, or association of five or more persons that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage in or have engaged in criminal activity; and (C) committed the offense with the intent to promote or further the felonious activities of , or with the intent to maintain or increase his or her position in, such group, club, organization, or association.

**Option 2** would set forth the new [2][3][4]-level enhancement at subsection (b)(8). The enhancement would be applicable if the defendant (A) is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 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; (B) participated, at the time of the offense, in a group, club, organization, or association of five or more persons that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage in or have engaged in criminal activity; and (C) committed the offense with the intent to promote or further the felonious activities of , or with the intent to maintain or increase his or her position in, such group, club, organization, or association;.

### *Issues for Comment*

Part A of the proposed amendment also provides issues for comment.

Proposed Amendment:

## APPENDIX A

## STATUTORY INDEX

\* \* \*

18 U.S.C. § 931	2K2.6
18 U.S.C. § 932	2K2.1
18 U.S.C. § 933	2K2.1
18 U.S.C. § 956	2A1.5, 2X1.1

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### Option 1 (Revised SOC Enhancement for Straw Purchase and Trafficking Offenses)

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

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(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), § 932, or § 933; 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), § 932, or § 933; 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 18 U.S.C. § 1715.

(b) Specific Offense Characteristics

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

NUMBER OF FIREARMS		INCREASE IN LEVEL
(A)	3–7	add <b>2</b>
(B)	8–24	add <b>4</b>
(C)	25–99	add <b>6</b>
(D)	100–199	add <b>8</b>
(E)	200 or more	add <b>10</b> .

- (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.~~ (Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by **[1][2]** levels;

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i), increase by **[1][2]** levels; or

(C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence; or (III) intended to use or dispose of the firearms unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i), increase by **[5][6]** 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.

(8) If the defendant—

(A) [receives an enhancement under subsection (b)(5)] [is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 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];

(B) participated, at the time of the offense, in a group, club, organization, or association of five or more persons that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage in or have engaged in criminal activity; and

(C) committed the offense with the intent to promote or further the felonious activities of , or with the intent to maintain or increase his or her position in, such group, club, organization, or association;

increase by [2][3][4] levels.

(9) If the defendant—

(A) [receives an enhancement under subsection (b)(5)] [ is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 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];

(B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and

(C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity];

decrease by [1][2] levels.

(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), 932, 933, 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), (b)(5), [(b)(8), and (b)(9)], “**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 subsections (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 “**criminal justice sentence**” includes probation, parole, supervised release, imprisonment, work release, or escape status.~~

~~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.~~

**(B) Application of Subsection (b)(5)(C)(i).**—Subsection (b)(5)(C)(i) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction

for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual [had no prior conviction for a crime of violence or controlled substance offense and had not more than one conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, but 5 years had elapsed from the later of the judgment of conviction or the completion of the individual's custodial or supervisory sentence for such an offense and the individual had not subsequently been convicted of another such offense; a misdemeanor under federal, state, tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; or any other offense covered 18 U.S.C. § 922(g)] [met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C)].

- (C) **Upward Departure Provision.**—If the defendant trafficked, transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms [or an unusually large amount of ammunition], 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.]~~

~~\* \* \*~~

## Option 2 (Increase Penalties for Offenses with Statutory Maximum of 15 years or more)

### §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][27][28]**, 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][25][26]**, 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][23][24]**, 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) **[21][22]**, 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) (i) the defendant is convicted under 18 U.S.C. § 922(d), § 922(g), § 924(h), § 924(k), § 932, or § 933; and (ii) 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);

~~(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 (iA) offense involved a (Hi) semiautomatic firearm that is capable of accepting a large capacity magazine; or (Hii) firearm that is described in 26 U.S.C. § 5845(a); and (iiB) defendant~~

(~~Hi~~) was a prohibited person at the time the defendant committed the instant offense; (~~Hi~~) is convicted under 18 U.S.C. § 922(d); or (~~Hi~~) 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;

(~~56~~) 18, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(7) [15][16], if the defendant is convicted under 18 U.S.C. § 922(d), § 922(g), § 924(h), § 924(k), § 932, or § 933;

(~~68~~) 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;

(~~79~~) 12, except as provided below; or

(~~810~~) 6, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715.

(b) Specific Offense Characteristics

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

NUMBER OF FIREARMS		INCREASE IN LEVEL
(A)	3–7	add <b>2</b>
(B)	8–24	add <b>4</b>
(C)	25–99	add <b>6</b>
(D)	100–199	add <b>8</b>
(E)	200 or more	add <b>10</b> .

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), ~~or (a)(5)~~, or (a)(6), 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][30][31]**, 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.

(8) If the defendant—

(A) is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 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;

(B) participated, at the time of the offense, in a group, club, organization, or association of five or more persons that had as one of its primary purposes the commission of criminal offenses,

with knowledge that its members engage in or have engaged in criminal activity; and

(C) committed the offense with the intent to promote or further the felonious activities of , or with the intent to maintain or increase his or her position in, such group, club, organization, or association;

increase by [2][3][4] levels.

(9) If (A) the base offense level is determined under subsection (a)(7); (B) none of the enhancements in subsection (b) apply; and (C) the offense of conviction established only the possession or receipt of firearms or ammunition, decrease by [1 level][2 levels].

(10) If subsection (b)(9) does not apply and the defendant—

(A) is convicted under 18 U.S.C. § 922(d), § 924(h), § 924(k), § 932, or § 933;

(B) does not have more than 1 criminal history point, as determined under §4A1.1 (Criminal History Category) and §4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); and

(C) ((i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity];

decrease by [1][2] levels.

(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), 932, 933, 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)~~, and (a)(5), 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)~~ (a)(5), (a)(8), and (b)(8), “**prohibited person**” means any person described in 18 U.S.C. § 922(g) or § 922(n).

4. **Application of Subsection ~~(a)(7)~~(a)(9).**—Subsection ~~(a)(7)~~(a)(9) 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)~~(a)(6), 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)~~(a)(5), or ~~(a)(5)~~(a)(6)), 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)~~(a)(9).**—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)~~(a)(9), 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)~~(a)(9), 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~~ **person described in 18 U.S.C. § 922(g) or § 922(n)**, the offense level is increased to the offense level applicable to the sale of a firearm to a ~~prohibited person~~ **person described in 18 U.S.C. § 922(g) or § 922(n)**).

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)~~ **(a)(5)**, ~~or~~ (a)(6), **(a)(7), or (a)(8)** 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). However, an individual shall not be considered an “individual whose possession or receipt of the firearm would be unlawful” [if, at the time of the instant offense, the individual was not otherwise covered by such definition and had not more than one conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, but 5 years had elapsed from the later of the judgment of conviction or the completion of the individual’s custodial or supervisory sentence for such an offense and the individual had not subsequently been convicted of: another such offense; a misdemeanor under federal, state, tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; or any other offense covered by the definition of “individual whose possession or receipt of the firearm would be unlawful.”] [based upon a conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, if the individual met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C) at the time of the instant offense.]

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.]~~

\* \* \*

## Issues for Comment

1. The directive in the Bipartisan Safer Communities Act requires the Commission to ensure that defendants convicted of the new offenses at 18 U.S.C. §§ 932 and 933 and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines for such straw purchasing and trafficking of firearms offenses. The two options presented in Part A of the proposed amendment would amend §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to increase penalties in response to the Act. The Commission seeks comment on whether either of the options presented in Part A of the proposed amendment would provide appropriate penalties for cases involving straw purchases and trafficking of firearms. Should the Commission adopt either of these options or neither? Are there particular changes to the penalty levels in either of these options that should be made?

In addition, the Commission seeks comment on whether additional changes should be made to §2K2.1 in response to the part of the directive that requires the Commission to increase penalties for offenses involving straw purchases and trafficking of firearms. If so, what additional changes would be appropriate?

2. As described above, the Bipartisan Safer Communities Act also amended the definition of “misdemeanor crime of domestic violence” at 18 U.S.C. § 921(a)(33) to include misdemeanor offenses against a person in “a current or recent former dating relationship.” The Act also added a new provision at section 921(a)(33)(C) stating as follows:

A person shall not be considered to have been convicted of a misdemeanor crime of domestic violence against an individual in a

dating relationship for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had firearm rights restored unless the expungement, pardon, or restoration of rights expressly provides that the person may not ship, transport, possess, or receive firearms: *Provided*, That, in the case of a person who has not more than 1 conviction of a misdemeanor crime of domestic violence against an individual in a dating relationship, and is not otherwise prohibited under this chapter, the person shall not be disqualified from shipping, transport, possession, receipt, or purchase of a firearm under this chapter if 5 years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence, if any, and the person has not subsequently been convicted of another such offense, a misdemeanor under Federal, State, Tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, or any other offense that would disqualify the person under [18 U.S.C. §] 922(g). The national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act (34 U.S.C. 40901) shall be updated to reflect the status of the person. Restoration under this subparagraph is not available for a current or former spouse, parent, or guardian of the victim, a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim.

In light of this new provision, a person with a conviction for a misdemeanor crime of domestic violence against an individual in a dating relationship is not disqualified from shipping, transporting, possessing, receiving, or purchasing a firearm under chapter 44 of title 18, United States Code, if the criteria described above are met. Are the changes to the Commentary to §2K2.1 set forth in Options 1 and 2 adequate to address this new provision? If not, how should the Commission address it?

3. In response to the directive in the Bipartisan Safer Communities Act, Part A of the proposed amendment includes an Option 1 that would amend §2K2.1 to, among other things, revise the firearms trafficking enhancement at §2K2.1(b)(5) to apply to straw purchase and other trafficking offenses. The revised enhancement would result in higher penalties for straw purchasers and certain firearms traffickers. The Commission seeks comment on whether having higher penalties for straw purchasers than prohibited persons raises proportionality concerns the Commission should address. If so, how should the Commission address those concerns?
4. Part A of the proposed amendment includes an Option 2 that would revise §2K2.1(a) in several ways. Among other things, it would keep current §2K.1(a)(4)(B) with a base offense level of 20 applicable if the (A) 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) defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) 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. In addition, Option 2 would delete current §2K2.1(a)(6)(B) but still keep the base offense level of 14 applicable to any defendant who (A) was a prohibited person at the time the defendant committed the instant offense; or (B) 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. The Commission seeks comment on whether it should change the current base offense levels of 14 and 20 applicable to the defendants described above. If so, what offense level would be appropriate to any such defendant, and why?

5. Options 1 and 2 of Part A of the proposed amendment would add to §2K2.1 a new [1][2]-level reduction based on certain mitigating factors. Option 1 provides that the reduction applies if the defendant [received an enhancement under the new subsection (b)(5) proposed in Option 1][was convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 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] and meets other certain criteria]. Option 2 provides that the reduction applies if subsection (b)(9) does not apply and the defendant is convicted under 18 U.S.C. § 922(d), § 924(h), § 924(k), § 932, or § 933, and meets the same other criteria provided in Option 1. The Commission seeks comment on whether this new adjustment should apply more broadly. Instead of providing a [1][2]-level reduction, should the Commission provide a departure provision applicable to defendants who meet the criteria?

The Commission also seeks comment on whether the criteria provided in Options 1 and 2 for this new reduction are appropriate. Should any criterion be deleted or changed? Should the Commission provide additional or different criteria?

The Commission further seeks comment on the criminal history requirement provided in Options 1 and 2. Is the proposed requirement appropriate to respond to Congress' intent to address "straw purchasers without significant criminal histories"? Should the Commission instead use a different criminal history requirement than the one proposed in Options 1 and 2?

6. Application Note 15 of §2K2.1 contains a downward departure provision for cases in which the defendant is convicted under 18 U.S.C. § 922(a)(6), § 922(d), or § 924(a)(1)(A) and meets certain criteria, similar to some of the criteria included in the new proposed reduction provided in Option 1 at subsection (b)(9) and in Option 2 at (b)(10). Hence, both options bracket the possibility of deleting the current departure provision. If the Commission were to promulgate any of the options in Part A of the proposed amendment, either as an adjustment or a downward departure provision, should the Commission delete the current departure provision at Application Note 15? If not, how should the new reduction interact with the current departure provision? Should the current departure provision be modified in any way?



7. In response to the directive contained in the Bipartisan Safer Communities Act, Options 1 and 2 of Part A of the proposed amendment would provide a new [2][3][4]-level enhancement in §2K2.1 based on the criminal affiliations of the defendant. Option 1 provides that the new enhancement would be applicable if the defendant [received an enhancement under the new subsection (b)(5) proposed in Option 1][was convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 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] and meets other criteria. Option 2 provides that the new enhancement would be applicable if the defendant is convicted under (i) 18 U.S.C. § 922(d), § 932, or § 933; or (ii) 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; and meets the other the same other criteria provided in Option 1. The Commission seeks comment on whether the new enhancement should apply more broadly. Should the Commission provide additional or different criteria for purposes of applying this enhancement? In addition, how should this new enhancement interact with the existing enhancements at §2K2.1? Should the new enhancement be cumulative with other enhancements, or should it interact with other enhancements in some other way (*e.g.*, by establishing a “cap” on its cumulative impact with other enhancements)? Should the Commission instead provide an altogether different approach to respond to this part of the congressional directive?

**(B) Firearms Not Marked with Serial Number (“Ghost Guns”)**

**Synopsis of Proposed Amendment:** Subsection (b)(4) of 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an alternative enhancement for a firearm that was stolen or that has an altered or obliterated serial number. Specifically, subsection (b)(4)(A) provides for a 2-level increase where a firearm is stolen, while subsection (b)(4)(B) provides for a 4-level increase where a firearm has an altered or obliterated serial number. The Commentary to §2K2.1 provides that the enhancement 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. USSG §2K2.1, comment. (n.8(B)).

The enhancement at §2K2.1 currently does not apply to “ghost guns.” “Ghost guns” is the term commonly used to refer to firearms that are not marked by a serial number by which it can be identified and traced, and that are typically made by an unlicensed individual from purchased components (such as standalone parts or weapon parts kits) or homemade components. Because of their lack of identifying markings, ghost guns are difficult to trace and determine where and who manufactured them, and to whom they were sold or otherwise disposed. The Commission has heard from commenters that the very purpose of “ghost guns” is to avoid the tracking and tracing systems associated with a firearm’s serial number and that they increasingly are associated with violent crime. Commenters have also indicated that §2K2.1 does not adequately address “ghost guns,” as the enhancement at §2K2.1(b)(4)(B) only covers firearms that were marked with a serial number when manufactured but where such identifier was later altered or obliterated.

Part B of the proposed amendment would respond to these concerns by revising §2K2.1(b)(4)(B) to provide that the 4-level enhancement applies if any firearm had an altered or obliterated serial number or was not otherwise marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. § 921(16))]. Part D of the proposed amendment also brackets the possibility of making the revised enhancement not applicable to antique firearms, as defined in 18 U.S.C. § 921(16).

An issue for comment is provided.

**Proposed amendment:**

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

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

\* \* \*

(b) Specific Offense Characteristics

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

	NUMBER OF FIREARMS	INCREASE IN LEVEL
(A)	3–7	add <b>2</b>
(B)	8–24	add <b>4</b>
(C)	25–99	add <b>6</b>
(D)	100–199	add <b>8</b>
(E)	200 or more	add <b>10</b> .

- (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)(i) had an altered or obliterated serial number; or (ii) was not otherwise marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. § 921(16))], 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.

\* \* \*

**Commentary**

\* \* \*

**Application Notes:**

\* \* \*

**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, or that was not otherwise marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. § 921(16))], apply subsection (b)(4)(B)(i) or (ii).

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)(i). 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, or a firearm that was not otherwise marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. § 921(16))], apply subsection (b)(4)(A) or (B)(ii).

(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, or was not otherwise marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. § 921(16))].

\* \* \*

## Issue for Comment

1. Part B of the proposed amendment would expand the scope of subsection (b)(4) of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to address firearms that are not marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. § 921(16))], in addition to firearms that were stolen or had an altered or obliterated serial number. The Commission seeks comment on whether it should further revise the enhancement at §2K2.1(b)(4). For example, should the Commission insert in §2K2.1(b)(4) a mental state (*mens rea*) requirement that the defendant knew, or had reason to believe, that the firearm was stolen, had an altered or obliterated serial number, or was not otherwise marked with a serial number (other than an antique firearm, as defined in 18 U.S.C. § 921(16))?

**(C) Issues for Comment on Further Revisions to §2K2.1**

1. Parts A of the proposed amendment would amend §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to respond to the Bipartisan Safer Communities Act. Part B of the proposed amendment would amend §2K2.1 to address concerns expressed by some commenters about firearms that are not marked by a serial number (*i.e.*, “ghost guns”). The Commission seeks comment on whether it should further revise §2K2.1 to appropriately address firearms offenses.
2. Offenses under 18 U.S.C. § 922(u) are referenced to §2K2.1. Section 922(u) prohibits stealing or unlawfully taking or carrying away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee’s business inventory that has been shipped or transported in interstate or foreign commerce. The Department of Justice has expressed concerns that all offenses under 18 U.S.C. § 922(u), which covers conduct of varying severity (including simple theft, burglary, and robbery), are treated the same in §2K2.1. According to the Department of Justice, burglaries and robberies of federal firearms licensees are particularly dangerous crimes that often involve multiple weapons. Currently, §2K2.1 provides at subsection (b)(4)(A) a 2-level enhancement if any firearm was stolen. Application Note 8(A) of §2K2.1 provides that this 2-level enhancement should not apply if the base offense level is set at level 12 under §2K2.1(a)(7) (*e.g.*, a defendant convicted under 18 U.S.C. § 922(u)) because the base offense level takes into account that the firearm or ammunition was stolen. The Commission seeks comment on whether it should amend §2K2.1 to specifically address offenses where the offense involved the burglary or robbery of a federal firearm licensee. For example, should the Commission add an enhancement to §2K2.1 that would be applicable if the offense involved the burglary or robbery of a federal firearms licensee? If so, what level of enhancement should the Commission set forth for such conduct? How should this enhancement interact with the stolen firearms enhancement at §2K2.1(b)(4)(A)? Should the Commission provide that both enhancements are to be applied cumulatively or in the alternative?
3. The base offense levels at §2K2.1(a) include as factors that form the basis for their application certain recidivism requirements, such as whether the defendant committed the instant offense subsequent to sustaining one or more felony convictions of either a crime of violence or controlled substance offense. The Commission seeks comment on whether it should add other types of prior convictions as the basis for applying base offense levels or specific offense characteristics, and what base offense level or offense level increase should the Commission provide for any such prior conviction. For example, should the Commission provide for increased penalties if the defendant committed the instant offense subsequent to sustaining a conviction or multiple convictions for a misdemeanor crime of domestic violence or an offense that involved a firearm? If so, should the Commission treat prior convictions for a misdemeanor crime of domestic violence or an offense that involved a firearm the same as prior convictions for a crime of violence or a controlled substance offense and provide the same level of enhancement? If not, what base offense level or level increase should the Commission

set forth for prior convictions for a misdemeanor crime of domestic violence or an offense that involved a firearm?

4. The general definition of “firearm” in §2K2.1 at Application Note 1 is drawn from 18 U.S.C. § 921(a)(3). However, §2K2.1 applies a higher base offense level to offenses involving firearms described in 26 U.S.C. § 5845(a). Although section 5845(a) generally defines a more limited class of firearms than section 921(a)(3), there are a limited number of devices—such as those “designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun” which are “firearms” under section 5845(a) but not section 921(a)(3). Thus, such devices are “firearms” for purposes of the increased base offenses levels in §2K2.1(a)(1), (3), (4)(B)(i)(II), and (6), but not for purposes of specific offense characteristics referring to “firearms,” such as §2K2.1(b)(1). The Commission seeks comment on whether it should amend the definition of “firearms” in Application Note 1 of §2K2.1 to include devices which are “firearms” under section 5845(a) but not section 921.
5. The Commission seeks general comment on whether it should amend §2K2.1 to increase penalties for defendants who transfer a firearm to a minor. If so, how?

**PROPOSED AMENDMENT:****CIRCUIT CONFLICTS**

**Synopsis of Proposed Amendment:** This proposed amendment addresses certain circuit conflicts involving §3E1.1 (Acceptance of Responsibility) and §4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022) (identifying resolution of circuit conflicts as a priority, including the circuit conflicts concerning (A) whether the government may withhold a motion pursuant to §3E1.1(b) because a defendant moved to suppress evidence; and (B) whether an offense must involve a substance controlled by the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) to qualify as a “controlled substance offense” under §4B1.2(b)). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

**Part A** of the proposed amendment would amend §3E1.1 and its accompanying commentary to address circuit conflicts regarding the permissible bases for withholding a reduction under §3E1.1(b). It would set forth a definition of the term “preparing for trial” that provides more clarity on what actions typically constitute preparing for trial for the purposes of §3E1.1(b). An issue for comment is also provided.

**Part B** of the proposed amendment would amend §4B1.2 by adding a definition of the term “controlled substance” to address a circuit conflict concerning whether the definition of “controlled substance offense” in §4B1.2(b) only covers offenses involving substances controlled by federal law. Two options are presented. An issue for comment is also included.



## (A) Circuit Conflicts Concerning §3E1.1(b)

**Synopsis of Proposed Amendment:** Subsection (a) of §3E1.1 (Acceptance of Responsibility) provides for a 2-level reduction for a defendant who clearly demonstrates acceptance of responsibility for the offense. *See* USSG §3E1.1(a). Subsection (b) of §3E1.1 sets forth the circumstances under which a defendant is eligible for an additional 1-level reduction by providing:

If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level. USSG §3E1.1(b).

Section 401(g) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (“PROTECT Act”), among other things, directly amended §3E1.1(b) to include the language requiring a government motion and consideration of government resources. *See* Pub. L. 108–21, § 401(g)(1), 117 Stat. 650 (2003). The PROTECT Act also added the following sentence to Application Note 6 of the Commentary to §3E1.1: “Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing.” *Id.* § 401(g)(2).

In 2013, the Commission promulgated Amendment 775 to address two circuit conflicts over the §3E1.1(b) motion requirement. *See* USSG App. C, amend. 775 (effective Nov. 1, 2013). Among other things, the amendment added the following sentence to Application Note 6: “The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.” *Id.*

Two circuit conflicts have arisen relating to §3E1.1(b). The first conflict concerns whether a §3E1.1(b) reduction may be withheld or denied because a defendant moved to suppress evidence. Justice Sotomayor, joined by Justice Gorsuch, recently “emphasize[d] the need for clarification from the Commission” on this “important and longstanding split.” *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., with whom Gorsuch, J. joins, respecting the denial of certiorari). The second conflict concerns whether the government may withhold a §3E1.1(b) motion where the defendant has raised sentencing challenges.

These conflicts largely turn on how much discretion the government has to withhold a motion under §3E1.1(b). Some circuits use the analytical framework from *Wade v. United States*, 504 U.S. 181, 185–86 (1992), applicable to substantial assistance motions under §5K1.1 (Substantial Assistance to Authorities) and 18 U.S.C. § 3553(e)—that the government’s discretion is broad, but refusal to file a motion cannot be based on “an unconstitutional motive” or a reason “not rationally related to any legitimate Government end.” Other circuits specify that withholding is permissible if based on an interest identified in §3E1.1. Courts also

have grappled with whether the government’s discretion is limited to situations involving trial preparation, and whether suppression motions or sentencing disputes are enough like trial preparation to withhold a motion.

In relation to the first circuit conflict, the Third, Fifth, and Sixth Circuits have permitted the government to withhold a §3E1.1(b) motion based on a suppression motion. *See, e.g., United States v. Longoria*, 958 F.3d 372, 376–78 (5th Cir. 2020) (Amendment 775 did not clearly overrule its caselaw “allowing the government to withhold the third point when it must litigate a suppression motion”; suppression hearing was largely the “substantive equivalent of a full trial” (citation omitted)), *cert. denied*, 141 S. Ct. 978 (2021); *United States v. Collins*, 683 F.3d 697, 707 (6th Cir. 2012) (suppression motion required the government “to undertake trial-like preparations”; “Avoiding litigation on a motion to suppress is rationally related to the legitimate government interest in the efficient allocation of its resources. Accordingly . . . the government’s decision to withhold the §3E1.1(b) motion was not arbitrary or unconstitutionally motivated.”); *United States v. Drennon*, 516 F.3d 160, 161, 163 (3d Cir. 2008) (suppression hearing involved “the large majority of the work to prepare for trial”; motion withheld due to “concern for the efficient allocation of the government’s litigating resources,” not an unconstitutional motive).

The First, Second, Ninth, Tenth, and D.C. Circuits have held that a reduction may not be denied based on a suppression motion. *See, e.g., United States v. Vargas*, 961 F.3d 566, 582–84 (2d Cir. 2020) (district court erred in denying government’s §3E1.1(b) motion because of suppression hearing; any “experienced criminal lawyer knows that preparing for a jury trial involves more work than preparing for a suppression hearing”); *United States v. Price*, 409 F.3d 436, 443–44 (D.C. Cir. 2005) (district court erred in denying additional reduction based on suppression motion; while government had to prepare for a suppression hearing, “it never had to prepare for trial”); *United States v. Marquez*, 337 F.3d 1203, 1212 (10th Cir. 2003) (“district court may not rely on the fact that the defendant filed a motion to suppress requiring a ‘lengthy suppression hearing’ to justify a denial of the third level reduction”; even where issues substantially overlap, “preparation for a motion to suppress would not require the preparation of voir dire questions, opening statements, closing arguments, and proposed jury instructions, to name just a few examples”); *United States v. Marroquin*, 136 F.3d 220, 225 (1st Cir. 1998) (“[g]uidelines do not force a defendant to forgo the filing of routine pre-trial motions as the price of receiving a one-step decrease”); *United States v. Kimple*, 27 F.3d 1409, 1415 (9th Cir. 1994) (district court erred in denying the additional reduction where “resources were expended not in conducting trial preparation, but in considering pretrial motions [including suppression motion] necessary to protect [the defendant’s] rights”).

With respect to the second circuit conflict, the First, Third, Seventh, and Eighth Circuits have held that the government may withhold a §3E1.1(b) motion where the defendant has raised sentencing challenges. *See, e.g., United States v. Adair*, 38 F.4th 341, 361 (3d Cir. 2022) (government properly withheld motion where defendant “caused [the government] to have to prepare for a two-day sentencing hearing”; government did not act with an unconstitutional motive); *United States v. Jordan*, 877 F.3d 391, 395 (8th Cir. 2017) (defendant’s denial of conduct relevant to sentencing did not “permit[ ] the government and the court to allocate their resources efficiently” (citation omitted)); *United States v. Sainz-Preciado*, 566 F.3d 708, 716 (7th Cir. 2009) (government had “good reason” to withhold motion where it had to prepare “testimony and other evidence to prove the full scope of [defendant’s] criminal conduct at the sentencing hearing”); *United States v. Beatty*,

538 F.3d 8, 16–17 (1st Cir. 2008) (within the government’s broad discretion to withhold motion where government reasonably determined that the defendant frivolously contested issues related to sentencing). The Second and Fifth Circuits have held that the government may not withhold a motion on this basis. *See, e.g., United States v. Castillo*, 779 F.3d 318, 324–26 (5th Cir. 2015) (“we disagree that the government may withhold a §3E1.1(b) motion simply because it has had to use its resources to litigate a sentencing issue”; however, dispute must be in good faith); *United States v. Lee*, 653 F.3d 170, 174 (2d Cir. 2011) (“As long as the defendant disputes the accuracy of a factual assertion in the PSR in good faith, the government abuses its authority by refusing to move for a third-point reduction because the defendant has invoked his right to a *Fatico* hearing.”).

Part A of the proposed amendment would amend §3E1.1(b) to provide a definition of the term “preparing for trial.” It would also delete the following sentence in Application Note 6 of the Commentary to §3E1.1: “The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.”

An issue for comment is provided.

#### **Proposed Amendment:**

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#### **§3E1.1. Acceptance of Responsibility**

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- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
  
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level. For the purposes of this guideline, the term “*preparing for trial*” means substantive preparations taken to present the government’s case against the defendant to a jury (or judge, in the case of a bench trial) at trial. “Preparing for trial” is ordinarily indicated by actions taken close to trial, such as drafting in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparation for early pretrial proceedings (such as litigation related to a charging document, early discovery motions, and early suppression motions) ordinarily are not considered “preparing for trial” under this subsection. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered “preparing for trial.”

## Commentary

### Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:
  - (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous;
  - (B) voluntary termination or withdrawal from criminal conduct or associations;
  - (C) voluntary payment of restitution prior to adjudication of guilt;
  - (D) voluntary surrender to authorities promptly after commission of the offense;
  - (E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
  - (F) voluntary resignation from the office or position held during the commission of the offense;
  - (G) post-offense rehabilitative efforts (*e.g.*, counseling or drug treatment); and
  - (H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.
2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.
3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (*see* Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.
5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.
6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Public Law 108–21. ~~The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.~~

If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

**Background:** The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

Section 401(g) of Public Law 108–21 directly amended subsection (b), Application Note 6 (including adding the first sentence of the second paragraph of that application note), and the Background Commentary, effective April 30, 2003.

\* \* \*

### Issue for Comment

1. Part A of the proposed amendment would amend §3E1.1 (Acceptance of Responsibility) to address the circuit conflicts described in the synopsis above. The proposed amendment would amend subsection (b) of §3E1.1 to provide a definition for the term “preparing for trial.” The Commission seeks comment on whether the proposed definition of “preparing for trial” is appropriate for purposes of §3E1.1(b). If not, what definition should the Commission provide?

In the alternative, should the Commission address the circuit conflicts in a manner other than the one provided in Part A of the proposed amendment? For example, should the Commission address the breadth of the government’s discretion to withhold a §3E1.1(b) motion, either by incorporating the framework outlined in *Wade v. United States*, 504 U.S. 181, 185–86 (1992) (*i.e.*, an “unconstitutional motive” or a reason “not rationally related to any legitimate Government end”) (*see, e.g., United States v. Adair*, 38 F.4th 341, 361 (3d Cir. 2022)), or by specifying a different standard?

## (B) Circuit Conflicts Concerning §4B1.2(b)

**Synopsis of Proposed Amendment:** Subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) defines a “controlled substance offense” as “an offense under federal or state law . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.” The definition in §4B1.2(b) principally applies to the career offender guideline at §4B1.1 (Career Offender). However, several other guidelines incorporate this definition by reference, often providing for higher base offense levels if the defendant committed the instant offense after sustaining a conviction for a “controlled substance offense.” *See* §§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 4B1.4 (Armed Career Criminal), 5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)), and 7B1.1 (Classification of Violations (Policy Statement)).

The circuits are split regarding whether the definition of a “controlled substance offense” in §4B1.2(b) only covers offenses involving substances controlled by the federal Controlled Substances Act (“CSA”) (21 U.S.C. § 801 *et seq.*), or whether the definition also applies to offenses involving substances controlled by applicable state law. This circuit conflict prompted Justice Sotomayor, joined by Justice Barrett, to call for the Commission to “address this division to ensure fair and uniform application of the [g]uidelines.” *Guerrant v. United States*, 142 S. Ct. 640, 640–41 (2022) (statement of Sotomayor, J., with whom Barrett, J. joins, respecting the denial of certiorari).

The Second and Ninth Circuits have held that a “controlled substance offense” only includes offenses involving substances controlled by federal law (the CSA), not offenses involving substances that a state’s schedule lists as a controlled substance, but the CSA does not. *See United States v. Bautista*, 989 F.3d 698, 705 (9th Cir. 2021) (conviction under Arizona statute criminalizing hemp as well as marijuana is not a “controlled substance offense” because hemp is not listed in the CSA); *United States v. Townsend*, 897 F.3d 66, 74 (2d Cir. 2018) (conviction under New York statute prohibiting the sale of Human Chorionic Gonadotropin (“HCG”) is not a “controlled substance offense” because HCG is not controlled under the CSA).

By contrast, the Fourth, Seventh, Eighth, and Tenth Circuits have held that a state conviction involving a controlled substance that is not identified in the CSA can qualify as a “controlled substance offense” under the guidelines. *See United States v. Jones*, 15 F.4th 1288, 1295 (10th Cir. 2021) (definition of “controlled substance offense” includes “state-law controlled substance offenses, involving substances not found on the CSA”), *cert. denied*, 143 S.Ct. 268 (2022); *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021) (“There is no requirement that the particular substance underlying the state offense is also controlled under a distinct federal law.”), *cert. denied*, 142 S. Ct. 1696 (2022); *United States v. Ward*, 972 F.3d 364, 374 (4th Cir. 2020) (“the Commission has specified that we look to *either* the federal or state law of conviction to define whether an offense will qualify [as a controlled substance offense].”), *cert denied*, 141 S.Ct. 2864 (2021); *United States v. Ruth*, 966 F.3d 642, 654 (7th

Cir. 2020) (“The career-offender guideline defines the term controlled substance offense broadly, and the definition is most plainly read to include state-law offenses[.]” (citation and quotation omitted)), *cert. denied*, 141 S.Ct. 1239 (2021).

Part B of the proposed amendment would amend §4A1.2(b) to include a definition for “controlled substance” to address the circuit conflict. Two options are provided.

**Option 1** would set forth a definition of “controlled substance” that adopts the approach of the Second and Ninth Circuits. It would limit the definition of the term to substances that are specifically included in the CSA.

**Option 2** would set forth a definition of “controlled substance” that adopts the approach of the Fourth, Seventh, Eighth, and Tenth Circuits. It would provide that the term “controlled substance” refers to substances either included in the CSA or otherwise controlled under applicable state law.

An issue for comment is also provided.

### **Proposed Amendment:**

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

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

#### **[Option 1 (Controlled Substances under Federal Law):**

“Controlled substance” refers to a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*.)]



**[Option 2 (Controlled Substances under Federal or State Law):**

“Controlled substance” refers to a drug or other substance, or immediate precursor, either included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) or otherwise controlled under applicable state law.]

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

**Commentary**

**Application Notes:**

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

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

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

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

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

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

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

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

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

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

2. **Offense of Conviction as Focus of Inquiry.**—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.
3. **Applicability of §4A1.2.**—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.
4. **Upward Departure for Burglary Involving Violence.**—There may be cases in which a burglary involves violence, but does not qualify as a “crime of violence” as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a “crime of violence.” In such a case, an upward departure may be appropriate.

\* \* \*

### Issue for Comment

1. Part B of the proposed amendment would amend subsection (b) of §4A1.2 (Definitions of Terms Used in Section 4B1.1) to set forth a definition of “controlled substance.” Two options are provided for such definition.

The Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States) contains a definition for the term “drug trafficking offense” that closely tracks the definition of “controlled substance offense” in §4B1.2(b). *See* USSG §2L1.2, comment. (n.2). If the Commission were to amend §4B1.2(b) to include a definition of “controlled substance,” should the Commission also amend Application Note 2 to §2L1.2 to include the same definition of “controlled substance” for purposes of the “drug trafficking offense” definition?

## PROPOSED AMENDMENT:

## CRIME LEGISLATION

**Synopsis of Proposed Amendment:** This proposed amendment responds to recently enacted legislation. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022) (identifying as a priority "[i]mplementation of any legislation warranting Commission action").

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

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

**Part B** responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (2018), by amending Appendix A, §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor). In addition, Part B brackets the possibility of amending the Commentary to §§4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and 5D1.2 (Term of Supervised Release) to exclude offenses under 18 U.S.C. § 2421A from the definitions of "covered sex offense" and "sex offense." Issues for comment are also provided.

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

**Part D** responds to the SUPPORT for Patients and Communities Act, Pub. L. 115–271 (2018), by amending Appendix A and the Commentary to §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). An issue for comment is also provided.

**Part E** responds to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. 115–299 (2018), by amending Appendix A and the Commentary to §2X5.2. An issue for comment is also provided.

**Part F** responds to the Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. 115–435 (2019), by amending Appendix A and the Commentary to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). An issue for comment is also provided.

**Part G** responds to the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116–92 (2019), by amending Appendix A and the Commentary to §2X5.2. An issue for comment is also provided.

**Part H** responds to the Representative Payee Fraud Prevention Act of 2019, Pub. L. 116–126 (2020), by amending Appendix A and the Commentary to §2B1.1. An issue for comment is also provided.

**Part I** responds to the Stop Student Debt Relief Scam Act of 2019, Pub. L. 116–251 (2020), by amending Appendix A and the Commentary to §2B1.1. An issue for comment is also provided.

**Part J** responds to the Protecting Lawful Streaming Act of 2020, Pub. L. 116–260 (2021), by amending Appendix A. Issues for comment are also provided.

**Part K** responds to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283 (2021), by amending Appendix A and the Commentary to §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). An issue for comment is also provided.

**(A) FDA Reauthorization Act of 2017**

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

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

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

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

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

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

An issue for comment is also provided.

**Proposed Amendment:**

**APPENDIX A**

**STATUTORY INDEX**

\* \* \*

21 U.S.C. § 333(b)(1)–(6)	2N2.1
21 U.S.C. § 333(b)(7)	2N1.1
21 U.S.C. § 333(b)(8)	2N2.1
21 U.S.C. § 458	2N2.1

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

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

**Commentary**

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

**Application Notes:**

- 1. This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted. *See* Chapter Five, Part K (Departures).
- 2. The cross reference at subsection (c)(1) addresses cases in which the offense involved fraud. The cross reference at subsection (c)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (*e.g.*, bribery).
- 3. **Upward Departure Provisions.**—The following are circumstances in which an upward departure may be warranted:
  - (A) The offense created a substantial risk of bodily injury or death; or bodily injury, death, extreme psychological injury, property damage, or monetary loss resulted from the offense. *See* Chapter Five, Part K (Departures).
  - (B) The defendant was convicted under 7 U.S.C. § 7734.

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

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

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\* \* \*

### **Commentary**

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

\* \* \*

### **Issue for Comment:**

1. In response to the FDA Reauthorization Act of 2017, Pub. L. 115–52 (2017), Part A of the proposed amendment would reference 21 U.S.C. § 333(b)(8) to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product). The Commission seeks comment on whether any additional changes to the guidelines are required to account for section 333(b)(8)’s offense conduct. Specifically, should the Commission amend §2N2.1 to provide a higher or lower base offense level if 21 U.S.C. § 333(b)(8) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to §2N2.1 in response to section 333(b)(8)? If so, what should that specific offense characteristic provide and why?

## **(B) Allow States and Victims to Fight Online Sex Trafficking Act of 2017**

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

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

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

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

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

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

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



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

Part B of the proposed amendment also would amend the Commentary to §2G1.3 to add a new application note instructing that if 18 U.S.C. §2421A(a) or §2421A(b)(1) is the offense of conviction, the specific offense characteristic at §2G1.3(b)(3)(B) does not apply. That special offense characteristic provides for a two-level increase in the defendant’s offense level if the offense involved the use of a computer or an interactive computer service to entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor.

Part B of the proposed amendment would make conforming changes to §§2G1.1 and 2G1.3 and their accompanying commentary.

Finally, 18 U.S.C. § 2421A is codified in chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) of title 18 of the United States Code, which contains statutes that generally prohibit conduct intended to promote or facilitate prostitution. Various guidelines refer to chapter 117 overall, including §4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and §5D1.2 (Term of Supervised Release). Specifically, §4B1.5 provides for increases in the defendant’s offense level if the offense of conviction is a “covered sex crime.” The Commentary to §4B1.5 states that a “covered sex crime” generally includes offenses under chapter 117 but excludes from coverage the offenses of “transmitting information about a minor or filing a factual statement about an alien individual.” Section 5D1.2 includes a policy statement recommending that the court impose the statutory maximum term of supervised release if the instant offense of conviction is a “sex offense.” The Commentary to §5D1.2 defines “sex offense” to mean, among other things, an offense, perpetrated against a minor, under chapter 117, “not including transmitting information about a minor or filing a factual statement about an alien individual.” Part B of the proposed amendment brackets the possibility of amending the Commentary to §§4B1.5 and 5D1.2 to exclude offenses under 18 U.S.C. § 2421A from the definitions of “covered sex offense” and “sex offense.”

An issue for comment is also provided.

**Proposed Amendment:**

## **APPENDIX A**

## **STATUTORY INDEX**

\* \* \*

18 U.S.C. § 2421	2G1.1, 2G1.3
<b>18 U.S.C. § 2421A</b>	<b>2G1.1, 2G1.3</b>
18 U.S.C. § 2422	2G1.1, 2G1.3

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

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- (a) Base Offense Level:
  - (1) 34, if the offense of conviction is 18 U.S.C. § 1591(b)(1); or
  - (2) 14, otherwise.
- (b) Specific Offense Characteristic
  - (1) If (A) subsection (a)(2) applies; and (B) (i) the offense involved fraud or coercion, or (ii) [the offense of conviction is] [the offense involved conduct described in] 18 U.S.C. § 2421A(b)(2), increase by 4 levels.
- (c) Cross Reference
  - (1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).
- (d) Special Instruction
  - (1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

**Commentary**

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

**Application Notes:**

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

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

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

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

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

2. **Application of Subsection (b)(1).**—Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. *See* Chapter Five, Part K (Departures). For purposes of subsection (b)(1), **“coercion”** includes any form of conduct that negates the voluntariness of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken.
3. **Application of Chapter Three Adjustment.**—For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.
4. **Application of Subsection (c)(1).**—
  - (A) **Conduct Described in 18 U.S.C. § 2241(a) or (b).**—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.
  - (B) **Conduct Described in 18 U.S.C. § 2242.**—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2242 is: (i) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (ii) engaging in, or causing another person to engage in, a sexual act with a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.
5. **Special Instruction at Subsection (d)(1).**—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.
6. **Upward Departure Provision.**—If the offense involved more than ten victims, an upward departure may be warranted.

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

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(a) Base Offense Level:

- (1) **34**, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);
- (2) **30**, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);
- (3) **28**, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or
- (4) **24**, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.
- (2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by **2** levels.
- (3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by **2** levels.
- (4) **(Apply the greater):**
  - (A)** If **(Ai)** the offense involved the commission of a sex act or sexual contact; or **(Bii)** subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by **2** levels.

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

(5) If (A) subsection (a)(3) or (a)(4) applies; and (B) the offense involved a minor who had not attained the age of 12 years, increase by 8 levels.

(c) Cross References

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

(2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the “consent” of the minor.

(d) Special Instruction

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

### Commentary

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

## Application Notes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (B) **Application of Subsection (b)(3)(B).**—If the offense of conviction is 18 U.S.C. § 2421A(a) or § 2421A(b)(1), do not apply subsection (b)(3)(B).

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

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

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

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

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

7. **Upward Departure Provision.**—If the offense involved more than ten victims, an upward departure may be warranted.

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#### **§4B1.5. Repeat and Dangerous Sex Offender Against Minors**

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- (a) In any case in which the defendant’s instant offense of conviction is a covered sex crime, §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:



- (1) The offense level shall be the greater of:
  - (A) the offense level determined under Chapters Two and Three; or
  - (B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from §3E1.1 (Acceptance of Responsibility):

	OFFENSE STATUTORY MAXIMUM	OFFENSE LEVEL
(i)	Life	<b>37</b>
(ii)	25 years or more	<b>34</b>
(iii)	20 years or more, but less than 25 years	<b>32</b>
(iv)	15 years or more, but less than 20 years	<b>29</b>
(v)	10 years or more, but less than 15 years	<b>24</b>
(vi)	5 years or more, but less than 10 years	<b>17</b>
(vii)	More than 1 year, but less than 5 years	<b>12.</b>

- (2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category V.
- (b) In any case in which the defendant’s instant offense of conviction is a covered sex crime, neither §4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:
- (1) The offense level shall be **5** plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level **22**, the offense level shall be level **22**, decreased by the number of levels corresponding to any applicable adjustment from §3E1.1.
  - (2) The criminal history category shall be the criminal history category determined under Chapter Four, Part A.

### Commentary

#### Application Notes:

1. **Definition.**—For purposes of this guideline, “*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. **Covered Sex Crime as Instant Offense of Conviction.**—For purposes of this guideline, the instant offense of conviction must be a covered sex crime, *i.e.*: (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not

including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor~~[-or,]~~ filing a factual statement about an alien individual~~], or an offense under 18 U.S.C. § 2421A~~; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this note.

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

(A) **Definitions.**—For purposes of subsection (a):

- (i) “**Offense statutory maximum**” means the maximum term of imprisonment authorized for the instant offense of conviction that is a covered sex crime, including any increase in that maximum term under a sentencing enhancement provision (such as a sentencing enhancement provision contained in 18 U.S.C. § 2247(a) or § 2426(a)) that applies to that covered sex crime because of the defendant’s prior criminal record.
- (ii) “**Sex offense conviction**” (I) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography. “**Child pornography**” has the meaning given that term in 18 U.S.C. § 2256(8).

(B) **Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.**—In a case in which more than one count of the instant offense of conviction is a felony that is a covered sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (a).

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

(A) **Definition.**—For purposes of subsection (b), “**prohibited sexual conduct**” means any of the following: (i) any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) the production of child pornography; or (iii) trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography. It does not include receipt or possession of child pornography. “**Child pornography**” has the meaning given that term in 18 U.S.C. § 2256(8).

(B) **Determination of Pattern of Activity.**—

- (i) **In General.**—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.
- (ii) **Occasion of Prohibited Sexual Conduct.**—An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.

5. **Treatment and Monitoring.**—

(A) **Recommended Maximum Term of Supervised Release.**—The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.

- (B) **Recommended Conditions of Probation and Supervised Release.**—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.

**Background:** This guideline applies to offenders whose instant offense of conviction is a sex offense committed against a minor and who present a continuing danger to the public. The relevant criminal provisions provide for increased statutory maximum penalties for repeat sex offenders and make those increased statutory maximum penalties available if the defendant previously was convicted of any of several federal and state sex offenses (*see* 18 U.S.C. §§ 2247, 2426). In addition, section 632 of Public Law 102–141 and section 505 of Public Law 105–314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

Section 401(i)(1)(A) of Public Law 108–21 directly amended Application Note 4(b)(i), effective April 30, 2003.

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## **§5D1.2. Term of Supervised Release**

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- (a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:
- (1) At least two years but not more than five years for a defendant convicted of a Class A or B felony. *See* 18 U.S.C. § 3583(b)(1).
  - (2) At least one year but not more than three years for a defendant convicted of a Class C or D felony. *See* 18 U.S.C. § 3583(b)(2).
  - (3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor. *See* 18 U.S.C. § 3583(b)(3).
- (b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—
- (1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or
  - (2) a sex offense.
- (Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.
- (c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.

## Commentary

### Application Notes:

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

“**Sex offense**” means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor~~[-or,]~~ filing a factual statement about an alien individual~~[-or]~~, or an offense under 18 U.S.C. § 2421A; (iv) an offense under 18 U.S.C. § 1201; or (v) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).

“**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. **Safety Valve Cases.**—A defendant who qualifies under §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. *See* 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).

3. **Substantial Assistance Cases.**—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. *See* 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

4. **Factors Considered.**—The factors to be considered in determining the length of a term of supervised release are the same as the factors considered in determining whether to impose such a term. *See* 18 U.S.C. § 3583(c); Application Note 3 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is long enough to address the purposes of imposing supervised release on the defendant.

5. **Early Termination and Extension.**—The court has authority to terminate or extend a term of supervised release. *See* 18 U.S.C. § 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.

6. **Application of Subsection (c).**—Subsection (c) specifies how a statutorily required minimum term of supervised release may affect the minimum term of supervised release provided by the guidelines.

For example, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of three years and a maximum term of life, the term of supervised release provided by the guidelines is restricted by subsection (c) to three years to five years. Similarly, if subsection (a) provides a range of two years to five years, but the

relevant statute requires a minimum term of supervised release of five years and a maximum term of life, the term of supervised release provided by the guidelines is five years.

The following example illustrates the interaction of subsections (a) and (c) when subsection (b) is also involved. In this example, subsection (a) provides a range of two years to five years; the relevant statute requires a minimum term of supervised release of five years and a maximum term of life; and the offense is a sex offense under subsection (b). The effect of subsection (b) is to raise the maximum term of supervised release from five years (as provided by subsection (a)) to life, yielding a range of two years to life. The term of supervised release provided by the guidelines is then restricted by subsection (c) to five years to life. In this example, a term of supervised release of more than five years would be a guideline sentence. In addition, subsection (b) contains a policy statement recommending that the maximum — a life term of supervised release — be imposed.

**Background:** This section specifies the length of a term of supervised release that is to be imposed. Subsection (c) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.

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#### Issues for Comment:

1. In response to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115–164 (2018), Part B of the proposed amendment would reference 18 U.S.C. § 2421A to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), and would make various revisions to those guidelines to account for the new statute’s offense conduct. The Commission seeks comment on whether the proposed revisions are appropriate and on whether the Commission should make other changes to the guidelines to account for section 2421A’s offense conduct.

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

2. The new offenses codified at 18 U.S.C. § 2421A are included in chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) of title 18 of the United States Code, which contains statutes that generally prohibit conduct intended to promote or facilitate prostitution. As indicated in the synopsis, §§4B1.5 and 5D1.2 provide definitions for the terms “covered sex crime” and “sex offense,” respectively,

that generally include offenses in chapter 117 of title 18, with notable exceptions. The chapter 117 offenses that the Commission excluded from the definitions of “covered sex crime” and “sex offense” do not criminalize conduct involving the direct sexual exploitation of a minor by the defendant, but rather are primarily concerned with the transmission or filing of information about individuals.

Part B of the proposed amendment brackets the possibility of amending the Commentary to §§4B1.5 and 5D1.2 to exclude offenses under 18 U.S.C. § 2421A from the definitions of “covered sex offense” and “sex offense.” Section 2421A offenses generally involve the posting or sharing (*i.e.*, transmission) of information about an individual, which may not necessarily involve the direct exploitation of a minor victim by the defendant. The Commission seeks comment on whether excluding offenses under 18 U.S.C. § 2421A from the definitions of “covered sex crime” and “sex offense” for purposes of §§4B1.5 and 5D1.2 is appropriate due to the nature of such offenses. Should the Commission, instead, include the aggravated form of the offense under 18 U.S.C. § 2421A(b) in the definitions of “covered sex crime” and “sex offense”?

## **(C) FAA Reauthorization Act of 2018**

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

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

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

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

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

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

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

An issue for comment is also provided.

**Proposed Amendment:**

## APPENDIX A

## STATUTORY INDEX

\* \* \*

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

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

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- (a) Base Offense Level (Apply the greatest):
- (1) **30**, if the offense involved intentionally endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility or a mass transportation vehicle;
  - (2) **18**, if the offense involved recklessly endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility or a mass transportation vehicle;
  - (3) if an assault occurred, the offense level from the most analogous assault guideline, §§2A2.1–2A2.4; or
  - (4) **9**.



(b) Specific Offense Characteristic

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

(c) Cross References

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

**Commentary**

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

**Application Note:**

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

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

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

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

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

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

**Commentary**

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

**Application Note:**

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

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**§2A2.4. Obstructing or Impeding Officers**

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

(b) Specific Offense Characteristics

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

(c) Cross Reference

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

**Commentary**

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

**Application Notes:**

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

2. **Application of Certain Chapter Three Adjustments.**—The base offense level incorporates the fact that the victim was a governmental officer performing official duties. Therefore, do not apply §3A1.2 (Official Victim) unless, pursuant to subsection (c), the offense level is determined under §2A2.2 (Aggravated Assault). Conversely, the base offense level does not incorporate the possibility that the defendant may create a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement official (although an offense under 18 U.S.C. § 758 for fleeing or evading a law enforcement checkpoint at high speed will often, but not always, involve the creation of that risk). If the defendant creates that risk and no higher guideline adjustment is applicable for the conduct creating the risk, apply §3C1.2 (Reckless Endangerment During Flight).
3. **Upward Departure Provision.**—The base offense level does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. *See* §5K2.7 (Disruption of Governmental Function).

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**Issue for Comment:**

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

## (D) SUPPORT for Patients and Communities Act

**Synopsis of Proposed Amendment:** Part D of the proposed amendment responds to the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (“the SUPPORT for Patients and Communities Act”), Pub. L. 115–271 (2018).

This Act includes the Eliminating Kickbacks in Recovery Act of 2018, which added a new offense at 18 U.S.C. § 220 (Illegal remunerations for referrals to recovery homes, clinical treatment facilities, and laboratories). Section 220 prohibits, with respect to services covered by a “health care benefit program,” knowing or willfully: (1) soliciting or receiving any remuneration (including kickbacks, bribes, or rebates), in cash or in kind, for referring a patient or patronage to a recovery home, clinical treatment facility, or laboratory; and (2) paying or offering any remuneration (including kickbacks, bribes, or rebates), in cash or in kind, for inducing a referral of a patient to or in exchange for a patient using the services of a recovery home, clinical treatment facility, or laboratory. 18 U.S.C. § 220(a). The new offense has a statutory maximum term of imprisonment of ten years.

A “health care benefit program,” for purposes of section 220, includes public and private plans and contracts affecting commerce. *See* 18 U.S.C § 220(e)(3) (referring to the definition of such term at 18 U.S.C. § 24(b)). Section 220 also sets forth exemptions to the offense relating to certain discounts, payments, and waivers. *See* 18 U.S.C. § 220(b).

Part D of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 220 to §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). The conduct prohibited in 18 U.S.C. § 220 is similar to the conduct prohibited in 42 U.S.C. § 1320a-7b(b) (Criminal penalties for acts involving Federal health care programs). Currently, section 1320a-7b offenses are referenced in Appendix A to both §§2B1.1 and 2B4.1.

Part D of the proposed amendment would also amend the commentaries to §§2B1.1 and 2B4.1 to reflect that 18 U.S.C. § 220 is referenced to these guidelines.

An issue for comment is also provided.

### Proposed Amendment:

## APPENDIX A

## STATUTORY INDEX

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18 U.S.C. § 219

2C1.3

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

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(a) Base Offense Level:

- (1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
- (2) **6**, otherwise.

(b) Specific Offense Characteristics

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

LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
(A) \$6,500 or less	no increase
(B) More than \$6,500	add <b>2</b>
(C) More than \$15,000	add <b>4</b>
(D) More than \$40,000	add <b>6</b>
(E) More than \$95,000	add <b>8</b>
(F) More than \$150,000	add <b>10</b>
(G) More than \$250,000	add <b>12</b>
(H) More than \$550,000	add <b>14</b>
(I) More than \$1,500,000	add <b>16</b>
(J) More than \$3,500,000	add <b>18</b>
(K) More than \$9,500,000	add <b>20</b>
(L) More than \$25,000,000	add <b>22</b>
(M) More than \$65,000,000	add <b>24</b>
(N) More than \$150,000,000	add <b>26</b>
(O) More than \$250,000,000	add <b>28</b>
(P) More than \$550,000,000	add <b>30</b> .

- (2) (Apply the greatest) If the offense—

- (A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by **2** levels;

- (B) resulted in substantial financial hardship to five or more victims, increase by **4** levels; or
  - (C) resulted in substantial financial hardship to **25** or more victims, increase by **6** levels.
- (3) If the offense involved a theft from the person of another, increase by **2** levels.
  - (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.
  - (5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.
  - (6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.
  - (7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than \$1,000,000, increase by **2** levels; (ii) more than \$7,000,000, increase by **3** levels; or (iii) more than \$20,000,000, increase by **4** levels.
  - (8) (Apply the greater) If—
    - (A) the offense involved conduct described in 18 U.S.C. § 670, increase by **2** levels; or
    - (B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by **4** levels.
  - (9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an

institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

- (10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of **5** or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by **4** levels. If the resulting offense level is less than **12**, increase to level **12**.
- (14) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended—
  - (A) that the trade secret would be transported or transmitted out of the United States, increase by **2** levels; or
  - (B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **4** levels.

If subparagraph (B) applies and the resulting offense level is less than level **14**, increase to level **14**.
- (15) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a

cargo shipment, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(17) (Apply the greater) If—

(A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by **4** levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed **8** levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

(18) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

(19) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.



(B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

(20) If the offense involved—

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by 4 levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (*e.g.*, 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

- (4) If the offense involved a cultural heritage resource or a paleontological resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

### Commentary

**Statutory Provisions:** 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 220, 225, 285–289, 471–473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025, 1026, 1028, 1029, 1030(a)(4)–(5), 1031, 1037, 1040, 1341–1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312–2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

### Application Notes:

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

“**Cultural heritage resource**” has the meaning given that term in Application Note 1 of the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).

“**Equity securities**” has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).

“**Federal health care offense**” has the meaning given that term in 18 U.S.C. § 24.

“**Financial institution**” includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. “Union or employee pension fund” and “any health, medical, or hospital insurance association,” primarily include large pension funds that serve many persons (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

“**Firearm**” and “**destructive device**” have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

“**Foreign instrumentality**” and “**foreign agent**” have the meaning given those terms in 18 U.S.C. § 1839(1) and (2), respectively.

**“Government health care program”** means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. Examples of such programs are the Medicare program, the Medicaid program, and the CHIP program.

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

**“National cemetery”** means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

**“Paleontological resource”** has the meaning given that term in Application Note 1 of the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).

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

**“Pre-retail medical product”** has the meaning given that term in 18 U.S.C. § 670(e).

**“Publicly traded company”** means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). “Issuer” has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).

**“Supply chain”** has the meaning given that term in 18 U.S.C. § 670(e).

**“Theft from the person of another”** means theft, without the use of force, of property that was being held by another person or was within arms’ reach. Examples include pick-pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

**“Trade secret”** has the meaning given that term in 18 U.S.C. § 1839(3).

**“Veterans’ memorial”** means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).

**“Victim”** means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. “Person” includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

## 2. **Application of Subsection (a)(1).—**

(A) **“Referenced to this Guideline”**.—For purposes of subsection (a)(1), an offense is **“referenced to this guideline”** if (i) this guideline is the applicable Chapter Two guideline

specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of §1B1.2 (Applicable Guidelines); or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

- (B) **Definition of “Statutory Maximum Term of Imprisonment”.**—For purposes of this guideline, “*statutory maximum term of imprisonment*” means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.
  - (C) **Base Offense Level Determination for Cases Involving Multiple Counts.**—In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.
3. **Loss Under Subsection (b)(1).**—This application note applies to the determination of loss under subsection (b)(1).
- (A) **General Rule.**—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.
    - (i) **Actual Loss.**—“*Actual loss*” means the reasonably foreseeable pecuniary harm that resulted from the offense.
    - (ii) **Intended Loss.**—“*Intended loss*” (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).
    - (iii) **Pecuniary Harm.**—“*Pecuniary harm*” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.
    - (iv) **Reasonably Foreseeable Pecuniary Harm.**—For purposes of this guideline, “*reasonably foreseeable pecuniary harm*” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.
    - (v) **Rules of Construction in Certain Cases.**—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:
      - (I) **Product Substitution Cases.**—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim’s business operations caused by the product substitution.
      - (II) **Procurement Fraud Cases.**—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm

includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) **Offenses Under 18 U.S.C. § 1030.**—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

- (B) **Gain.**—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.
- (C) **Estimation of Loss.**—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to appropriate deference. *See* 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

- (i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.
  - (ii) In the case of proprietary information (*e.g.*, trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.
  - (iii) The cost of repairs to damaged property.
  - (iv) The approximate number of victims multiplied by the average loss to each victim.
  - (v) The reduction that resulted from the offense in the value of equity securities or other corporate assets.
  - (vi) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.
- (D) **Exclusions from Loss.**—Loss shall not include the following:
- (i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.
  - (ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.
- (E) **Credits Against Loss.**—Loss shall be reduced by the following:

- (i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.
- (ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.
- (iii) Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.

(F) **Special Rules.**—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

- (i) **Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.**—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this subdivision, “*counterfeit access device*” and “*unauthorized access device*” have the meaning given those terms in Application Note 10(A).
- (ii) **Government Benefits.**—In a case involving government benefits (*e.g.*, grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, loss is \$50.
- (iii) **Davis–Bacon Act Violations.**—In a case involving a Davis–Bacon Act violation (*i.e.*, a violation of 40 U.S.C. § 3142, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.
- (iv) **Ponzi and Other Fraudulent Investment Schemes.**—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by

the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (*i.e.*, the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).

- (v) **Certain Other Unlawful Misrepresentation Schemes.**—In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.
- (vi) **Value of Controlled Substances.**—In a case involving controlled substances, loss is the estimated street value of the controlled substances.
- (vii) **Value of Cultural Heritage Resources or Paleontological Resources.**—In a case involving a cultural heritage resource or paleontological resource, loss attributable to that resource shall be determined in accordance with the rules for determining the “value of the resource” set forth in Application Note 2 of the Commentary to §2B1.5.
- (viii) **Federal Health Care Offenses Involving Government Health Care Programs.**—In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted.
- (ix) **Fraudulent Inflation or Deflation in Value of Securities or Commodities.**—

In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by—

  - (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and
  - (II) multiplying the difference in average price by the number of shares outstanding.

In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (*e.g.*, changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).

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

- (A) **Definition.**—For purposes of subsection (b)(2), “*mass-marketing*” means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. “Mass-marketing” includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.
- (B) **Applicability to Transmission of Multiple Commercial Electronic Mail Messages.**—For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.
- (C) **Undelivered United States Mail.**—
- (i) **In General.**—In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, “*victim*” means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.
- (ii) **Special Rule.**—A case described in subdivision (C)(i) of this note that involved—
- (I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 10 victims.
- (II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.
- (iii) **Definition.**—“*Undelivered United States mail*” means mail that has not actually been received by the addressee or the addressee’s agent (*e.g.*, mail taken from the addressee’s mail box).
- (D) **Vulnerable Victims.**—If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.
- (E) **Cases Involving Means of Identification.**—For purposes of subsection (b)(2), in a case involving means of identification “*victim*” means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.
- (F) **Substantial Financial Hardship.**—In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—



- (i) becoming insolvent;
  - (ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);
  - (iii) suffering substantial loss of a retirement, education, or other savings or investment fund;
  - (iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;
  - (v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and
  - (vi) suffering substantial harm to his or her ability to obtain credit.
5. **Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).**—For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:
- (A) The regularity and sophistication of the defendant’s activities.
  - (B) The value and size of the inventory of stolen property maintained by the defendant.
  - (C) The extent to which the defendant’s activities encouraged or facilitated other crimes.
  - (D) The defendant’s past activities involving stolen property.
6. **Application of Subsection (b)(6).**—For purposes of subsection (b)(6), “*improper means*” includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.
7. **Application of Subsection (b)(8)(B).**—If subsection (b)(8)(B) applies, do not apply an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
8. **Application of Subsection (b)(9).**—
- (A) **In General.**—The adjustments in subsection (b)(9) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.
  - (B) **Misrepresentations Regarding Charitable and Other Institutions.**—Subsection (b)(9)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable, educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (*e.g.*, for the defendant’s personal gain). Subsection (b)(9)(A) applies, for example, to the following:
    - (i) A defendant who solicited contributions for a non-existent famine relief organization.
    - (ii) A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.

(iii) A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.

(C) **Fraud in Contravention of Prior Judicial Order.**—Subsection (b)(9)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (*e.g.*, a violation of a condition of release addressed in §3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).

(D) **College Scholarship Fraud.**—For purposes of subsection (b)(9)(D):

“*Financial assistance*” means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.

“*Institution of higher education*” has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).

(E) **Non-Applicability of Chapter Three Adjustments.**—

(i) **Subsection (b)(9)(A).**—If the conduct that forms the basis for an enhancement under subsection (b)(9)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under §3B1.3.

(ii) **Subsection (b)(9)(B) and (C).**—If the conduct that forms the basis for an enhancement under subsection (b)(9)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under §3C1.1.

9. **Application of Subsection (b)(10).**—

(A) **Definition of United States.**—For purposes of subsection (b)(10)(B), “*United States*” means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(B) **Sophisticated Means Enhancement under Subsection (b)(10)(C).**—For purposes of subsection (b)(10)(C), “*sophisticated means*” means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one

jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

- (C) **Non-Applicability of Chapter Three Adjustment.**—If the conduct that forms the basis for an enhancement under subsection (b)(10) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.

10. **Application of Subsection (b)(11).**—

- (A) **Definitions.**—For purposes of subsection (b)(11):

“**Authentication feature**” has the meaning given that term in 18 U.S.C. § 1028(d)(1).

“**Counterfeit access device**” (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.

“**Device-making equipment**” (i) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). “Scanning receiver” has the meaning given that term in 18 U.S.C. § 1029(e)(8).

“**Produce**” includes manufacture, design, alter, authenticate, duplicate, or assemble. “**Production**” includes manufacture, design, alteration, authentication, duplication, or assembly.

“**Telecommunications service**” has the meaning given that term in 18 U.S.C. § 1029(e)(9).

“**Unauthorized access device**” has the meaning given that term in 18 U.S.C. § 1029(e)(3).

- (B) **Authentication Features and Identification Documents.**—Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.

- (C) **Application of Subsection (b)(11)(C)(i).**—

- (i) **In General.**—Subsection (b)(11)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual’s authorization unlawfully to produce or obtain another means of identification.

- (ii) **Examples.**—Examples of conduct to which subsection (b)(11)(C)(i) applies are as follows:

- (I) A defendant obtains an individual’s name and social security number from a source (*e.g.*, from a piece of mail taken from the individual’s mailbox) and obtains a bank loan in that individual’s name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.
  - (II) A defendant obtains an individual’s name and address from a source (*e.g.*, from a driver’s license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual’s name. In this example, the credit card is the other means of identification that has been obtained unlawfully.
- (iii) **Non-Applicability of Subsection (b)(11)(C)(i).**—Examples of conduct to which subsection (b)(11)(C)(i) does not apply are as follows:
- (I) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.
  - (II) A defendant forges another individual’s signature to cash a stolen check. Forging another individual’s signature is not producing another means of identification.
- (D) **Application of Subsection (b)(11)(C)(ii).**—Subsection (b)(11)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.
11. **Interaction of Subsection (b)(13) and §3B1.3 (Abuse of Position of Trust or Use of Special Skill).**—If subsection (b)(13) applies, do not apply §3B1.3.
12. **Application of Subsection (b)(15).**—Subsection (b)(15) provides a minimum offense level in the case of an ongoing, sophisticated operation (*e.g.*, an auto theft ring or “chop shop”) to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, “*vehicle*” means motor vehicle, vessel, or aircraft. A “*cargo shipment*” includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.
13. **Gross Receipts Enhancement under Subsection (b)(17)(A).**—
- (A) **In General.**—For purposes of subsection (b)(17)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.
  - (B) **Definition.**—“*Gross receipts from the offense*” includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. *See* 18 U.S.C. § 982(a)(4).
14. **Application of Subsection (b)(17)(B).**—
- (A) **Application of Subsection (b)(17)(B)(i).**—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:

- (i) The financial institution became insolvent.
- (ii) The financial institution substantially reduced benefits to pensioners or insureds.
- (iii) The financial institution was unable on demand to refund fully any deposit, payment, or investment.
- (iv) The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.
- (v) One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a “bailout”.

**(B) Application of Subsection (b)(17)(B)(ii).—**

- (i) **Definition.**—For purposes of this subsection, “*organization*” has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).
- (ii) **In General.**—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:
  - (I) The organization became insolvent or suffered a substantial reduction in the value of its assets.
  - (II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).
  - (III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.
  - (IV) The organization substantially reduced its workforce.
  - (V) The organization substantially reduced its employee pension benefits.
  - (VI) The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company’s securities was halted for more than one full trading day.
  - (VII) One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a “bailout”.

**15. Application of Subsection (b)(19).—**

- (A) **Definitions.**—For purposes of subsection (b)(19):

“*Critical infrastructure*” means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical

infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

“**Government entity**” has the meaning given that term in 18 U.S.C. § 1030(e)(9).

- (B) **Subsection (b)(19)(A)(iii).**—If the same conduct that forms the basis for an enhancement under subsection (b)(19)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(17)(B), do not apply the enhancement under subsection (b)(17)(B).

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

- (A) **Definitions.**—For purposes of subsection (b)(20):

“**Commodities law**” means (i) the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*) and 18 U.S.C. § 1348; and (ii) includes the rules, regulations, and orders issued by the Commodity Futures Trading Commission.

“**Commodity pool operator**” has the meaning given that term in section 1a(11) of the Commodity Exchange Act (7 U.S.C. § 1a(11)).

“**Commodity trading advisor**” has the meaning given that term in section 1a(12) of the Commodity Exchange Act (7 U.S.C. § 1a(12)).

“**Futures commission merchant**” has the meaning given that term in section 1a(28) of the Commodity Exchange Act (7 U.S.C. § 1a(28)).

“**Introducing broker**” has the meaning given that term in section 1a(31) of the Commodity Exchange Act (7 U.S.C. § 1a(31)).

“**Investment adviser**” has the meaning given that term in section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(11)).

“**Person associated with a broker or dealer**” has the meaning given that term in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(18)).

“**Person associated with an investment adviser**” has the meaning given that term in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(17)).

“**Registered broker or dealer**” has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(48)).

“**Securities law**” (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.

- (B) **In General.**—A conviction under a securities law or commodities law is not required in order for subsection (b)(20) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant’s conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly

traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.

(C) **Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).**—If subsection (b)(20) applies, do not apply §3B1.3.

17. **Cross Reference in Subsection (c)(3).**—Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).
18. **Continuing Financial Crimes Enterprise.**—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the “continuing financial crimes enterprise”.
19. **Partially Completed Offenses.**—In the case of a partially completed offense (*e.g.*, an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. *See* Application Note 4 of the Commentary to §2X1.1.
20. **Multiple-Count Indictments.**—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. *See* Chapter Three, Part D (Multiple Counts).
21. **Departure Considerations.**—
  - (A) **Upward Departure Considerations.**—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. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:
    - (i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.

- (ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed. Similarly, an upward departure would be warranted in a case involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.
  - (iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).
  - (iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.
  - (v) In a case involving stolen information from a “protected computer”, as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.
  - (vi) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:
    - (I) The offense caused substantial harm to the victim’s reputation, or the victim suffered a substantial inconvenience related to repairing the victim’s reputation.
    - (II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual’s name.
    - (III) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual’s identity.
- (B) **Upward Departure for Debilitating Impact on a Critical Infrastructure.**—An upward departure would be warranted in a case in which subsection (b)(19)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.
- (C) **Downward Departure Consideration.**—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a



case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.

- (D) **Downward Departure for Major Disaster or Emergency Victims.**—If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.

**Background:** This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under §2B3.1 (Robbery).

A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond

the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.

Subsection (b)(5) implements the instruction to the Commission in section 2 of Public Law 105–101 and the directive to the Commission in section 3 of Public Law 110–384.

Subsection (b)(7) implements the directive to the Commission in section 10606 of Public Law 111–148.

Subsection (b)(8) implements the directive to the Commission in section 7 of Public Law 112–186.

Subsection (b)(9)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106–420.

Subsection (b)(10) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.

Subsections (b)(11)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

Subsection (b)(11)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as “affirmative identity theft” or “breeding”, in which a defendant uses another individual’s name, social security number, or some other form of identification (the “means of identification”) to “breed” (*i.e.*, produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines “means of identification”, the new or additional forms of identification can include items such as a driver’s license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were “bred” (*i.e.*, produced or obtained) often are within the defendant’s exclusive control, making it difficult for the individual victim to detect that the victim’s identity has been “stolen.” Generally, the victim does not become aware of the offense until certain harms have already occurred (*e.g.*, a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (*e.g.*, harm to the individual’s reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

Subsection (b)(12) implements the directive in section 5 of Public Law 110–179.

Subsection (b)(14) implements the directive in section 3 of Public Law 112–269.

Subsection (b)(16)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(17)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (b)(17)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(18) implements the directive in section 209 of Public Law 110–326.

Subsection (b)(19) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(19)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.

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

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- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
  - (1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded \$2,500 but did not exceed \$6,500, increase by **1** level; or (B) exceeded \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (2) (Apply the greater) If—
    - (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or
    - (B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by **4** levels.

If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

- (c) Special Instruction for Fines — Organizations
  - (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

**Commentary**

**Statutory Provisions:** 18 U.S.C. §§ 215, **220**, 224, 225; 26 U.S.C. §§ 9012(e), 9042(d); 41 U.S.C. §§ 8702, 8707; 42 U.S.C. §§ 1395nn(b)(1), (2), 1396h(b)(1),(2); 49 U.S.C. § 11902. For additional statutory provision(s), see Appendix A (Statutory Index).

## Application Notes:

1. This guideline covers commercial bribery offenses and kickbacks that do not involve officials of federal, state, or local government, foreign governments, or public international organizations. *See* Part C, Offenses Involving Public Officials, if any such officials are involved.
2. The “*value of the improper benefit to be conferred*” refers to the value of the action to be taken or effected in return for the bribe. *See* Commentary to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).
3. “*Financial institution*,” as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005–1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. “Union or employee pension fund” and “any health, medical, or hospital insurance association,” as used above, primarily include large pension funds that serve many individuals (*e.g.*, pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (*e.g.*, medical or hospitalization insurance) to large numbers of persons.
4. **Gross Receipts Enhancement under Subsection (b)(2)(A).—**
  - (A) **In General.**—For purposes of subsection (b)(2)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.
  - (B) **Definition.**—“*Gross receipts from the offense*” includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. *See* 18 U.S.C. § 982(a)(4).
5. **Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(2)(B).—**For purposes of subsection (b)(2)(B), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of any of subdivisions (A) through (D) of this note.
6. If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the “continuing financial crimes enterprise.”

**Background:** This guideline applies to violations of various federal bribery statutes that do not involve governmental officials. The base offense level is to be enhanced based upon the value of the unlawful payment or the value of the action to be taken or effected in return for the unlawful payment, whichever is greater.

One of the more commonly prosecuted offenses to which this guideline applies is offering or accepting a fee in connection with procurement of a loan from a financial institution in violation of 18 U.S.C. § 215.

As with non-commercial bribery, this guideline considers not only the amount of the bribe but also the value of the action received in return. Thus, for example, if a bank officer agreed to the offer of a \$25,000 bribe to approve a \$250,000 loan under terms for which the applicant would not otherwise qualify, the court, in increasing the offense level, would use the greater of the \$25,000 bribe, and the savings in interest over the life of the loan compared with alternative loan terms. If a gambler paid a player \$5,000 to shave points in a nationally televised basketball game, the value of the action to the gambler would be the amount that he and his confederates won or stood to gain. If that amount could not be estimated, the amount of the bribe would be used to determine the appropriate increase in offense level.

This guideline also applies to making prohibited payments to induce the award of subcontracts on federal projects for which the maximum term of imprisonment authorized is ten years. 41 U.S.C. §§ 8702, 8707. Violations of 42 U.S.C. § 1320a-7b involve the offer or acceptance of a payment to refer an individual for services or items paid for under a federal health care program (*e.g.*, the Medicare and Medicaid programs).

This guideline also applies to violations of law involving bribes and kickbacks in expenses incurred for a presidential nominating convention or presidential election campaign. These offenses are prohibited under 26 U.S.C. §§ 9012(e) and 9042(d), which apply to candidates for President and Vice President whose campaigns are eligible for federal matching funds.

This guideline also applies to violations of 18 U.S.C. § 224, sports bribery, as well as certain violations of the Interstate Commerce Act.

Subsection (b)(2)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (b)(2)(B) implements the instruction to the Commission in section 2507 of Public Law 101-647.

\* \* \*

#### **Issue for Comment:**

1. In response to the SUPPORT for Patients and Communities Act, Part D of the proposed amendment would reference 18 U.S.C § 220 to §§2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for section 220's offense conduct. Specifically, should the Commission amend §2B1.1 or §2B4.1 to provide a higher or lower base offense level if 18 U.S.C § 220 is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to section 220? If so, what should that specific offense characteristic provide and why?

## (E) Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018

**Synopsis of Proposed Amendment:** Part E of the proposed amendment responds to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. 115–299 (2018).

Among other things, the Act amended 18 U.S.C. § 2259 (Mandatory restitution), with respect to victims of child pornography, by adding a new subsection (d). This new subsection permits any victim of child pornography trafficking to receive “defined monetary assistance” from the Child Pornography Victims Reserve when a defendant is convicted of trafficking in child pornography. It also sets forth rules for determining the amount of “defined monetary assistance” a victim may receive and certain limitations relating to the effect of restitution and on eligibility. In addition, new subsection (d)(4)(A) states that that any attorney representing a victim seeking “defined monetary assistance” may not charge, receive, or collect (nor may the court approve) the payment of fees and costs that in the aggregate exceeds 15 percent of any payment made under new subsection (d) in general. It also provides that an attorney who violates subsection (d)(4)(A) may be subject to a statutory maximum term of imprisonment of not more than one year. *See* 18 U.S.C. § 2259(d)(4)(B).

Part E of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 2259(d)(4) to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). It would also amend the Commentary to §2X5.2 to reflect that 18 U.S.C. § 2259(d)(4) is referenced to the guideline.

An issue for comment is also provided.

### Proposed Amendment:

## APPENDIX A

## STATUTORY INDEX

18 U.S.C. § 2257A	2G2.5	* * *
18 U.S.C. § 2259(d)(4)	2X5.2	
18 U.S.C. § 2260(a)	2G2.1	* * *

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

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

## Commentary

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

### Application Note:

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

\* \* \*

### Issue for Comment:

1. In response to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Part E of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 2259(d)(4) to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The Commission seeks comment on whether this proposed reference is appropriate and whether any additional changes to the guidelines are required to account for the new offense conduct at 18 U.S.C. § 2259(d)(4).

## (F) Foundations for Evidence-Based Policymaking Act of 2018

**Synopsis of Proposed Amendment:** Part F of the proposed amendment responds to the Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. 115–435 (2019).

This Act includes the Confidential Information Protection and Statistical Efficiency Act of 2018, which added a new offense at 44 U.S.C. § 3572 (Confidential information protection). Section 3572 prohibits the unauthorized disclosure of information collected by an agency under a pledge of confidentiality and for exclusively statistical purposes, or the use of such information for other than statistical purposes. Any willful unauthorized disclosure of such information by an officer, employee, or agent of an agency acquiring information for exclusively statistical purposes is punishable by a statutory maximum term of imprisonment of five years. *See* 44 U.S.C. § 3572(f).

Part F of the proposed amendment would amend Appendix A (Statutory Index) to reference 44 U.S.C. § 3572 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Similar confidential information disclosure offenses, such as 18 U.S.C. § 1039 and 26 U.S.C. § 7213(a), are referenced to this guideline. Part F of the proposed amendment would also amend the Commentary to §2H3.1 to reflect that 44 U.S.C. § 3572 is referenced to the guideline.

An issue for comment is also provided.

### Proposed Amendment:

## APPENDIX A

## STATUTORY INDEX

\* \* \*

43 U.S.C. § 1822(b)      2Q1.2

44 U.S.C. § 3572      2H3.1

45 U.S.C. § 359(a)      2B1.1

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

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

(1) **9**; or



- (2) **6**, if the offense of conviction has a statutory maximum term of imprisonment of one year or less but more than six months.

(b) **Specific Offense Characteristics**

- (1) If (A) the defendant is convicted under 18 U.S.C. § 1039(d) or (e); or (B) the purpose of the offense was to obtain direct or indirect commercial advantage or economic gain, increase by **3** levels.
- (2) (Apply the greater) If—
  - (A) the defendant is convicted under 18 U.S.C. § 119, increase by **8** levels; or
  - (B) the defendant is convicted under 18 U.S.C. § 119, and the offense involved the use of a computer or an interactive computer service to make restricted personal information about a covered person publicly available, increase by **10** levels.

(c) **Cross Reference**

- (1) If the purpose of the offense was to facilitate another offense, apply the guideline applicable to an attempt to commit that other offense, if the resulting offense level is greater than that determined above.

**Commentary**

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

**Application Notes:**

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

3. **Inapplicability of Chapter Three (Adjustments).**—If the enhancement under subsection (b)(2) applies, do not apply §3A1.2 (Official Victim).

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

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

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

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

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

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

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

5. **Upward Departure.**—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:

(A) The offense involved personal information, means of identification, confidential phone records information, or tax return information of a substantial number of individuals.

(B) The offense caused or risked substantial non-monetary harm (*e.g.* physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.

\* \* \*

**Issue for Comment:**

1. In response to the Foundations for Evidence-Based Policymaking Act of 2018, Part F of the proposed amendment would reference 44 U.S.C. § 3572 to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). The Commission seeks comment on whether this proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 3572’s offense conduct. Specifically, should the Commission amend §2H3.1 to provide a higher or lower base offense level if 44 U.S.C. § 3572 is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to section 3572? If so, what should that specific offense characteristic provide and why?

## (G) National Defense Authorization Act for Fiscal Year 2020

**Synopsis of Proposed Amendment:** Part G of the proposed amendment responds to the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116–92 (2019).

The Act added a new statute at 10 U.S.C. § 2733a regarding medical malpractice claims by members of the uniformed services. The new statute authorizes the Secretary of Defense to allow, settle, and pay a claim against the United States for personal injury or death that occurred during the service of a member of the uniformed services and that was caused by the medical malpractice of a health care provided of the Department of Defense, if certain requirements are met. Under section 2733a(c)(2), the Department of Defense is not liable for the payment of attorney fees for a claim under the new statute. However, section 2733(g)(1) prohibits any attorney from charging, demanding, receiving, or collecting fees in excess of 20 percent of any claim paid pursuant to the new statute. Any attorney who charges, demands, receives, or collect a fee in excess of 20 percent faces a statutory maximum term of imprisonment of not more than one year. *See* 10 U.S.C. § 2733a(g)(2).

Part G of the proposed amendment would amend Appendix A (Statutory Index) to reference 10 U.S.C. § 2733a(g)(2) to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). It would also amend the Commentary to §2X5.2 to reflect that 10 U.S.C. § 2733a(g)(2) is referenced to the guideline.

An issue for comment is also provided.

### Proposed Amendment:

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		* * *
10 U.S.C. § 987(f)	2X5.2	
10 U.S.C. § 2733a(g)(2)	2X5.2	
12 U.S.C. § 631	2B1.1	
		* * *

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

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(a) Base Offense Level: 6

#### Commentary

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

**Application Note:**

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

\* \* \*

**Issue for Comment:**

1. In response to the National Defense Authorization Act for Fiscal Year 2020, Part G of the proposed amendment would amend Appendix A (Statutory Index) to reference 10 U.S.C. § 2733a(g)(2) to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The Commission seeks comment on whether this proposed reference is appropriate and whether any additional changes to the guidelines are required to account for the new offense conduct at 10 U.S.C. § 2733a(g)(2).

## (H) Representative Payee Fraud Prevention Act of 2019

**Synopsis of Proposed Amendment:** Part H of the proposed amendment responds to the Representative Payee Fraud Prevention Act of 2019, Pub. L. 116–126 (2020).

The Act amended certain sections in chapters 83 (Retirement) and 84 (Federal Employees’ Retirement System) of title 5 (Government Organization and Employees), United States, Code, relating to the Civil Services Retirement System (“CSRS”) and the Federal Employees Retirement System (“FERS”). Under both retirement programs, annuities that are due to a minor or an individual mentally incompetent or under other legal disability may be made to the guardian or other fiduciary of such individual. *See* 5 U.S.C. §§ 8345(e), 8466(c).

The Act added two identical new offenses at 5 U.S.C. §§ 8345a and 8466a, regarding embezzlement or conversion of payments due to a minor or an individual mentally incompetent or under other legal disability under CSRS and FERS. Both offenses apply to a “representative payee.” The Act added similar provisions to both chapters 83 and 84 of title 5 defining the term as “a person (including an organization) designated under [section 8345(e)(1) or section 8466(c)(1)] to receive payments on behalf of a minor or an individual mentally incompetent or under other legal disability.” 5 U.S.C. §§ 8331(33), 8401(39).

The new offense at 5 U.S.C. § 8345a prohibits a representative payee from embezzling or in any manner converting all or any part of the amounts received from payments under the CSRS retirement program for a use other than for the use and benefit of the minor or individual on whose behalf the payments were received. The new offense at 5 U.S.C. § 8466a prohibits a representative payee from engaging in the same conduct prohibited under section 8345a for purposes of payments received under the FERS retirement program. Offenses under both sections 8345a and 8466a are punishable by a statutory maximum term of imprisonment of five years.

Part H of the proposed amendment would amend Appendix A (Statutory Index) to reference 5 U.S.C. §§ 8345a and 8466a to §2B1.1 (Theft, Property Destruction, and Fraud). Similar financial fraud and embezzlement offenses relating to social security, veterans’ benefits, and welfare benefit and pension plans (such as 18 U.S.C. § 664, 38 U.S.C. § 6102, and 42 U.S.C. §§ 408(a)(5), 1011(a)(4) and 1383a(a)(4)) are referenced to §2B1.1. Part H of the proposed amendment would also amend the Commentary to §2B1.1 to reflect that 5 U.S.C. §§ 8345a and 8466a are referenced to the guideline.

An issue for comment is also provided.

### Proposed Amendment:

## APPENDIX A

## STATUTORY INDEX

\* \* \*

2 U.S.C. § 390

2J1.1, 2J1.5

5 U.S.C. § 8345a 2B1.1

5 U.S.C. § 8466a 2B1.1

7 U.S.C. § 6 2B1.1

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

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\* \* \*

**Commentary**

**Statutory Provisions:** 5 U.S.C. §§ 8345a, 8466a; 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285–289, 471–473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025, 1026, 1028, 1029, 1030(a)(4)–(5), 1031, 1037, 1040, 1341–1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312–2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

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**Issue for Comment:**

1. In response to the Representative Payee Fraud Prevention Act of 2019, Part H of the proposed amendment would reference 5 U.S.C. §§ 8345a and 8466a to §2B1.1 (Theft, Property Destruction, and Fraud). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for the offense conduct covered by sections 8345a and 8466a. Specifically, should the Commission amend §2B1.1 to provide a higher or lower base offense level if 5 U.S.C. § 8345a or § 8466a is the offense of conviction? If so, what should that base offense level be for each of these sections and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to 5 U.S.C. § 8345a or § 8466a? If so, what should that specific offense characteristic provide and why?

## (I) Stop Student Debt Relief Scam Act of 2019

**Synopsis of Proposed Amendment:** Part I of the proposed amendment responds to the Stop Student Debt Relief Scam Act of 2019, Pub. L. 116–251 (2020).

The Act created a new offense at 20 U.S.C. § 1097(e). Current subsections (a) through (d) of section 1097 provide criminal penalties for crimes relating to student assistance programs, including embezzlement, theft, fraud, forgery, and making unlawful payments to a lender to acquire a loan. New subsection (e) of section 1097 prohibits knowingly using an access device (as defined in 18 U.S.C. § 1029(e)(1)) issued to another person or obtained by fraud or false statement to access information technology systems of the Department of Education for purposes of obtaining commercial advantage or private financial gain, or in furtherance of any criminal or tortious act. The statutory maximum term of imprisonment for the offense is five years.

Part I of the proposed amendment would amend Appendix A (Statutory Index) to reference 20 U.S.C. § 1097(e) to §2B1.1 (Theft, Property Destruction, and Fraud). Section 1097(a), (b), and (d) offenses (theft, embezzlement, and fraud) are currently referenced to §2B1.1, while section 1097(c) offenses (unlawful payments to acquire a loan) are referenced to §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). Part I of the proposed amendment would also amend the Commentary to §2B1.1 to reflect that 20 U.S.C. § 1097(a), (b), (d), and (e) are referenced to the guideline.

An issue for comment is also provided.

### Proposed Amendment:

## APPENDIX A

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		* * *
20 U.S.C. § 1097(d)	2B1.1	
20 U.S.C. § 1097(e)	2B1.1	
21 U.S.C. § 101	2N2.1	
		* * *

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

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\* \* \*

## Commentary

**Statutory Provisions:** 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285–289, 471–473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025, 1026, 1028, 1029, 1030(a)(4)–(5), 1031, 1037, 1040, 1341–1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312–2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 20 U.S.C. § 1097(a), (b), (d), (e); 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

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### Issue for Comment:

1. In response to the Stop Student Debt Relief Scam Act of 2019, Part I of the proposed amendment would reference 20 U.S.C. § 1097(e) to §2B1.1 (Theft, Property Destruction, and Fraud). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 1097(e) offenses. Specifically, should the Commission amend §2B1.1 to provide a higher or lower base offense level if 20 U.S.C. § 1097(e) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to 20 U.S.C. § 1097(e)? If so, what should that specific offense characteristic provide and why?



## (J) Protecting Lawful Streaming Act of 2020

**Synopsis of Proposed Amendment:** Part J responds to Protecting Lawful Streaming Act of 2020, Pub. L. 116–260 (2021).

The Act created a new commercial streaming piracy offense at 18 U.S.C. § 2319C (Illicit digital transmission services). Section 2319C(b) makes it unlawful to willfully, and for purposes of commercial advantage or private financial gain, offer or provide to the public a digital transmission service that (1) is primarily designed or provided for the purpose of publicly performing works protected under copyright law by means of a digital transmission without the authority of the copyright owner or the law; (2) has no commercially significant purpose or use other than to publicly perform works protected under copyright law by means of a digital transmission without the authority of the copyright owner or the law; or (3) is intentionally marketed to promote its use in publicly performing works protected under copyright law by means of a digital transmission without the authority of the copyright owner or the law. Section 2319C(a) provides definitions for some of the terms used in the statute.

A violation of section 2319C has a statutory maximum term of imprisonment of three years. 18 U.S.C. § 2319C(c)(1). However, the maximum penalty increases to five years if (1) the offense was committed in connection with one or more works being prepared for commercial public performance; and (2) the offender knew or should have known that the work was being prepared for commercial public performance. *Id.* § 2319C(c)(2). A ten-year maximum penalty applies if the offense is a second or subsequent offense under 18 U.S.C. § 2319C or § 2319(a). *Id.* § 2319C(c)(3).

Part J of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. § 2319C to §2B5.3 (Criminal Infringement of Copyright or Trademark). Similar offenses, such as 17 U.S.C. § 506 (prohibiting infringing a copyright of a work being prepared for commercial distribution) and 18 U.S.C. §§ 2319A and 2319B (prohibiting the unauthorized recording and trafficking of live musical performances for commercial advantage or private financial gain, and the unauthorized recording of motion pictures in movie theaters), are referenced to §2B5.3.

Two issues for comment are also provided.

### Proposed Amendment:

## APPENDIX A

## STATUTORY INDEX

\* \* \*

18 U.S.C. § 2319B	2B5.3
18 U.S.C. § 2319C	2B5.3
18 U.S.C. § 2320	2B5.3

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

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- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
  - (1) If the infringement amount (A) exceeded \$2,500 but did not exceed \$6,500, increase by **1** level; or (B) exceeded \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.
  - (3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
  - (4) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but the resulting offense level shall be not less than level **8**.
  - (5) If the offense involved a drug that uses a counterfeit mark on or in connection with the drug, increase by **2** levels.
  - (6) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
  - (7) If the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause (A) the disclosure of classified information; (B) impairment of combat operations; or (C) other significant harm to (i) a combat operation, (ii) a member of the Armed Forces, or (iii) national security, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

**Commentary**

**Statutory Provisions:** 17 U.S.C. §§ 506(a), 1201, 1204; 18 U.S.C. §§ 2318–2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

## Application Notes:

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

“*Circumvention devices*” are devices used to perform the activity described in 17 U.S.C. §§ 1201(a)(3)(A) and 1201(b)(2)(A).

“*Commercial advantage or private financial gain*” means the receipt, or expectation of receipt, of anything of value, including other protected works.

“*Counterfeit military good or service*” has the meaning given that term in 18 U.S.C. § 2320(f)(4).

“*Drug*” and “*counterfeit mark*” have the meaning given those terms in 18 U.S.C. § 2320(f).

“*Infringed item*” means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

“*Infringing item*” means the item that violates the copyright or trademark laws.

“*Uploading*” means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item as an openly shared file. “Uploading” does not include merely downloading or installing an infringing item on a hard drive on a defendant’s personal computer unless the infringing item is an openly shared file.

“*Work being prepared for commercial distribution*” has the meaning given that term in 17 U.S.C. § 506(a)(3).

2. **Determination of Infringement Amount.**—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).

(A) **Use of Retail Value of Infringed Item.**—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:

- (i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.
- (ii) The retail price of the infringing item is not less than 75% of the retail price of the infringed item.
- (iii) The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.
- (iv) The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the “retail value of the infringed item” is the price the user of the transmission would have paid to lawfully receive that transmission, and the “infringed item” is the satellite transmission rather than the intercepting device.)

- (v) The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.
  - (vi) The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the “retail value of the infringed item” is the value of that item upon its initial commercial distribution.
  - (vii) A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the “infringed item” is the identifiable, genuine good or service.
  - (viii) A case under 17 U.S.C. §§ 1201 and 1204 in which the defendant used a circumvention device. In such an offense, the “retail value of the infringed item” is the price the user would have paid to access lawfully the copyrighted work, and the “infringed item” is the accessed work.
- (B) **Use of Retail Value of Infringing Item.**—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A.
- (C) **Retail Value Defined.**—For purposes of this Application Note, the “*retail value*” of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.
- (D) **Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.**—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B) of this Application Note. For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (*i.e.*, the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (*i.e.*, the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).
- (E) **Indeterminate Number of Infringing Items.**—In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.
3. **Application of Subsection (b)(7).**—In subsection (b)(7), “*other significant harm to a member of the Armed Forces*” means significant harm other than serious bodily injury or death. In a case in which the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, subsection (b)(6)(A) (conscious or reckless risk of serious bodily injury or death) would apply.

4. **Application of §3B1.3.**—If the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.
5. **Departure Considerations.**—If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:
  - (A) The offense involved substantial harm to the reputation of the copyright or trademark owner.
  - (B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.
  - (C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.
  - (D) The offense resulted in death or serious bodily injury.

**Background:** This guideline treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guideline, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147, by using the retail value of the infringed item, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

Subsection (b)(5) implements the directive to the Commission in section 717 of Public Law 112–144.

Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

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## Issue for Comment

1. In response to the Protecting Lawful Streaming Act of 2020, Part J of the proposed amendment would reference 18 U.S.C. § 2319C to §2B5.3 (Criminal Infringement of Copyright or Trademark). The Commission seeks comment on whether the proposed

reference is appropriate and whether any additional changes to the guidelines are required to account for section 2319C offenses. Specifically, should the Commission amend §2B5.3 to provide a higher or lower base offense level if 18 U.S.C. § 2319C is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to 18 U.S.C. § 2319C? If so, what should that specific offense characteristic provide and why?

The new statute at 18 U.S.C. § 2319C provides enhanced penalties if (1) the offense was committed in connection with one or more works being prepared for commercial public performance, and the offender knew or should have known that the work was being prepared for commercial public performance; or (2) if the offense is a second or subsequent offense under 18 U.S.C. § 2319C or § 2319(a). Should the Commission amend §2B5.3 to address these enhanced penalties? If so, how should the Commission address them and why?

2. Currently, §2B5.3 includes a specific offense characteristic at subsection (b)(2) providing a 2-level enhancement “[i]f the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution.” The new offense at 18 U.S.C. § 2319C mainly addresses the streaming (*i.e.*, offering or providing “to the public a digital transmission service”) of works “being prepared for commercial public performance.” The Commission seeks comment on whether current §2B5.3(b)(2) adequately accounts for section 2319C’s offense conduct. If not, what revisions to §2B5.3(b)(2) would be appropriate to account for this conduct? Should the Commission instead revise §2B5.3 in general provide one or more specific offense characteristics or departure provisions to better account for this conduct? If so, what should the Commission provide?

**(K) William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021**

**Synopsis of Proposed Amendment:** Part K of the proposed amendment responds to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283 (2021). The Act created several new offenses at 31 U.S.C. §§ 5335 and 5336.

The Act included two regulatory offenses in a new section 5335 of title 31, United States Code. Section 5335(b) prohibits knowingly concealing, falsifying, or misrepresenting (or attempting to do so) from or to a financial institution, a material fact concerning the ownership or control of assets involved in a monetary transaction if (1) the person or entity who owns or controls the assets is a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure; and (2) the aggregate value of the assets involved in one or more monetary transactions is not less than \$1,000,000. Section 5335(c) prohibits knowingly concealing, falsifying, or misrepresenting (or attempting to do so) from or to a financial institution, a material fact concerning the source of funds in a monetary transaction that (1) involves an entity found to be a primary money laundering concern under 31 U.S.C. § 5318A or applicable regulations; and (2) violates the prohibitions or conditions prescribed under 31 U.S.C. § 5318A(b)(5) or applicable regulations. Both new offenses cover conspiracies to commit the prohibited conduct and have a statutory maximum term of imprisonment of ten years. *See* 31 U.S.C. § 5335(d).

The Act also added a new section 5336 to title 31, United States Code, concerning reporting requirements of beneficial ownership of certain entities. Specifically, section 5336(b) requires certain United States and foreign corporations, limited liability companies, and similar entities, to file annual reports with the Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”). The annual reports must identify an entity’s beneficial owners (*i.e.*, those exercising substantial control or who own or control no less than 25% of the ownership interests), including names, dates of birth, street address, and unique identification numbers (such as passport numbers, driver’s license numbers, or FinCEN identifiers). Section 5336(c) provides certain conditions under which FinCEN may disclose the beneficial ownership information to certain requesting agencies, including federal agencies, state, local and tribal law enforcement agencies, federal agencies on behalf of law enforcement, or a prosecutor or judge of a foreign country.

Section 5336 includes three new offenses relating to the provisions described above. First, section 5336(h)(1) prohibits (1) willfully providing, or attempting to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN; or (2) willfully failing to report complete or updated beneficial ownership information to FinCEN. The statutory maximum term of imprisonment for this offense is two years. Second, section 5336(c)(4) prohibits any employee or officer of a requesting agency from violating the protocols established by the regulations promulgated by the Secretary of the Treasury under section 5336, including unauthorized disclosure or use of the beneficial ownership information obtained from FinCEN. Third, section 5336(h)(2) prohibits the knowingly disclosure or knowingly use, without authorization, of beneficial ownership information obtained through a report submitted to FinCEN or a disclosure made by FinCEN. Both sections 5336(c)(4) and 5336(h)(2) offenses face a statutory maximum term of imprisonment of five years, with an enhanced penalty of up to ten years if the offense was

committed while violating another law or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period.

Part K of the proposed amendment would amend Appendix A (Statutory Index) to reference 31 U.S.C. §§ 5335 and 5336 to §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). Similar offenses, such as offenses under 31 U.S.C. §§ 5313 and 5318(g)(2), are referenced to §2S1.3. Part K of the proposed amendment would also amend the Commentary to §2S1.3 to reflect that 31 U.S.C. §§ 5335 and 5336 are referenced to the guideline.

An issue for comment is also provided.

**Proposed Amendment:**

## APPENDIX A

## STATUTORY INDEX

		* * *
31 U.S.C. § 5332	2S1.3	
31 U.S.C. § 5335	2S1.3	
31 U.S.C. § 5336	2S1.3	
31 U.S.C. § 5363	2E3.1	
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**§2S1.3. Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts**

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(a) Base Offense Level:

- (1) **8**, if the defendant was convicted under 31 U.S.C. § 5318 or § 5318A;  
or
- (2) **6** plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds, if subsection (a)(1) does not apply.



(b) Specific Offense Characteristics

- (1) If (A) the defendant knew or believed that the funds were proceeds of unlawful activity, or were intended to promote unlawful activity; or (B) the offense involved bulk cash smuggling, increase by **2** levels.
- (2) If the defendant (A) was convicted of an offense under subchapter II of chapter 53 of title 31, United States Code; and (B) committed the offense as part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period, increase by **2** levels.
- (3) If (A) subsection (a)(2) applies and subsections (b)(1) and (b)(2) do not apply; (B) the defendant did not act with reckless disregard of the source of the funds; (C) the funds were the proceeds of lawful activity; and (D) the funds were to be used for a lawful purpose, decrease the offense level to level **6**.

(c) Cross Reference

- (1) If the offense was committed for the purposes of violating the Internal Revenue laws, apply the most appropriate guideline from Chapter Two, Part T (Offenses Involving Taxation) if the resulting offense level is greater than that determined above.

**Commentary**

**Statutory Provisions:** 18 U.S.C. § 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. § 1960(b)(1)(A) and (B)); 26 U.S.C. §§ 7203 (if a violation based upon 26 U.S.C. § 6050I), 7206 (if a violation based upon 26 U.S.C. § 6050D); 31 U.S.C. §§ 5313, 5314, 5316, 5318, 5318A(b), 5322, 5324, 5326, 5331, 5332, 5335, 5336. For additional statutory provision(s), see Appendix A (Statutory Index).

**Application Notes:**

1. **Definition of “Value of the Funds”.**—For purposes of this guideline, “*value of the funds*” means the amount of the funds involved in the structuring or reporting conduct. The relevant statutes require monetary reporting without regard to whether the funds were lawfully or unlawfully obtained.
2. **Bulk Cash Smuggling.**—For purposes of subsection (b)(1)(B), “*bulk cash smuggling*” means (A) knowingly concealing, with the intent to evade a currency reporting requirement under 31 U.S.C. § 5316, more than \$10,000 in currency or other monetary instruments; and (B) transporting or transferring (or attempting to transport or transfer) such currency or monetary instruments into or outside of the United States. “United States” has the meaning given that term in Application Note 1 of the Commentary to §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).
3. **Enhancement for Pattern of Unlawful Activity.**—For purposes of subsection (b)(2), “*pattern of unlawful activity*” means at least two separate occasions of unlawful activity involving a total amount of more than \$100,000 in a 12-month period, without regard to whether

any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion.

**Background:** Some of the offenses covered by this guideline relate to records and reports of certain transactions involving currency and monetary instruments. These reports include Currency Transaction Reports, Currency and Monetary Instrument Reports, Reports of Foreign Bank and Financial Accounts, and Reports of Cash Payments Over \$10,000 Received in a Trade or Business.

This guideline also covers offenses under 31 U.S.C. §§ 5318 and 5318A, pertaining to records, reporting and identification requirements, prohibited accounts involving certain foreign jurisdictions, foreign institutions, and foreign banks, and other types of transactions and types of accounts.

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### Issue for Comment

1. In response to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Part K of the proposed amendment would reference 31 U.S.C. §§ 5335 and 5336 to §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for sections 5335 and 5336 offenses. Specifically, should the Commission amend §2B1.1 to provide a higher or lower base offense level if 31 U.S.C. § 5335 or § 5336 is the offense of conviction? If so, what should that base offense level be for each of these sections and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to 31 U.S.C. §§ 5335 and 5336? If so, what should that specific offense characteristic provide and why?

The new statute provides an enhanced penalty for offenses under 31 U.S.C. §§ 5336(c)(4) and 5336(h)(2) offenses if the offense was committed while violating another law or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period. Should the Commission amend §2B1.1 to address this enhanced penalty? If so, how should the Commission address it and why?

## PROPOSED AMENDMENT:

## CAREER OFFENDER

**Synopsis of Proposed Amendment:** This proposed amendment is a result of the Commission’s multiyear work on §4B1.2 (Definitions of Terms Used in Section 4B1.1), including possible amendments to (A) provide an alternative approach to the “categorical approach” in determining whether an offense is a “crime of violence” or a “controlled substance offense”; and (B) address various application issues, including the meaning of “robbery” and “extortion,” and the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance. See U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022). The proposed amendment contains four parts (Parts A through D). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

**Part A** of the proposed amendment would amend §4B1.2 to address recurrent criticism of the categorical approach and modified categorical approach, which courts have applied in the context of §4B1.1 (Career Offender). It eliminates the categorical approach from the guidelines by defining “crime of violence” and “controlled substance offense” based upon a list of guidelines, rather than offenses or elements of an offense. Part A would also make conforming changes to the guidelines that use the terms “crime of violence” and “controlled substance offense” and define these terms by making specific reference to §4B1.2. Issues for comment are also provided.

**Part B** of the proposed amendment would address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a “crime of violence” under §4B1.2, as amended in 2016. It would amend §4B1.2 to add a definition of “robbery” that mirrors the Hobbs Act robbery definition at 18 U.S.C. § 1951(b)(1). Part B of the proposed amendment also brackets a provision defining the phrase “actual or threatened force,” for purposes of the new “robbery” definition, as “force sufficient to overcome a victim’s resistance,” informed by the Supreme Court’s holding in *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019). Finally, Part B of the proposed amendment would make conforming changes to the definition of “crime of violence” in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States), which includes robbery as an enumerated offense. Issues for comment are also provided.

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

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

## (A) Listed Guidelines Approach

**Synopsis of Proposed Amendment:** Part A of the proposed amendment addresses recurrent criticism of the categorical approach and modified categorical approach, which courts have applied in the context of §4B1.1 (Career Offender). It eliminates the categorical approach from the guidelines by defining “crime of violence” and “controlled substance offense” based upon a list of guidelines, rather than offenses or elements of an offense.

### *The Categorical Approach as Developed by Supreme Court Jurisprudence*

A number of statutes and guidelines provide enhanced penalties for defendants convicted of offenses that meet the definition of a particular category of crimes. Courts typically determine whether a conviction fits within the definition of a particular category of crimes through the application of the “categorical approach” and “modified categorical approach,” as set forth by Supreme Court jurisprudence. The categorical approach requires courts to look only to the statute of conviction, rather than the particular facts underlying the conviction, to determine whether the offense meets the definition of a particular category of crimes. In applying the modified categorical approach, courts are allowed to look to certain additional sources of information, now commonly referred to as the “*Shepard* documents,” to determine the elements of the offense of conviction. See *Taylor v. United States*, 495 U.S. 575 (1990) (holding that, under the “categorical approach,” courts must compare the elements of the offense as described in the statute of conviction to the elements of the applicable definition of a particular category of crimes to determine if such offense criminalizes the same or a narrower range of conduct than the definition captures in order to serve as a predicate offense); *Shepard v. United States*, 544 U.S. 13 (2005) (holding that courts may use a “modified categorical approach” in cases where the statute of conviction is “overbroad,” that is, the statute defines both conduct that fits within the applicable definition and conduct that does not). However, the Supreme Court later held that a court may only apply the modified categorical approach if the court first conducts a threshold inquiry to determine whether a statute of conviction is “divisible.” See *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 579 U.S. 500 (2016). Thus, under *Descamps* and *Mathis*, if a statute of conviction is “indivisible” and criminalizes a broader range of conduct than the applicable definition, the entire statute is categorically disqualified from serving as a predicate offense, even if a defendant was convicted under a part of the statute that falls within the definition.

### *Application of the Categorical Approach in the Guidelines*

Even though Supreme Court jurisprudence on this subject pertains only to statutory provisions (e.g., 18 U.S.C. § 924(e)), courts have applied the categorical approach and the modified categorical approach to guideline provisions. For example, courts have used these approaches to determine if a conviction is a “crime of violence” or a “controlled substance offense” for purposes of applying the career offender guideline at §4B1.1. Additionally, several other guidelines, such as §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), also rely upon the career offender guideline’s definitions of “crime of violence” and “controlled substance offense.” Therefore, courts have also used the categorical approach for purposes of these guidelines.

Commission data indicates that of the 53,779 offenders sentenced in fiscal year 2021, 1,246 offenders (2.3%) were sentenced under the career offender guideline. An additional 3,239 offenders (6.0% of the offenders sentenced in fiscal year 2021) sentenced under §2K2.1 were assigned to a base offense level that requires a prior conviction for a “crime of violence” or “controlled substance offense.”

While representing a relatively small portion of the federal caseload each year, the categorical approach continues to result in substantial litigation. Since 1990, the Supreme Court has issued dozens of opinions that have shaped the categorical approach and modified categorical approach. The Commission identified over 3,300 written opinions over the past five years in which federal courts have invoked, discussed, or applied the categorical approach. More than half of those opinions focused on categorical approach issues raised in applying guideline provisions while the remainder dealt with statutory provisions (e.g., 18 U.S.C. § 924(c)).

#### *General Criticism of the Categorical Approach as Developed by Supreme Court Jurisprudence*

The Commission has received significant comment over the years regarding the complexity and limitations of the categorical approach, as developed by Supreme Court jurisprudence. Specifically, courts and stakeholders have criticized the requirement of a threshold inquiry of whether a statute of conviction is divisible or indivisible as resulting in an overly complex and time-consuming analysis that often leads to counterintuitive and arbitrary results. For example, dissenting justices in *Descamps* and *Mathis* expressed concern that the “divisibility” inquiry is confusing and “will cause serious practical problems” (e.g., *Descamps*, 570 U.S. at 284 (Alito, J., dissenting); *Mathis*, 579 U.S. at 523–33 (Breyer, J., joined by Ginsberg, J., dissenting)), and noted that “lower court judges[,] who must regularly grapple with the modified categorical approach, struggle[] to understand *Descamps*” (*Mathis*, 579 U.S. at 538 (Alito, J., dissenting)).

In the aftermath of *Descamps* and *Mathis*, commenters have stressed that the categorical approach has become increasingly difficult to apply, while simultaneously producing results less reflective of the types of conduct §4B1.1 was intended to capture. See, e.g., Public Comment on Proposed Amendments (Feb. 2019), at <https://www.ussc.gov/policymaking/public-comment/public-comment-february-19-2019>. Courts have further criticized the categorical approach as a “legal fiction,” in which an offense that a defendant commits violently is deemed to be a non-violent offense because other defendants at other times could have been convicted of violating the same statute without violence, often leading to “odd” and “arbitrary” results (e.g., *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017); *United States v. McCollum*, 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring); *id.* (Wilkinson, J., dissenting)).

#### *Proposed Approach for §4B1.2*

Part A of the proposed amendment eliminates the categorical approach from the guidelines by defining “crime of violence” and “controlled substance offense” based upon a list of guidelines, rather than offenses or elements of an offense. The list of Chapter Two

guidelines included in the definition of “crime of violence” is informed by the guidelines that the Commission has identified as covering “violent instant offenses” for purposes of the study of recidivism of federal offenders. See COURTNEY R. SEMISCH, CASSANDRA SYCKES & LANDYN ROOKARD, U.S. SENT’G COMM’N, RECIDIVISM OF FEDERAL VIOLENT OFFENDERS RELEASED IN 2010 (2022), <https://www.ussc.gov/research/research-reports/recidivism-federal-violent-offenders-released-2010>. The Chapter Two guidelines listed in the definition of “controlled substance offense” are the guidelines that cover the offenses expressly referenced in the career offender directive at 28 U.S.C. §994(h).

The focus of inquiry set forth in the proposed approach is whether the defendant was convicted of a federal offense for which the “applicable Chapter Two guideline” is listed in §4B1.2 or a state offense for which the “most appropriate” offense guideline would have been one of the Chapter Two guidelines listed in §4B1.2 had the defendant been sentenced under the guideline in federal court. The court would make this determination based on: (1) the elements, and any means of committing such an element, that formed the basis of the defendant’s conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means.

The proposed approach is intended to remove the complexity inherent in determining whether a statute of conviction is “divisible” or “indivisible” based on a threshold “elements-means” inquiry. Thus, the court would not be required to determine whether an indivisible statute criminalizes conduct that does not meet the applicable definition; rather, the court would be required to determine only whether the Chapter Two guideline that covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted is listed in §4B1.2. The proposed approach would also expand the use of additional sources of information by permitting courts to use the *Shepard* documents when necessary to make the career offender determination.

#### *Conforming Changes to Other Guidelines*

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

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

Issues for comment are also provided.

**Proposed Amendment:**

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

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(a) **CRIME OF VIOLENCE.—**

(1) **IN GENERAL.—**The term “crime of violence” means ~~any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that~~ **any of the following offenses:**

~~(1)(A) has as an element the use, attempted use, or threatened use of physical force against the person of another, or~~ **Any offense under federal law, punishable by imprisonment for a term exceeding one year—**

**(i) for which the applicable Chapter Two guideline (as determined under the provisions of §1B1.2 (Applicable Guidelines)); or**

**(ii) to which §2X1.1 (Attempt, Solicitation, or Conspiracy) or §2X2.1 (Aiding and Abetting) applies and the appropriate guideline for the offense the defendant aided or abetted, or conspired, solicited, or attempted to commit;**

**is one of the guidelines listed in paragraph (2).**

~~(2)(B) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(e).~~ **Any offense under state law (or the offense of aiding or abetting, or conspiring, soliciting, or attempting to commit any such offense), punishable by imprisonment for a term exceeding one year, for which the most appropriate guideline would have been one of the Chapter Two guidelines listed in paragraph (2) had the defendant been sentenced under the guidelines in federal court (as determined under subsection (c)).**

(2) GUIDELINES LISTED.—For purposes of the “crime of violence” definition, use the following Chapter Two guidelines:

- HOMICIDE.—§§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.5 (Conspiracy or Solicitation to Commit Murder);
- ASSAULT.—§§2A2.1 (Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.4 (Obstructing or Impeding Officers);
- CRIMINAL SEXUAL ABUSE.—§§2A3.1 (Sexual Abuse), 2A3.3 (Sexual Abuse of a Ward), 2A3.4 (Abusive Sexual Contact);
- KIDNAPPING, ABDUCTION, AND UNLAWFUL RESTRAINT.—§2A4.1 (Kidnapping, Abduction, Unlawful Restraint);
- AIR PIRACY AND OFFENSES AGAINST MASS TRANSPORTATION SYSTEMS.—§§2A5.1 (Aircraft Piracy), 2A5.2 (Interference with Flight or Cabin Crew, or Mass Transportation);
- THREATENING OR HARASSING COMMUNICATIONS, HOAXES, STALKING, AND DOMESTIC VIOLENCE.—§§2A6.1 (Threatening or Harassing Communications, Hoaxes, or False Liens) (only if the offense involve a threat to injure a person or property), 2A6.2 (Stalking or Domestic Violence);
- ROBBERY AND EXTORTION.—§§2B3.1 (Robbery), 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage);
- RACKETEERING.—§§2E1.1 (Unlawful Conduct Relating to Racketeering), 2E1.2 (Travel or Transportation Aiding Racketeering), 2E1.3 (Violent Crimes Aiding Racketeering), 2E1.4 (Using Certain Facilities to Commit Murder-For-Hire);
- PROMOTING A COMMERCIAL SEX ACT OR PROHIBITED SEXUAL CONDUCT WITH MINORS.—§2G1.3 (Promoting Commercial Sex Acts or Prohibited Sexual Conduct with Minors; Using Certain Facilities to Transport Information about Minors);
- SEXUAL EXPLOITATION OF MINORS.—§§2G2.1 (Sexual Exploitation of Minors; Production of Child Pornography), 2G2.3 (Selling or Buying Children for Pornography Production), 2G2.6 (Child Exploitation Enterprises);
- PEONAGE AND SLAVERY.—§2H4.1 (Peonage, Slavery, Child Soldiers);
- EXPLOSIVES AND ARSON.—§§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials), 2K1.4 (Arson);
- FIREARMS.—§§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) (only if the offense involved possession of a firearm that is described in 26 U.S.C. § 5845(a), 2K2.4 (Using Certain Firearms, Ammunition, or Explosives During or in Relation to Certain Crimes);



- MATERIAL SUPPORT TO TERRORISTS.—§2M5.3 (Providing Material Support to Certain Terrorists or for Terrorist Purposes);
- NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS AND MATERIALS.—§2M6.1 (Unlawful Activity Involving Nuclear, Biological, or Chemical Weapons or Materials, or Other Weapons of Mass Destruction);
- USE OF MINORS IN CRIMES OF VIOLENCE.—§2X6.1 (Using Minors in Crimes of Violence).

(3) EXCLUSION.—For purposes of this guideline, a conviction under federal or state law based upon a finding of recklessness or negligence is not a “crime of violence.”

(b) CONTROLLED SUBSTANCE OFFENSE.—

(1) IN GENERAL.—The term “controlled substance offense” means ~~an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.~~ any of the following offenses:

(A) Any offense under federal law, punishable by imprisonment for a term exceeding one year—

(i) for which the applicable Chapter Two guideline (as determined under the provisions of §1B1.2 (Applicable Guidelines)); or

(ii) to which §2X1.1 (Attempt, Solicitation, or Conspiracy) or §2X2.1 (Aiding and Abetting) applies and the appropriate guideline for the offense the defendant aided or abetted, or conspired, solicited, or attempted to commit;

is one of the guidelines listed in paragraph (2).

(B) Any offense under state law (or the offense of aiding or abetting, or conspiring, soliciting, or attempting to commit any such offense), punishable by imprisonment for a term exceeding one year, for which the most appropriate guideline would have been one of the Chapter Two guidelines listed in paragraph (2) had the defendant been sentenced under the

guidelines in federal court (as determined under subsection (c)).

(C) Any offense described in chapter 705 of title 46, United States Code.

(2) GUIDELINES LISTED.—For purposes of the “controlled substance offense” definition, use the following Chapter Two guidelines:

- §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking); 2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect Unlawful Production of Drugs); 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing Listed Chemicals);]
- §§2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Certain Individuals); 2D1.6 (Use of Communication Facility in Committing Drug Offense), if the appropriate guideline for the underlying offense is also listed in this paragraph; 2D1.8 (Renting or Managing Drug Establishments); 2D1.10 (Life Endangerment While Manufacturing Drugs); 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Items)].

(3) EXCLUSION.—For purposes of this guideline, a conviction under federal or state law based upon a finding of recklessness or negligence is not a “controlled substance offense.”

(c) DETERMINATION OF WHETHER A STATE OFFENSE IS A “CRIME OF VIOLENCE” OR A “CONTROLLED SUBSTANCE OFFENSE”.—For purposes of determining whether a state offense is a “crime of violence” or a “controlled substance offense” under subsection (a)(1)(B) or (b)(1)(B), the “most appropriate guideline” is the Chapter Two guideline that covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted. The court shall make this determination based on: (1) the elements, and any means of committing such an element, that formed the basis of the defendant’s conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means.

(ed) TWO PRIOR FELONY CONVICTIONS.—The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of

violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

### Commentary

#### Application Notes:

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

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

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

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

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

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

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

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

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

**“Prior Felony Conviction” Defined.**—**“Prior felony conviction,”** for purposes of this guideline, means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed

prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. **Offense of Conviction as Focus of Inquiry.—Determination of Whether a State Offense Is a “Crime of Violence” or a “Controlled Substance Offense.”**—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense of conviction is a crime of violence or controlled substance for purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry. In determining whether a state offense is a “crime of violence” or a “controlled substance offense” under subsection (a)(1)(B) or (b)(1)(B), the court may only consider the statute of conviction and the following sources of information:

- (A) The judgment of conviction.
- (B) The charging document.
- (C) The jury instructions.
- (D) The judge’s formal rulings of law or findings of fact.
- (E) The plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.
- (F) Any explicit factual finding by the trial judge to which the defendant assented.
- (G) Any comparable judicial record of the sources described in clauses (i) through (vi).

The fact that the statute of conviction describes conduct that is broader than, or encompasses types of conduct in addition to, the type of conduct covered by any of the Chapter Two guidelines listed in subsection (a)(2) or (b)(2) is not determinative.

3. **Applicability of §4A1.2.**—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1. Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2(a)(2).

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

**Background:** Section 4B1.2 defines the terms “crime of violence,” “controlled substance offense,” and “two prior felony convictions” for purposes of §4B1.1 (Career Offender). Prior to [2023], to determine if an offense met the definition of “crime of violence” or “controlled substance offense” in §4B1.2, courts typically used the categorical approach and the modified categorical approach, as set forth in Supreme Court jurisprudence. See, e.g., *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); *Descamps v. United States*, 570 U.S. 254 (2013); *Mathis v. United States*, 579 U.S.

500 (2016). These Supreme Court cases, however, involved statutory provisions (e.g., 18 U.S.C. § 924(e)) rather than guideline provisions.

In [2023], the Commission amended §4B1.2 to set forth an approach for determining whether an offense is a “crime of violence” or a “controlled substance offense” that does not require the application of the categorical approach and modified categorical approach established by Supreme Court jurisprudence. See USSG App. C, Amendment [ ] (effective [Date]). The definitions of “crime of violence” and “controlled substance offense,” rather than describing offenses or elements of an offense, are based upon a list of guidelines. The focus of inquiry is whether the defendant was convicted of a federal offense for which the applicable Chapter Two guideline is one of the listed guidelines, or a state offense for which the “most appropriate” Chapter Two guideline would have been one of the listed guidelines had the defendant been sentenced in federal court under the guidelines. The approach set forth by this guideline requires the court to consider not only the statute of conviction, but also the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any of the elements, and any means of committing such an element, that formed the basis of the defendant’s conviction. The court is also permitted to use certain additional sources of information, as appropriate, while conducting this inquiry.

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

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

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

\* \* \*

#### **Commentary**

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#### **Application Notes:**

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2. For purposes of this guideline:

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

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

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

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(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 18 U.S.C. § 1715.

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

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

\* \* \*

**Commentary**

\* \* \*

**Application Notes:**

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

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

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

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

\* \* \*

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

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

(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and

(ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—

(I) whose possession or receipt of the firearm would be unlawful; or

(II) who intended to use or dispose of the firearm unlawfully.

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

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

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

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\* \* \*

(b) **Specific Offense Characteristics**

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

\* \* \*

**Commentary**

\* \* \*



**Application Notes:**

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

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

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**§4A1.1. Criminal History Category**

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\* \* \*

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

\* \* \*

**Commentary**

\* \* \*

**Application Notes:**

\* \* \*

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

\* \* \*

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

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\* \* \*

- (p) CRIME OF VIOLENCE DEFINED

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

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**§4B1.4. Armed Career Criminal**

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- (a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.
- (b) The offense level for an armed career criminal is the greatest of:
  - (1) the offense level applicable from Chapters Two and Three; or
  - (2) the offense level from §4B1.1 (Career Offender) if applicable; or
  - (3) (A) **34**, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, ~~as defined in §4B1.2(a),~~ or a controlled substance offense, ~~as defined in §4B1.2(b)~~ as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)\*; or  
(B) **33**, otherwise.\*

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

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

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**§5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)**

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If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A “semiautomatic firearm capable of accepting a large capacity magazine” means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (1) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (2) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

**Commentary**

**Application Note:**

1. ~~“*Crime of violence*” and “*controlled substance offense*” are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1)~~ mean a “crime of violence” and a “controlled substance offense” as defined and determined in accordance with §4B1.2 (Definitions of Terms Used in Section 4B1.1).

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

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

\* \* \*

**Commentary**

**Application Notes:**

\* \* \*

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

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

\* \* \*

#### Issues for Comment:

1. Part A of the proposed amendment would allow courts to look to the documents expressly approved in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), in determining whether a conviction is a “crime of violence” or a “controlled substance offense.”

The Commission seeks comment on whether additional or different guidance should be provided. For example, should the Commission provide a specific set of factors to assess the reliability of a source of information, such as whether the document came out of the adversarial process, was accepted by both parties, or was made by an impartial third party? Should the Commission list specific sources or types of sources that courts may consider, in addition to the sources expressly approved in *Taylor* and *Shepard* (i.e., the *Shepard* documents)? Are there any documents or types of information that should be expressly excluded?

2. The Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States) contains definitions for the terms “crime of violence” and “drug trafficking offense” that closely track the definitions of “crime of violence” and “controlled substance offense,” respectively, in §4B1.2(b). See USSG §2L1.2, comment. (n.2).

If the Commission were to promulgate Part A of the proposed amendment, should the Commission also amend the Commentary to §2L1.2 to mirror the proposed approach for §4B1.2?

## (B) Meaning of “Robbery”

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

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

The Department of Justice has expressed concern that courts have held that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a “crime of violence” under the guideline, as amended in 2016, because the statute of conviction does not fit either the generic definition of “robbery” or the new guideline definition of “extortion.” *See, e.g.*, Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf>. The Hobbs Act defines the term “robbery” as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person *or property* . . . .” 18 U.S.C. §1951(b)(1) (emphasis added). Following the 2016 amendment, every circuit court addressing the issue has concluded that Hobbs Act robbery does not fall within §4B1.2’s narrow definition of “crime of violence.” *See* *United States v. Chappelle*, 41 F.4th 102 (2d Cir. 2022); *United States v. Scott*, 14 F.4th 190 (3d Cir. 2021); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States v. Green*, 996 F.3d 176 (4th Cir. 2021); *Bridges v. United States*, 991 F.3d 793 (7th Cir. 2021); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *United States v. Edling*, 895 F.3d 1153 (9th Cir. 2018); *United States v. O’Connor*, 874 F.3d 1147 (10th Cir. 2017). At least two circuits—the Ninth and Tenth Circuits—have found ambiguity as to whether the guideline definition of extortion includes injury to property, and (under the rule of lenity) both circuits have interpreted the new definition as excluding prior convictions where the statute encompasses injury to property offenses, such as Hobbs Act robbery. *See, e.g.*, *United States v. O’Connor*, 874 F.3d 1147 (10th Cir. 2017) (Hobbs Act robbery); *United States v. Edling*, 895 F.3d 1153 (9th Cir. 2018) (Nevada robbery).

Part B of the proposed amendment would amend §4B1.2 to address this issue. First, it would move the definitions of enumerated offenses (*i.e.*, “forcible sex offense” and “extortion”) and “prior felony conviction” from the Commentary to §4B1.2 to a new subsection (d) in the guideline itself. Second, Part B of the proposed amendment would add to new subsection (d) a definition of “robbery” that mirrors the “robbery” definition at 18 U.S.C. § 1951(b)(1). Specifically, it would provide that “robbery” is “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.” Finally, Part B of the proposed amendment brackets the possibility of defining the phrase “actual or threatened use of force,” for purposes of the “robbery” definition, as “force that is sufficient to overcome a victim’s resistance.” This definition is informed by the Supreme Court’s holding in *Stokeling v. United States*, 139 S. Ct. 544 (2019).

In addition, Part B of the proposed amendment sets forth conforming changes to the definition of “crime of violence” in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States), which includes robbery as an enumerated offense.

Issues for comment are also provided.

#### **Proposed Amendment:**

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

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

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

(d) **ADDITIONAL DEFINITIONS.**—

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

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

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

(4) **PRIOR FELONY CONVICTION.**—{“**Prior felony conviction**” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense

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\* The text in braces currently appears in the Commentary to §4B1.2. The proposed amendment would place the text here.

committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).}\*

### Commentary

#### Application Notes:

1. **Definitions Further Considerations Regarding “Crimes of Violence” and “Controlled Substance Offenses”**.—For purposes of this guideline—

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

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

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

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

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

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

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

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

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\* The text in braces currently appears in the Commentary to §4B1.2. The proposed amendment would place the text here.



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

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

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\* \* \*

### **Commentary**

\* \* \*

#### **Application Notes:**

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

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

\* \* \*

#### **Issues for Comment:**

1. Part B of the proposed amendment would provide a definition of “robbery” for purposes of §4B1.2 (Definitions of Terms Used in Section 4B1.1) and §2L1.2 (Unlawfully Entering or Remaining in the United States) that mirrors the Hobbs Act definition of “robbery” at 18 U.S.C. § 1951(b)(1). The Commission seeks comment

on whether the proposed definition of “robbery” is appropriate. Are there robbery offenses that are covered by the proposed definition but should not be? Are there robbery offenses that are not covered by the proposed definition but should be?

2. Part B of the proposed amendment brackets the possibility of defining the phrase “actual or threatened force,” for purposes of the proposed “robbery” definition, as “force that is sufficient to overcome a victim’s resistance,” which is consistent with the Supreme Court’s holding in *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019). The Commission seeks comment regarding whether the definition of “actual or threatened force” is necessary after the *Stokeling* decision. If so, is the proposed definition of the phrase appropriate? Are there robbery offenses that would be covered by defining “actual or threatened force” in such a way but should not be? Are there robbery offenses that would not be covered but should be?

## (C) Inchoate Offenses

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

The first circuit conflict concerns whether the definition of controlled substance offense in §4B1.2(b) includes the inchoate offenses listed in Application Note 1 to §4B1.2. Although courts had previously held that §4B1.2’s definitions include inchoate offenses based on the Commentary to §4B1.2 and the Supreme Court’s decision in *Stinson v. United States*, 508 U.S. 36 (1993), four circuits have now held that §4B1.2(b)’s definition of a “controlled substance offense” does not include inchoate offenses because such offenses are not expressly included in the guideline text, while five have continued with their long-standing holding that such offenses are included.

The Third, Fourth, Sixth, and D.C. Circuits have held that inchoate offenses are not included in the definition of a “controlled substance offense” because the commentary is inconsistent with the text of the guideline and, thus, does not control. These courts have concluded that that the Commission exceeded its authority under *Stinson* when it attempted to incorporate inchoate offenses to §4B1.2(b)’s definition through the commentary, because the commentary can only interpret or explain the guideline, it cannot expand its scope by adding qualifying offenses. See *United States v. Winstead*, 890 F.3d 1082, 1090–92 (D.C. Cir. 2018) (Where the guideline “present[ed] a very detailed ‘definition’ of controlled substance offense that clearly excludes inchoate offenses,” the Commentary’s inclusion of such offenses had “no grounding in the guidelines themselves.”); *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (en banc) (“To make attempt crimes a part of §4B1.2(b), the Commission did not interpret a term in the guideline itself—no term in §4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to *add* an offense not listed in the guideline.”); *United States v. Nasir*, 982 F.3d 144, 156–60 (3d Cir. 2020) (en banc), *vacated and remanded on other grounds*, 142 S. Ct. 56, 211 L.Ed.2d 1 (2021), *aff’d on remand*, 17 F.4th 459, 467–72 (3d Cir. 2021) (en banc); *United States v. Campbell*, 22 F.4th 438, 444–47 (4th Cir. 2022).

The First, Second, Seventh, Eighth, Ninth, and Eleventh Circuits continue to hold that inchoate offenses like attempt and conspiracy qualify as controlled substance offenses, reasoning that the commentary is consistent with the text of §4B1.2(b) because it does not include any offense that is explicitly excluded by the text of the guideline. See *United States v. Smith*, 989 F.3d 575, 583–85 (7th Cir. 2021) (citing *United States v. Adams*, 934 F.3d 720, 727–29 (7th Cir. 2019) (“conclud[ing] that §4B1.2’s Application Note 1 is authoritative

and that ‘controlled substance offense’ includes inchoate offenses” (citation omitted)), *cert. denied*, 142 S.Ct. 488 (2021); accord *United States v. Lewis*, 963 F.3d 16, 21–23 (1st Cir. 2020); *United States v. Richardson*, 958 F.3d 151, 154–55 (2d Cir. 2020) (citing *United States v. Tabb*, 949 F.3d 81, 87–89 (2d Cir. 2020)); *United States v. Garcia*, 946 F.3d 413, 417 (8th Cir. 2019); *United States v. Crum*, 934 F.3d 963, 966 (9th Cir. 2019); *United States v. Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017). *See also* *United States v. Goodin*, 835 F. App’x 771, 782 n.1 (5th Cir. 2021) (unpublished) (noting that circuit precedent provides that Application Note 1 in the career offender guideline is binding).

The second circuit conflict concerns whether certain conspiracy offenses qualify as crimes of violence or controlled substance offenses. Some courts have employed a two-step analysis in determining whether a prior conviction for conspiracy to commit a crime of violence or controlled substance offense is itself a crime of violence or controlled substance offense, by first comparing the substantive offense to its generic definition and then separately comparing the inchoate offense to its generic definition. *See, e.g.*, *United States v. McCollum*, 885 F.3d 300, 303 (4th Cir. 2018) (Employing a two-step categorical approach and concluding that conspiracy to commit murder in aid of racketeering is not categorically a crime of violence because generic conspiracy requires an overt act while the conspiracy at issue does not). In doing so, these courts have held that because the generic definition of conspiracy requires proof of an overt act, certain conspiracy offenses that do not contain an “overt act” element are categorically excluded as crimes of violence or controlled substance offenses, even though the substantive crime is a crime of violence or a controlled substance offense. *See, e.g.*, *United States v. Norman*, 935 F.3d 232, 237–39 (4th Cir. 2019) (finding that prior federal convictions for conspiracy to distribute and possess with intent to distribute crack cocaine under 21 U.S.C. § 846 do not qualify as controlled substance offenses, even though there is no dispute that the underlying drug trafficking crimes qualify as controlled substance offenses); *United States v. Martinez-Cruz*, 836 F.3d 1305, 1314 (10th Cir. 2016) (holding that there is “no evidence [of the intent of the Sentencing Commission] regarding whether a conspiracy conviction requires an overt act—except for the plain language of the guideline, which uses a generic, undefined term, ripe for the categorical approach.”)

In contrast, the First and Second Circuits have declined to follow this reasoning, holding instead that “[t]he text and structure of Application Note 1 demonstrate that it was intended to include Section 846 narcotics conspiracy. Application Note 1 clarifies that ‘controlled substance offenses’ include ‘the offense[] of ... conspiring ... to commit such offenses,’ language that on its face encompasses federal narcotics conspiracy.” *United States v. Tabb*, 949 F.3d 81, 88 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2793 (2021) (“To us, it is patently evident that Application Note 1 was intended to and does encompass Section 846 narcotics conspiracy.”); *see also* *United States v. Lewis*, 963 F.3d 16, 26–27 (1st Cir. 2020).

Part C of the proposed amendment would address these circuit conflicts by amending §4B1.2 and its commentary. First, it would move the inchoate offenses provision from the Commentary to §4B1.2 to the guideline itself as a new subsection (c). Second, Part C of the proposed amendment would revise the provision to provide that the terms “crime of violence” and “controlled substance offense” include aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense

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

Third, Part C of the proposed amendment addresses the circuit conflict regarding whether certain conspiracy offenses qualify as crimes of violence or controlled substance offenses. Two options are provided.

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

**Option 2** would take a narrower approach, addressing only conspiracy offenses without addressing whether a court must perform the two-step analysis described above with regard to other inchoate offenses. Option 2 would instead add a provision to new subsection (c) that brackets two alternatives addressing conspiracy to commit a “crime of violence” or a “controlled substance offense.” The first bracketed alternative provides that an offense of conspiring to commit a “crime of violence” or a “controlled substance offense” qualifies as a “crime of violence” or a “controlled substance offense,” regardless of whether an overt act must be proved as an element of the conspiracy offense. The second bracketed alternative provides that an offense of conspiring to commit a “crime of violence” or a “controlled substance offense” qualifies as a “crime of violence” or a “controlled substance offense,” only if an overt act must be proved as an element of the conspiracy offense.

Issues for comment are also provided.

### **Proposed Amendment:**

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

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

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

**[Option 1 (includes changes to the commentary):**

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

**[Option 2 (includes changes to the commentary):**

- (c) The terms “crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a “crime of violence” or a “controlled substance offense.” [An offense of conspiring to commit a “crime of violence” or a “controlled substance offense” qualifies as a “crime of violence” or a “controlled substance offense,” regardless of whether an overt act must be proved as an element of the conspiracy offense][However, an offense of conspiring to commit a “crime of violence” or a “controlled substance offense” qualifies as a “crime of violence” or a “controlled substance offense,” only if an overt act must be proved as an element of the conspiracy offense].]
- (d) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

## Commentary

### Application Notes:

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

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

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

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

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

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

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

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

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

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

\* \* \*

## Issues for Comment:

1. In determining whether an inchoate offense is a “crime of violence” or a “controlled substance offense,” some courts have employed a two-step analysis. First, courts compare the substantive offense to its generic definition to determine whether it is a “crime of violence” or a “controlled substance offense.” Then, these courts make a second and separate analysis comparing the inchoate offense involving that substantive offense to the generic definition of the specific inchoate offense. Option 1 of Part C of the proposed amendment would amend §4B1.2 (Definitions of Terms Used in Section 4B1.1) to clarify that the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit a “crime of violence” or a “controlled substance offense,” or any other inchoate offense or offense arising from accomplice liability involving a “crime of violence” or a “controlled substance offense” are a “crime of violence” or a “controlled substance offense” if the substantive offense is a “crime of violence” or a “controlled substance offense.”

The Commission seeks comment on whether the guidelines should be amended to make this clarification by eliminating the two-step analysis some courts use in determining whether an inchoate offense is a “crime of violence” or a “controlled substance offense.” Should the guidelines adopt a different approach?

2. The Commission also seeks comment more broadly on how the guidelines definitions of “crime of violence” and “controlled substance offense” should address aiding and abetting, attempting to commit, soliciting to commit, or conspiring to commit a “crime of violence” or a “controlled substance offense,” or any other inchoate offense or offense arising from accomplice liability involving a “crime of violence” or a “controlled substance offense.” Specifically, should the Commission promulgate any of the options provided above? Should the Commission provide additional requirements or guidance to address these types of offenses? What additional requirements or guidance, if any, should the Commission provide? Should the Commission differentiate between “crimes of violence” and “controlled substance offenses”? For example, should the guidelines require proof of an overt act for purposes of a conspiracy to commit a controlled substance offense, but not include such a requirement for conspiracy to commit a crime of violence?

Alternatively, should the Commission exclude inchoate offenses and offenses arising from accomplice liability altogether as predicate offenses for purposes of the “crime of violence” and “controlled substance offenses” definitions?



#### (D) Definition of “Controlled Substance Offense”

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

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

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

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

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

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

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

While on board a covered vessel, an individual may not knowingly or intentionally—

- (1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;
- (2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)); or
- (3) conceal, or attempt or conspire to conceal, more than \$100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

46 U.S.C. § 70503(a). Section 70506(b) remained unchanged. The Act added two new offenses to section 70503(a), in subparagraphs (2) and (3). Following this statutory change, these two new offenses may not be covered by the current definition of “controlled substance offense” in §4B1.2.

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

An issue for comment is also provided.

#### **Proposed Amendment:**

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

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\* \* \*

- (b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that

- (1) prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; or
- (2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

\* \* \*

**Issue for Comment:**

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

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

## PROPOSED AMENDMENT:

## CRIMINAL HISTORY

**Synopsis of Proposed Amendment:** The proposed amendment contains three parts (Parts A through C). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive. Parts A through C of the proposed amendment all address the Commission’s priority on criminal history. *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022) (“In light of Commission studies, consideration of possible amendments to the *Guidelines Manual* relating to criminal history to address (A) the impact of ‘status’ points under subsection (d) of section 4A1.1 (Criminal History Category); (B) the treatment of defendants with zero criminal history points; and (C) the impact of simple possession of marihuana offenses.”). Part B of the proposed amendment also addresses the Commission’s priority on 28 U.S.C. § 994(j). *Id.* (“Consideration of possible amendments to the *Guidelines Manual* addressing 28 U.S.C. § 994(j).”).

A defendant’s criminal history score is calculated pursuant to Chapter Four, Part A (Criminal History). To calculate a criminal history score, courts are instructed to assign one, two, or three points to qualifying prior sentences under subsections (a) through (c) of §4A1.1 (Criminal History Category). One point is also added under §4A1.1(e) for any prior sentence resulting from a crime of violence that was not otherwise already assigned points. Finally, two criminal history points are added under §4A1.1(d) if the defendant committed the instant offense “while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.” A “criminal justice sentence” refers to a “sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required.” USSG §4A1.1, comment. (n.4).

### (A) Status Points under §4A1.1

“Status points” are relatively common in cases with at least one criminal history point, having been applied in 37.5 percent of cases with criminal history points over the last five fiscal years. Of the offenders who received status, 61.5 percent had a higher CHC as a result of the status points. Like other provisions in Chapter Four, “status points” are included in the calculation of a defendant’s criminal history as a reflection of several statutory purposes of sentencing. As described in the Introductory Commentary to Chapter Four, accounting for a defendant’s criminal history in the guidelines, including status points, addresses the need for the sentence “(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; [and] (C) to protect the public from further crimes of the defendant.” 18 U.S.C. § 3553(a)(2)(A)–(C). A series of recent Commission publications has focused on just one of these purposes of sentencing—specific deterrence—through detailed analyses regarding the recidivism rates of federal offenders. *See, e.g.,* U.S. SENT’G COMM’N, RECIDIVISM OF OFFENDERS RELEASED IN 2010 (2021), *available at* <https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010>. These reports again concluded that a defendant’s criminal history calculation under the guidelines is strongly associated with the likelihood of future recidivism by the defendant. In a related publication, the Commission also found, however, that status points add little to the overall predictive value associated with the criminal history score. U.S. SENT’G

COMM’N, REVISITING STATUS POINTS (2022), *available at* <https://www.ussc.gov/research/research-reports/revisiting-status-points>.

Part A of the proposed amendments addresses the impact of “status” points under the guidelines. Three options are provided.

**Option 1** would add a downward departure provision in Application Note 4 of the Commentary to §4A1.1 for cases in which “status” points are applied.

**Option 2** would reduce the impact of “status” points overall, by decreasing the criminal history points added under §4A1.1(d) from two points to one point. It would also add a departure provision in Application Note 4 of the Commentary to §4A1.1 that could result in either an upward departure or a downward departure, depending on the circumstances.

**Option 3** would eliminate the “status” points provided in §4A1.1(d). It would also make conforming changes to §2P1.1 (Escape, Instigating or Assisting Escape) and §4A1.2 to reflect the removal of “status” points from the *Guidelines Manual*. In addition, Option 3 would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide an example of an instance in which an upward departure from the defendant’s criminal history may be warranted.

Issues for comment are also provided.

## **(B) Zero Point Offenders**

The Sentencing Table in Chapter Five, Part A of the *Guidelines Manual* comprises two components: offense level and criminal history category. Criminal history forms the horizontal axis of the table and is divided into six categories, from I (lowest) to VI (highest). Chapter Four, Part A of the *Guidelines Manual* provides instructions on how to calculate a defendant’s criminal history category by assigning points for certain prior convictions. Criminal History Category I includes offenders with zero criminal history points and those with one criminal history point. Accordingly, the following types of offenders are classified under the same category: (1) offenders with no prior convictions; (2) offenders who have prior convictions that are not counted because they were not within the time limits set forth in subsection (d) and (e) of §4A1.2 (Definitions and Instructions for Computing Criminal History); (3) offenders who have prior convictions that are not used in computing the criminal history category for reasons other than their “staleness” (*e.g.*, sentences resulting from foreign or tribal court convictions, minor misdemeanor convictions, or infractions); and (4) offenders with a prior conviction that received only one criminal history point. In fiscal year 2021, there were approximately 17,500 offenders who received zero criminal history points, of whom approximately 13,200 had no prior convictions.

Chapter Five also address what types of sentences a court may impose (*e.g.*, probation or imprisonment), according to the location of the defendant’s applicable sentencing range in one of the four Zones (A–D) of the Sentencing Table. Specifically, §5C1.1 (Imposition of a Term of Imprisonment) provides that defendants in Zones A and B may receive, in the court’s discretion, a probationary sentence or a sentence of incarceration; defendants in Zone C may receive a “split” sentence of incarceration followed by community confinement

or a sentence of incarceration only at the court's discretion; and defendants in Zone D may only receive a sentence of imprisonment absent a downward departure or variance from that zone. The Commentary to §5C1.1 contains an application note that provides that "[i]f the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment." USSG §5C1.1, comment. (n.4).

Recidivism data analyzed by the Commission suggest that offenders with zero criminal history points ("zero-point" offenders) have considerably lower recidivism rates than other offenders, including lower recidivism rates than the offenders in Criminal History Category I with one criminal history point. See U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010 (2021), available at <https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010>. Among other findings, the report concluded that "zero-point" offenders were 15.5% less likely to be rearrested than "one point" offenders (26.8% compared to 42.3%), the largest variation of any comparison of offenders within the same Criminal History Category. In addition, 28 U.S.C. § 994(j) directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense.

Part B of the proposed amendment sets forth a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders). New §4C1.1 would provide a decrease of [1 level][2 levels] from the offense level determined under Chapters Two and Three for zero-point offenders who meet certain criteria. It provides two options for establishing the criteria.

**Option 1** would make the adjustment applicable to zero-point offenders with no prior convictions. It would provide a [1][2]-level decrease if the defendant meets all of the following criteria: (1) the defendant did not receive any criminal history points from Chapter Four, Part A, and had no prior convictions or other comparable judicial dispositions of any kind; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant's acts or omissions did not result in substantial financial hardship to [one or more victims][five or more victims][25 or more victims]; (5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under §3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and (6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime]. Under Option 1, approximately 10,500 offenders sentenced in fiscal year 2021 would have been eligible under §4C1.1 depending on the exclusionary criteria.

**Option 2** would make the adjustment applicable to all offenders who had no countable convictions (*i.e.*, offenders who received zero criminal history points based upon the criminal history rules in Chapter Four). It would provide a [1 level][2 levels] decrease if the defendant meets all of the following criteria: (1) the defendant did not receive any criminal history points from Chapter Four, Part A; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or

serious bodily injury; (4) the defendant's acts or omissions did not result in substantial financial hardship to [one or more victims][five or more victims][25 or more victims]; (5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under §3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and (6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime]. Option 2 also provides for an upward departure that would be applicable if the adjustment under new §4C1.1 substantially underrepresents the seriousness of the defendant's criminal history. Under Option 2, approximately 13,500 offenders sentenced in fiscal year 2021 would have been eligible under §4C1.1 depending on the exclusionary criteria.

Both options include a subsection (c) that provides definitions and additional considerations for purposes of applying the guideline.

Part B of the proposed amendment would also amend the Commentary to §5C1.1 (Imposition of a Term of Imprisonment) as part of the Commission's implementation of 28 U.S.C. § 994(j). Section 994(j) directed the Commission to ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. Part B of the proposed amendment would address the alternatives to incarceration available to "zero-point" offenders by revising the application note in §5C1.1 that addresses "nonviolent first offenders" to focus on "zero-point" offenders. Two new provisions would be added. New Application Note 4(A) would provide that if the defendant received an adjustment under new §4C1.1 and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. New Application Note 4(B) would provide that if the defendant received an adjustment under new §4C1.1, the defendant's applicable guideline range is in Zone C or D of the Sentencing Table, and the defendant's instant offense of conviction is not an otherwise serious offense, a departure to a sentence other than a sentence of imprisonment [may be appropriate][is generally appropriate]. Of the approximately 10,500 offenders who received zero criminal history points and had no prior convictions in fiscal year 2021 who would be eligible under §4C1.1 under Option 1, about one-quarter were in Zones A and B, about ten percent were in Zone C, and over 60 percent were in Zone D. Of the approximately 13,500 offenders who received zero criminal history points in fiscal year 2021 who would be eligible under §4C1.1 under Option 2, about 30 percent were in Zones A and B, ten percent were in Zone C and about 60 percent were in Zone D.

In addition, Part B of the proposed amendment would amend subsection (b)(2)(A) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide that a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited, "unless otherwise specified." Part B of the proposed amendment would also amend Chapter One, Part A, Subpart 1(4)(d) (Probation and Split Sentences) to provide an explanatory note addressing amendments to the *Guidelines Manual* related to the implementation of 28 U.S.C. § 994(j), first offenders, and "zero-point" offenders.

Finally, Part B of the proposed amendment provides issues for comment.

### **(C) Impact of Simple Possession of Marihuana Offenses**

While marihuana remains a Schedule I controlled substance under the federal Controlled Substances Act (CSA), subjecting offenders to up to one year in prison (and up to two or three years in prison for repeat offenders), many states and territories have reduced or eliminated the penalties for possessing small quantities of marihuana for personal use. Twenty-one states and territories have removed legal prohibitions, including criminal and civil penalties, for the possession of small quantities for recreational use. An additional 14 states and territories have lowered the punishment for possession of small quantities for recreational use from criminal penalties (such as imprisonment) to solely civil penalties (such as a fine). At the end of fiscal year 2021, possession of marihuana remained illegal for all purposes only in 12 states and territories.

The Commission recently published a report on the impact of simple possession of marihuana offenses on sentencing. *See* U.S. SENT'G COMM'N, *WEIGHING THE IMPACT OF SIMPLE POSSESSION OF MARIJUANA: TRENDS AND SENTENCING IN THE FEDERAL SYSTEM* (2023), available at <https://www.ussc.gov/research/research-reports/weighing-impact-simple-possession-marijuana>.

The key findings from the report include—

- In fiscal year 2021, 4,405 federal offenders (8.0%) received criminal history points under the federal sentencing guidelines for prior marihuana possession sentences. Most (79.3%) of the prior sentences were for less than 60 days in prison, including non-custodial sentences. Furthermore, ten percent (10.2%) of these 4,405 offenders had no other criminal history points.
- The criminal history points for prior marihuana possession sentences resulted in a higher Criminal History Category for 40 percent (40.1%) of the 4,405 offenders (1,765).

Part C of the proposed amendment would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to include sentences resulting from possession of marihuana offenses as an example of when a downward departure from the defendant's criminal history may be warranted. Specifically, Part C of the proposed amendment would provide that a downward departure may be warranted if the defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person

Issues for comment are provided.



**PROPOSED AMENDMENT:**

**(A) Status Points under §4A1.1**

**Option 1 (Departure Provision for Status Points)**

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**§4A1.1. Criminal History Category**

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The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

- (a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this subsection.
- (d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
- (e) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.

**Commentary**

The total criminal history points from §4A1.1 determine the criminal history category (I–VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in §4A1.2 govern the computation of the criminal history points. Therefore, §§4A1.1 and 4A1.2 must be read together. The following notes highlight the interaction of §§4A1.1 and 4A1.2.

**Application Notes:**

1. **§4A1.1(a).** Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this subsection. The term “*prior sentence*” is defined at §4A1.2(a). The term “*sentence of imprisonment*” is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than fifteen years prior to the defendant’s commencement of the instant offense is not counted unless the defendant’s incarceration extended into this fifteen-year period. *See* §4A1.2(e).

A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted under this subsection only if it resulted from an adult conviction. *See* §4A1.2(d).

A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. *See* §4A1.2(h) and (j) and the Commentary to §4A1.2.

2. **§4A1.1(b).** Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term "**prior sentence**" is defined at §4A1.2(a). The term "**sentence of imprisonment**" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. *See* §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* §4A1.2(g).

3. **§4A1.1(c).** One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this subsection. The term "**prior sentence**" is defined at §4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. *See* §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's commencement of the current offense. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. *See* §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. *See* §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. See §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. See §4A1.2(g).

4. **§4A1.1(d).** Two points are added if the defendant committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). For the purposes of this subsection, a “***criminal justice sentence***” means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. See §4A1.2(m).

There may be cases in which adding points under §4A1.1(d) results in a Criminal History Category that substantially overrepresents the seriousness of the defendant’s criminal history. In such a case, a departure may be warranted in accordance with §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

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

For example, a defendant’s criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are treated as a single prior sentence. See §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(e) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(e) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

**Background:** Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of

this measure however, §4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.

Subsections (a), (b), and (c) of §4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house.

Section 4A1.1(d) adds two points if the defendant was under a criminal justice sentence during any part of the instant offense.

\* \* \*

## Option 2 (Reducing Status Points)

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### §4A1.1. Criminal History Category

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The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

- (a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this subsection.
- (d) Add ~~2~~ **1** point if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
- (e) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.

#### Commentary

The total criminal history points from §4A1.1 determine the criminal history category (I–VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in §4A1.2 govern the computation of the criminal history points. Therefore, §§4A1.1 and 4A1.2 must be read together. The following notes highlight the interaction of §§4A1.1 and 4A1.2.

#### Application Notes:

1. **§4A1.1(a)**. Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this subsection. The term “*prior sentence*” is defined at §4A1.2(a). The term “*sentence of*

***imprisonment***” is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than fifteen years prior to the defendant’s commencement of the instant offense is not counted unless the defendant’s incarceration extended into this fifteen-year period. *See* §4A1.2(e).

A sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted under this subsection only if it resulted from an adult conviction. *See* §4A1.2(d).

A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. *See* §4A1.2(h) and (j) and the Commentary to §4A1.2.

2. **§4A1.1(b).** Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term “***prior sentence***” is defined at §4A1.2(a). The term “***sentence of imprisonment***” is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant’s commencement of the instant offense is not counted. *See* §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant’s commencement of the instant offense. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. *See* §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* §4A1.2(g).

3. **§4A1.1(c).** One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this subsection. The term “***prior sentence***” is defined at §4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant’s commencement of the instant offense is not counted. *See* §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted only if imposed within five years of the defendant’s commencement of the current offense. *See* §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. *See* §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. *See* §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. *See* §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. *See* §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. *See* §4A1.2(g).

4. **§4A1.1(d).** ~~Two points are~~ **One point is** added if the defendant committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. *See* §4A1.2(n). For the purposes of this subsection, a “**criminal justice sentence**” means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. *See* §4A1.2(m).

There may be cases in which adding a point under §4A1.1(d) results in a Criminal History Category that substantially overrepresents or underrepresents the seriousness of the defendant’s criminal history. In such a case, a departure may be warranted in accordance with §4A1.3 (Departures Based on Inadequacy of Criminal History Category).

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

For example, a defendant’s criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are treated as a single prior sentence. *See* §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(e) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(e) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

**Background:** Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure however, §4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.

Subsections (a), (b), and (c) of §4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house.

Section 4A1.1(d) adds ~~two points~~ **one point** if the defendant was under a criminal justice sentence during any part of the instant offense.

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### Option 3 (Eliminating Status Points)

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#### §4A1.1. Criminal History Category

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The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

- (a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this subsection.
- ~~(d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.~~
- (e)** Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.

#### Commentary

\* \* \*

#### Application Notes:

\* \* \*

~~4. §4A1.1(d). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). For the purposes of this subsection, a “**criminal justice sentence**” means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. See §4A1.2(m).~~

54. §4A1.1(ed). In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (see §4A1.2(a)(2)), one point is added under §4A1.1(ed) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(ed). For purposes of this guideline, “**crime of violence**” has the meaning given that term in §4B1.2(a). See §4A1.2(pn).

For example, a defendant’s criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are treated as a single prior sentence. See §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(ed) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(ed) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

**Background:** Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure however, §4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.

Subsections (a), (b), and (c) of §4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house.

Section 4A1.1(d) adds two points if the defendant was under a criminal justice sentence during any part of the instant offense.



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

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### Commentary

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#### Application Notes:

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

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

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(a) PRIOR SENTENCE

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- (2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by (A) or (B) as a single sentence. *See also* §4A1.1(ed).

\* \* \*

(l) SENTENCES ON APPEAL

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), ~~(d)~~, and ~~(ed)~~ shall apply as if the execution of such sentence had not been stayed.

~~(m)~~ EFFECT OF A VIOLATION WARRANT

~~For the purposes of §4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.~~

~~(n)~~ FAILURE TO REPORT FOR SERVICE OF SENTENCE OF IMPRISONMENT

~~For the purposes of §4A1.1(d), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.~~

~~(o)~~ FELONY OFFENSE

For the purposes of §4A1.2(c), a “felony offense” means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed.

~~(p)~~ CRIME OF VIOLENCE DEFINED

For the purposes of §4A1.1(~~e~~), the definition of “crime of violence” is that set forth in §4B1.2(a).

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**§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)**

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(a) UPWARD DEPARTURES.—

(1) STANDARD FOR UPWARD DEPARTURE.—If reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.—The information described in subsection (a)(1) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal convictions).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

- (C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.
  - (D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.
  - (E) Prior similar adult criminal conduct not resulting in a criminal conviction.
- (3) PROHIBITION.—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.
- (4) DETERMINATION OF EXTENT OF UPWARD DEPARTURE.—
- (A) IN GENERAL.—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.
  - (B) UPWARD DEPARTURES FROM CATEGORY VI.—In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.
- (b) DOWNWARD DEPARTURES.—
- (1) STANDARD FOR DOWNWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.
  - (2) PROHIBITIONS.—
    - (A) CRIMINAL HISTORY CATEGORY I.—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.
    - (B) ARMED CAREER CRIMINAL AND REPEAT AND DANGEROUS SEX OFFENDER.—A downward departure under this subsection is

prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) LIMITATIONS.—

(A) LIMITATION ON EXTENT OF DOWNWARD DEPARTURE FOR CAREER OFFENDER.—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.—A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).

(c) WRITTEN SPECIFICATION OF BASIS FOR DEPARTURE.—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

**Commentary**

**Application Notes:**

1. **Definitions.**—For purposes of this policy statement, the terms “*depart*”, “*departure*”, “*downward departure*”, and “*upward departure*” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. **Upward Departures.**—

(A) **Examples.**—An upward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances:

(i) A previous foreign sentence for a serious offense.

- (ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.
- (iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.
- (iv) Commission of the instant offense while on bail or pretrial release for another serious offense.
- (v) The defendant committed the instant offense (*i.e.*, any relevant conduct to the instant offense under §1B1.3 (Relevant Conduct)) while under any criminal justice sentence having a custodial or supervisory component (including probation, parole, supervised release, imprisonment, work release, or escape status).

(B) **Upward Departures from Criminal History Category VI.**—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant’s criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant’s criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

(C) **Upward Departures Based on Tribal Court Convictions.**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.
- (iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.
- (iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.
- (v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.
- (vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

3. **Downward Departures.**—A downward departure from the defendant’s criminal history category may be warranted if, for example, the defendant had two minor misdemeanor

convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

**Background:** This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant's criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (*e.g.*, defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

\* \* \*

### Issues for Comment

1. Option 3 of Part A of the proposed amendment would eliminate the "status" points provided in subsection (d) of §4A1.1 (Criminal History Category). Instead of eliminating "status points" altogether, should the Commission eliminate "status points" related to certain categories of prior offenses, but not others? For example, should "status points" continue to apply if the defendant was under a criminal justice sentence resulting from a violent prior offense? Should "status points" continue to apply if the defendant was recently placed under a criminal justice sentence involving a custodial or supervisory component?
2. Option 3 of Part A of the proposed amendment would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide an example of an instance in which an upward departure from the defendant's criminal history may be warranted. Instead of a departure provision, should the Commission account in some other way for the "custody status" of the defendant during the commission of the instant offense? If so, how should the Commission account for such "status"?

## CHAPTER FOUR

# CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD

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### PART C — ADJUSTMENT FOR CERTAIN ZERO-POINT OFFENDERS

#### §4C1.1. Adjustment for Certain Zero-Point Offenders

##### [Option 1 (Zero-Point Offenders with No Prior Convictions):

(a) ADJUSTMENT.—If the defendant meets all of the following criteria:

- (1) the defendant did not receive any criminal history points from Chapter Four, Part A, and had no prior convictions or other comparable judicial dispositions of any kind;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury;
- (4) the defendant's acts or omissions did not result in substantial financial hardship to [one or more victims][five or more victims][25 or more victims];
- (5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under §3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
- (6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime];

decrease the offense level determined under Chapters Two and Three by [1 level][2 levels].

(b) DEFINITIONS AND ADDITIONAL CONSIDERATIONS.—

- (1) The phrase “**comparable judicial dispositions of any kind**” includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of nolo contendere and juvenile adjudications.
- (2) “**Dangerous weapon,**” “**firearm,**” “**offense,**” and “**serious bodily injury**” have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).
- (3) Consistent with §1B1.3 (Relevant Conduct), the term “**defendant**” 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.
- (4) In determining whether the defendant’s acts or omissions resulted in “**substantial financial hardship**” to a victim, the court shall consider, among other things, the non-exhaustive list of factors provided in Application Note 4(F) of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).
- [(5) “**Covered sex crime**” means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this definition.]]

**[Option 2 (Zero-Point Offenders with No Countable Convictions):**

(a) ADJUSTMENT.—If the defendant meets all of the following criteria:

- (1) the defendant did not receive any criminal history points from Chapter Four, Part A;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury;



- (4) the defendant's acts or omissions did not result in substantial financial hardship to [one or more victims][five or more victims][25 or more victims];
- (5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under §3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
- (6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime];

decrease the offense level determined under Chapters Two and Three by [1 level][2 levels].

(b) DEFINITIONS AND ADDITIONAL CONSIDERATIONS.—

- (1) “*Dangerous weapon*,” “*firearm*,” “*offense*,” and “*serious bodily injury*” have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).
- (2) Consistent with §1B1.3 (Relevant Conduct), the term “*defendant*” 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.
- (3) In determining whether the defendant's acts or omissions resulted in “*substantial financial hardship*” to a victim, the court shall consider, among other things, the non-exhaustive list of factors provided in Application Note 4(F) of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).
- [(4) “*Covered sex crime*” means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this definition.]

## Commentary

### Application Notes:

1. **Upward Departure.**—An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant’s criminal history. For example, an upward departure may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.]

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### §5C1.1. Imposition of a Term of Imprisonment

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- (a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.
- (b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.
- (c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by—
  - (1) a sentence of imprisonment; or
  - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or
  - (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).
- (d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by—
  - (1) a sentence of imprisonment; or
  - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.
- (e) Schedule of Substitute Punishments:

- (1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);
  - (2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;
  - (3) One day of home detention for one day of imprisonment.
- (f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

### Commentary

#### Application Notes:

1. **Application of Subsection (a).**—Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33–41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.
2. **Application of Subsection (b).**—Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.
3. **Application of Subsection (c).**—Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than nine months), the court has three options:
  - (A) It may impose a sentence of imprisonment.
  - (B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4–10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

- (C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4–10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4–10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4. **Zero-Point Offenders.**—~~If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3). See 28 U.S.C. § 994(j). For purposes of this application note, a “nonviolent first offender” is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction. The phrase “comparable judicial dispositions of any kind” includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere* and juvenile adjudications.~~

(A) **Zero-Point Offenders in Zones A and B of the Sentencing Table.**—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant’s applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. See 28 U.S.C. § 994(j).

(B) **Zero-Point Offenders in Zones C and D of the Sentencing Table.**—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders), the defendant’s applicable guideline range is in Zone C or D of the Sentencing Table, and the defendant’s instant offense of conviction is not an otherwise serious offense, a departure to a sentence other than a sentence of imprisonment [may be appropriate][is generally appropriate]. See 28 U.S.C. § 994(j).

5. **Application of Subsection (d).**—Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (*i.e.*, the minimum term specified in the applicable guideline range is ten or twelve months), the court has two options:

(A) It may impose a sentence of imprisonment.

(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement

or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

6. **Application of Subsection (e).**—Subsection (e) sets forth a schedule of imprisonment substitutes.
7. **Departures Based on Specific Treatment Purpose.**—There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant’s criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

**Examples:** The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.

8. **Use of Substitutes for Imprisonment.**—The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above.
9. **Residential Treatment Program.**—In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.
10. **Application of Subsection (f).**—Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in

the applicable guideline range is 15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

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### §4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

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\* \* \*

(b) DOWNWARD DEPARTURES.—

\* \* \*

(2) PROHIBITIONS.—

(A) CRIMINAL HISTORY CATEGORY I.—~~A~~Unless otherwise specified, a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

\* \* \*

#### Commentary

#### Application Notes:

\* \* \*

3. **Downward Departures.**—A downward departure from the defendant's criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), ~~due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism~~unless otherwise specified.

\* \* \*

## CHAPTER ONE

# INTRODUCTION, AUTHORITY, AND GENERAL APPLICATION PRINCIPLES

## PART A — INTRODUCTION AND AUTHORITY

\* \* \*

## 1. ORIGINAL INTRODUCTION TO THE GUIDELINES MANUAL

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### 4. The Guidelines' Resolution of Major Issues (Policy Statement)

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#### (d) Probation and Split Sentences.

The statute provides that the guidelines are to “reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . .” 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are “serious.”

The Commission’s solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention.\* The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.\*\*

\*Note: The Commission expanded Zones B and C of the Sentencing Table in 2010 to provide a greater range of sentencing options to courts with respect to certain offenders. (See USSG App. C, amendment 738.) In 2018, the Commission added a new application note to the Commentary to §5C1.1 (Imposition of a Term of Imprisonment), stating that if a defendant is a “nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.” (See USSG App. C, amendment 801.) In [2023], the Commission added a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of [1 level][2 levels] from the offense level determined under Chapters Two and Three for “zero-point” offenders who meet certain criteria. In addition, the Commission further amended the Commentary to §5C1.1 to address the alternatives to incarceration available to “zero-point” offenders by revising the application note in §5C1.1 that addressed “nonviolent first offenders” to focus on “zero-point” offenders. (See USSG App. C, amendment [ ].)

\*\*Note: Although the Commission had not addressed “single acts of aberrant behavior” at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See USSG App. C, amendment 603.)

### Issues for Comment:

1. Part B of the proposed amendment would set forth a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), that provides a decrease of [1 level][2 levels] from the offense level determined under Chapters Two and Three if the defendant meets certain criteria. It provides two options: one option for zero-point offenders with no prior convictions and another option for zero-point offenders with no countable convictions. The Commission seeks comment on which option is preferable, or whether there is an alternative approach that the Commission should consider. For example, if the Commission decides to exclude offenders with prior convictions, should the Commission consider a third option that nevertheless makes the new adjustment available to offenders with prior convictions that were not counted under a specific provision of §4A1.2 (Definitions and Instructions for Computing Criminal History)? If so, what type of prior convictions that did not receive criminal history points should not be excluded? For example, should the Commission allow the new adjustment to apply to offenders with prior convictions for misdemeanors and petty offenses that were not counted under §4A1.2(c)? Should the Commission instead exclude offenders with certain prior convictions that were not otherwise counted under §4A1.2? For example, should the Commission exclude offenders with prior convictions for sex offenses or violent offenses that were not counted for criminal history purposes?

If the Commission were to promulgate an option of §4C1.1 that excludes offenders with prior convictions not countable under Chapter Four, Part A (Criminal History), are there any practical issues or challenges that such an approach would present due to the availability of records documenting such convictions? If so, what are these practical issues or challenges?

2. Part B of the proposed amendment provides that the [1 level][2 levels] decrease under the new guideline applies if the defendant meets all of the criteria set forth in the two options. Should the Commission incorporate additional or different exclusionary criteria into either of the options set forth in Part B of the proposed amendment? Should the Commission change or remove any of the exclusionary criteria set forth in either of the options thereby making the adjustment available to a broader group of defendants?
3. If the Commission were to promulgate one of the proposed options, what conforming changes, if any, should the Commission make to other provisions of the *Guidelines Manual*?
4. Part B of the proposed amendment would also amend the Commentary to §5C1.1 (Imposition of a Term of Imprisonment) to address the alternatives to incarceration available to “zero-point” offenders. The Commission seeks comment on whether it should provide additional guidance about how to apply this new departure provision. If so, what additional guidance should the Commission provide? For example, should the



Commission provide guidance on how courts should determine whether the instant offense of conviction is “not an otherwise serious offense”?

**(C) Impact of Simple Possession of Marihuana Offenses**

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**§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)**

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- (a) UPWARD DEPARTURES.—
- (1) STANDARD FOR UPWARD DEPARTURE.—If reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.
  - (2) TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.—The information described in subsection (a)(1) may include information concerning the following:
    - (A) Prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal convictions).
    - (B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.
    - (C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.
    - (D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.
    - (E) Prior similar adult criminal conduct not resulting in a criminal conviction.
  - (3) PROHIBITION.—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.
  - (4) DETERMINATION OF EXTENT OF UPWARD DEPARTURE.—
    - (A) IN GENERAL.—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant’s.
    - (B) UPWARD DEPARTURES FROM CATEGORY VI.—In a case in which the court determines that the extent and nature of the defendant’s criminal history, taken together, are sufficient to warrant an

upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) DOWNWARD DEPARTURES.—

(1) STANDARD FOR DOWNWARD DEPARTURE.—If reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) PROHIBITIONS.—

(A) CRIMINAL HISTORY CATEGORY I.—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

(B) ARMED CAREER CRIMINAL AND REPEAT AND DANGEROUS SEX OFFENDER.—A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) LIMITATIONS.—

(A) LIMITATION ON EXTENT OF DOWNWARD DEPARTURE FOR CAREER OFFENDER.—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.—A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).

(c) WRITTEN SPECIFICATION OF BASIS FOR DEPARTURE.—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

- (1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.
- (2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

### Commentary

#### Application Notes:

1. **Definitions.**—For purposes of this policy statement, the terms “*depart*”, “*departure*”, “*downward departure*”, and “*upward departure*” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).
2. **Upward Departures.**—
  - (A) **Examples.**—An upward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances:
    - (i) A previous foreign sentence for a serious offense.
    - (ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.
    - (iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.
    - (iv) Commission of the instant offense while on bail or pretrial release for another serious offense.
  - (B) **Upward Departures from Criminal History Category VI.**—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant’s criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant’s criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.
  - (C) **Upward Departures Based on Tribal Court Convictions.**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.
- (iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.
- (iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.
- (v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.
- (vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

### 3. Downward Departures.—

(A) **Examples.**—A downward departure from the defendant’s criminal history category may be warranted ~~if, for example,~~ based on any of the following circumstances:

- (i) ~~the~~The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.
- (ii) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

(B) **Downward Departures from Criminal History Category I.**—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

**Background:** This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant’s criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (*e.g.*, defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant’s criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

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## Issues for Comment

1. Part C of the proposed amendment provides for a possible downward departure if the defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person. The Commission seeks comment on whether it should provide additional guidance for purposes of determining whether a downward departure is warranted in such cases. If so, what additional guidance should the Commission provide?
2. The Commission also seeks comment on whether there is an alternative approach it should consider for addressing sentences for possession of marihuana. For example, instead of a departure, should the Commission exclude such sentences from the criminal history score calculation if the offense is no longer subject to criminal penalties in the jurisdiction in which the defendant was convicted at the time of sentencing for the instant offense? Alternatively, should the Commission exclude all sentences for possession of marihuana offenses from the criminal history score calculation, regardless of whether such offenses are punishable by a term of imprisonment or subject to criminal penalties in the jurisdiction in which the defendant was convicted at the time of sentencing for the instant offense?

## PROPOSED AMENDMENT:

## ACQUITTED CONDUCT

**Synopsis of Proposed Amendment:** This proposed amendment is a result of the Commission's consideration of possible amendments to the *Guidelines Manual* to prohibit the use of acquitted conduct in applying the guidelines. See U.S. Sent'g Comm'n, "Notice of Final Priorities," 87 FR 67756 (Nov. 9, 2022).

Acquitted conduct is not expressly addressed in the *Guidelines Manual*, except for a reference in the parenthetical summary of the holding in *United States v. Watts*, 519 U.S. 148 (1997). See USSG §6A1.3, Comment. However, consistent with the Supreme Court's holding in *Watts*, consideration of acquitted conduct is permitted under the guidelines through the operation of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), in conjunction with §1B1.4 (Information to be Used in Imposing Sentence) and §6A1.3 (Resolution of Disputed Factors (Policy Statement)).

Section 1B1.3 sets forth the principles and limits of sentencing accountability for purposes of determining a defendant's guideline range, a concept referred to as "relevant conduct." Relevant conduct impacts nearly every aspect of guidelines application, including the determination of: base offense levels where more than one level is provided, specific offense characteristics, and any cross references in Chapter Two (Offense Conduct); any adjustments in Chapter Three (Adjustment); the criminal history calculations in Chapter Four, Part A (Criminal History); and departures and adjustments in Chapter Five (Determining the Sentence).

Specifically, §1B1.3(a)(1) provides that relevant conduct comprises "all acts and omissions . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." Relevant conduct includes, in subsection (a)(1)(A), "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," and, in subsection (a)(1)(B), all acts and omissions of others "in the case of a jointly undertaken criminal activity," that "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."

Relevant conduct also includes, for some offense types, "all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction," "all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions," and "any other information specified in the applicable guideline." See USSG §1B1.3(a)(2)–(a)(4). The background commentary to §1B1.3 explains that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range."

The *Guidelines Manual* also includes Chapter Six, Part A (Sentencing Procedures) addressing sentencing procedures that are applicable in all cases. Specifically, §6A1.3 provides for resolution of any reasonably disputed factors important to the sentencing determination. Consistent with 18 U.S.C. § 3661, §6A1.3(a) provides, in pertinent part, that "[i]n resolving any dispute concerning a factor important to sentencing determination, the court may consider relevant information without regard to its admissibility under the rules

of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.” The Commentary to §6A1.3 instructs that “[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial” and that “[a]ny information may be considered” so long as it has sufficient indicia of reliability to support its probable accuracy. The Commentary cites to 18 U.S.C. § 3661 and Supreme Court case law upholding the sentencing court’s unrestricted discretion in considering any information at sentencing, so long as it is proved by a preponderance of the evidence. Consistent with the Supreme Court case law, the Commentary also provides that “[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.”

In fiscal year 2021, nearly all offenders (56,324; 98.3%) were convicted through a guilty plea. The remaining 963 offenders (1.7% of all offenders) were convicted and sentenced after a trial, and of those offenders, 157 offenders (0.3% of all offenders) were acquitted of at least one offense.

The proposed amendment would amend §1B1.3 to add a new subsection (c) providing that acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless the conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, the instant offense of conviction. The new provision would define “acquitted conduct” as conduct underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction.

The proposed amendment would also amend the Commentary to §6A1.3 (Resolution of Disputed Factors (Policy Statement)) to make conforming revisions addressing the use of acquitted conduct for purposes of determining the guideline range.

Two issues for comment are also provided.

**Proposed Amendment:**

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

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- (a) CHAPTERS TWO (OFFENSE CONDUCT) AND THREE (ADJUSTMENTS). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
  - (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and



(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

- (i) within the scope of the jointly undertaken criminal activity,
- (ii) in furtherance of that criminal activity, and
- (iii) reasonably foreseeable in connection with that criminal activity;

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

- (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
- (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
- (4) any other information specified in the applicable guideline.

(b) CHAPTERS FOUR (CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD) AND FIVE (DETERMINING THE SENTENCE). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

(c) ACQUITTED CONDUCT.—

(1) LIMITATION.—Acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless such conduct—

(A) was admitted by the defendant during a guilty plea colloquy; or

(B) was found by the trier of fact beyond a reasonable doubt;

to establish, in whole or in part, the instant offense of conviction.

- (2) **DEFINITION OF ACQUITTED CONDUCT.**—For purposes of this guideline, “*acquitted conduct*” means conduct (*i.e.*, any acts or omission) underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction.

### Commentary

#### Application Notes:

1. **Sentencing Accountability and Criminal Liability.**—The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.
2. **Accountability Under More Than One Provision.**—In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant’s accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.
3. **Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).**—
  - (A) **In General.**—A “*jointly undertaken criminal activity*” is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:

- (i) within the scope of the jointly undertaken criminal activity;
- (ii) in furtherance of that criminal activity; and
- (iii) reasonably foreseeable in connection with that criminal activity.

The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (*i.e.*, “within the scope,” “in furtherance,” and “reasonably foreseeable”) is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.

- (B) **Scope.**—Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the “jointly undertaken criminal activity” is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant’s accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant’s agreement). In doing so, the court may consider any explicit agreement or implicit

agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (*e.g.*, in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

- (C) **In Furtherance.**—The court must determine if the conduct (acts and omissions) of others was in furtherance of the jointly undertaken criminal activity.
- (D) **Reasonably Foreseeable.**—The court must then determine if the conduct (acts and omissions) of others that was within the scope of, and in furtherance of, the jointly undertaken criminal activity was reasonably foreseeable in connection with that criminal activity.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the jointly undertaken criminal activity (the robbery), was in furtherance of that criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity.

The requirement of reasonable foreseeability applies only in respect to the conduct (*i.e.*, acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the

defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

4. **Illustrations of Conduct for Which the Defendant is Accountable under Subsections (a)(1)(A) and (B).—**

(A) **Acts and omissions aided or abetted by the defendant.—**

- (i) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (*i.e.*, the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity and all three criteria of subsection (a)(1)(B) are met. First, the conduct was within the scope of the criminal activity (the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity, as described above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. *See* Application Note 2.

(B) **Acts and omissions aided or abetted by the defendant; acts and omissions in a jointly undertaken criminal activity.—**

- (i) Defendant C is the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly

undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

**(C) Requirements that the conduct of others be within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable.—**

- (i) Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not within the scope of the jointly undertaken criminal activity (*i.e.*, the forgery of the \$800 check).
- (ii) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the jointly undertaken criminal activity (the scheme to sell fraudulent stocks), was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity.
- (iii) Defendants H and I engaged in an ongoing marijuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marijuana. Defendant J is accountable for the entire single shipment of marijuana he helped import under subsection (a)(1)(A) and any acts and omissions of others related to the importation of that shipment on the basis of subsection (a)(1)(B) (*see* the discussion in example (A)(i) above). He is not accountable for prior or subsequent shipments of marijuana imported by Defendants H or I because those acts were not within the scope of his jointly undertaken criminal activity (the importation of the single shipment of marijuana).
- (iv) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography

sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity (to distribute child pornography with Defendant K), in furtherance of that criminal activity, and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because he is not engaged in a jointly undertaken criminal activity with the other defendants. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

- (v) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not within the scope of her jointly undertaken criminal activity (*i.e.*, the one delivery).
- (vi) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.
- (vii) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (*i.e.*, the 500 grams).
- (viii) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant

would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, the scope of the jointly undertaken criminal activity may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. *See* Application Note 3(B).

5. **Application of Subsection (a)(2).—**

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

As noted above, subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. § 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.

- (B) **“Same Course of Conduct or Common Scheme or Plan”.**—“Common scheme or plan” and “same course of conduct” are two closely related concepts.
- (i) **Common scheme or plan.** For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; *i.e.*, the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of *modus operandi* (the same or similar computer manipulations were used to execute the scheme).
- (ii) **Same course of conduct.** Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are

sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses may also be a relevant consideration (*e.g.*, a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).

- (C) **Conduct Associated with a Prior Sentence.**—For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.

**Examples:** (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and *modus operandi*. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; *see* §4A1.2(a)(1).

Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).

6. **Application of Subsection (a)(3).**—

- (A) **Definition of “Harm”.**—“*Harm*” includes bodily injury, monetary loss, property damage and any resulting harm.
- (B) **Risk or Danger of Harm.**—If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. *See, e.g.*, §2K1.4 (Arson; Property Damage by Use of Explosives); §2Q1.2 ( Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (*e.g.*, §2A2.2 (Aggravated Assault); §2B3.1 (Robbery)) or to actual, attempted or intended harm (*e.g.*, §2B1.1 (Theft, Property Destruction, and Fraud); §2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is



not to be treated as the equivalent of harm that occurred. In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted. *See generally* §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.

7. **Factors Requiring Conviction under a Specific Statute.**—A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant “was convicted under 18 U.S.C. § 1956”. Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) (“if the offense involved conduct described in 18 U.S.C. § 2242”).

Unless otherwise specified, an express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, §2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956 but would not be applied in a case in which the defendant is convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. *See* Application Note 3(C) of §2S1.1.

8. **Partially Completed Offense.**—In the case of a partially completed offense (*e.g.*, an offense involving an attempted theft of \$800,000 and a completed theft of \$30,000), the offense level is to be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. *See* Application Note 4 in the Commentary to §2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under §2X1.1(c)(1).
9. **Solicitation, Misprision, or Accessory After the Fact.**—In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

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

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is

governed by §1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.

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

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

Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant’s state of mind; §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created.

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### **§6A1.3. Resolution of Disputed Factors (Policy Statement)**

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- (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court

may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

- (b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P.

### Commentary

Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. *See, e.g., United States v. Ibanez*, 924 F.2d 427 (2d Cir. 1991). An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. *See, e.g., United States v. Jimenez Martinez*, 83 F.3d 488, 494–95 (1st Cir. 1996) (finding error in district court’s denial of defendant’s motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing); *United States v. Roberts*, 14 F.3d 502, 521(10th Cir. 1993) (remanding because district court did not hold evidentiary hearing to address defendants’ objections to drug quantity determination or make requisite findings of fact regarding drug quantity); *see also, United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. *See* 18 U.S.C. § 3661; *see also United States v. Watts*, 519 U.S. 148, 154 (1997) (~~holding that lower evidentiary standard at sentencing permits sentencing court’s consideration of acquitted conduct~~); *Witte v. United States*, 515 U.S. 389, 399–401 (1995) (~~noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution~~); *Watts*, 519 U.S. at 157; *Witte*, 515 U.S. at 399–401; *Nichols v. United States*, 511 U.S. 738, 747–48 (1994) (noting that district courts have traditionally considered defendant’s prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. *Watts*, 519 U.S. at 157; *Witte*, 515 U.S. at 399–401; *Nichols*, 511 U.S. at 748; *United States v. Zuleta-Alvarez*, 922 F.2d 33 (1st Cir. 1990), *cert. denied*, 500 U.S. 927 (1991); *United States v. Beaulieu*, 893 F.2d 1177 (10th Cir.), *cert. denied*, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. *United States v. Petty*, 982 F.2d 1365 (9th Cir. 1993), *cert. denied*, 510 U.S. 1040 (1994); *United States v. Sciarrino*, 884 F.2d 95 (3d Cir.), *cert. denied*, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant’s identity and there is sufficient corroboration by other means. *United States v. Rogers*, 1 F.3d 341 (5th Cir. 1993); *see also United States v. Young*, 981 F.2d 180 (5th Cir.), *cert. denied*, 508 U.S. 980 (1993); *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. *United States v. Ortiz*, 993 F.2d 204 (10th Cir. 1993).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case. ~~Acquitted conduct, however, generally shall not be considered relevant~~

conduct for purposes of determining the guideline range. *See* subsection (c) of §1B1.3 (Relevant Conduct). Acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* §1B1.4 (Information to be Used in Imposing a Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)).

\* \* \*

### **Issue for Comment**

1. The proposed amendment is intended to generally prohibit the use of acquitted conduct for purposes of determining the guideline range, except when such conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish the instant offense of conviction. However, conduct underlying an acquitted charge may overlap with conduct found by the trier of fact beyond a reasonable doubt to establish the instant offense of conviction. Does this proposed amendment allow a court to consider such “overlapping” conduct for purposes of determining the guideline range? Should the Commission provide additional guidance to address this conduct?
2. The Commission seeks comment on whether the limitation on the use of acquitted conduct is too broad or too narrow. If so, how? For example, should the Commission account for acquittals for reasons such as jurisdiction, venue, or statute of limitations, that are otherwise unrelated to the substantive evidence?

## **PROPOSED AMENDMENT:       SEXUAL ABUSE OFFENSES**

**Synopsis of Proposed Amendment:** The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive. Part A of the proposed amendment responds to recently enacted legislation. *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022) (identifying as a priority “[i]mplementation of any legislation warranting Commission action”). Part B of the proposed amendment is a result of the Commission’s “[c]onsideration of possible amendments to the *Guidelines Manual* to address sexual abuse or contact offenses against a victim in the custody, care, or supervision of, and committed by law enforcement or correctional personnel.” *Id.*

### **(A)     Violence Against Women Act Reauthorization Act of 2022**

Part A of the proposed amendment responds to title XII of the Violence Against Women Act Reauthorization Act of 2022 (“the Act”). The Act is part of the Consolidated Appropriations Act of 2022, Pub. L. 117–103 (2022). It created two new offenses concerning sexual misconduct while committing civil rights offenses and sexual abuse of an individual in federal custody.

First, the Act created a new offense at 18 U.S.C. § 250 (Penalties for civil rights offenses involving sexual misconduct). New section 250(a) prohibits any person from engaging in, or causing another to engage in, sexual misconduct while committing a civil rights offense under chapter 13 (Civil Rights) of part I (Crimes) of title 18, United States Code, or an offense under section 901 of the Fair Housing Act (42 U.S.C. § 3631). The statute does not define “sexual misconduct,” but new section 250(b) delineates different maximum statutory terms of imprisonment for different degrees of sexual misconduct, ranging from two years to any term of years or life. The maximum penalties are: (1) any term of years or life if the offense involved aggravated sexual abuse, as defined in 18 U.S.C. § 2241, or sexual abuse, as defined in 18 U.S.C. § 2242, or any attempts to commit such conduct; (2) any term of years or life if the offense involved abusive sexual contact of a child who has not attained the age of 16, of the type prohibited by 18 U.S.C. § 2244(a)(5); (3) 40 years if the offense involved a sexual act, as defined in 18 U.S.C. § 2246, without the other person’s permission and the sexual act does not amount to sexual abuse or aggravated sexual abuse; (4) 10 years if the offense involved abusive sexual contact of the type prohibited by 18 U.S.C. § 2244(a)(1) or (b) (excluding abusive sexual contact through the clothing), with an enhanced maximum penalty of 30 years if such abusive sexual contact involved a child under the age of 12; (5) 3 years if the offense involved abusive sexual contact of the type prohibited by 18 U.S.C. § 2244(a)(2), with an enhanced maximum penalty of 20 years if such abusive sexual contact involved a child under the age of 12; (6) 2 years if the offense involved abusive sexual contact through the clothing of the type prohibited by 18 U.S.C. § 2244(a)(3), (a)(4), or (b), with an enhanced maximum penalty of 10 years if such abusive sexual conduct through the clothing involved a child under the age of 12.

Second, the Act amended 18 U.S.C. § 2243 and created a new offense at subsection (c). The new section 2243(c) prohibits an individual, while acting in their capacity as a federal law enforcement officer, from knowingly engaging in a sexual act with an individual who is under arrest, under supervision, in detention, or in federal custody. The statutory

maximum term of imprisonment for the offense is 15 years, which is the same maximum penalty for offenses under sections 2243(a) (prohibiting knowingly engaging in a sexual act with a minor who had attained the age of twelve but not the age of sixteen and is at least four younger than the person so engaging) and 2243(b) (prohibiting knowingly engaging in a sexual act with a ward in official detention (including in a federal prison or any prison, institution, or facility where people are held in custody by the direction of, or pursuant to a contract or agreement with, any federal department or agency) and under the custodial, supervisory, or disciplinary authority of the person so engaging).

The Act also included a provision defining “federal law enforcement officer” at 18 U.S.C. § 2246(7) as having the meaning given the term in 18 U.S.C. § 115 (*i.e.*, “any officer, agent, or employee of the United States authorized by law or by a Government agency to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of Federal criminal law.”). In addition, the Act amended 18 U.S.C. § 2244 (Abusive sexual contact) to add a new penalty provision at subsection (a)(6) stating any person that knowingly engages in or causes sexual contact with or by another person, if doing so would violate new section 2243(c), would face a maximum statutory term of imprisonment of two years.

Part A of the proposed amendment would amend Appendix A (Statutory Index) to reference offenses under 18 U.S.C. § 250 to §2H1.1 (Offenses Involving Individual Rights), and offenses under 18 U.S.C. § 2243(c) to §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts). Part A of the proposed amendment would also amend the Commentary to §§2A3.3 and 2H1.1 to reflect that these statutes are referenced to these guidelines. In addition, it would amend the title of §2A3.3 to add “Criminal Sexual Abuse of an Individual in Federal Custody.”

Issues for comment are also provided.

## **(B) Sexual Abuse Offenses Committed by Law Enforcement and Correctional Personnel**

Part B of the proposed amendment addresses concerns regarding the increasing number cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody, care, or supervision. In its annual letter to the Commission, the Department of Justice urged the Commission to consider amending the *Guidelines Manual* to better account for such sexual abuse offenses, including offenses under 18 U.S.C. § 2243(b) and the offense conduct covered by the new statute at 18 U.S.C. § 2243(c) (discussed in Part A of the proposed amendment). According to the Department of Justice, the provisions of the guideline applicable to such offenses, §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), do not sufficiently account for the severity of the conduct in such offenses, nor provide adequate penalties in accordance with the statutory maximum terms of imprisonment provided for these offenses.

Part B of the proposed amendment would amend §2A3.3 in several ways to address these concerns. First, it would increase the base offense level of the guideline from 14 to [22]. Second, Part B of the proposed amendment would address the presence of aggravating

factors in sexual abuse offenses, such as causing serious bodily injury and the use or threat of force, in the same way §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) currently does, by providing a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) for cases where the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242).

Issues for comment are also provided.

(A) Violence Against Women Act Reauthorization Act of 2022

Proposed Amendment:

## APPENDIX A

## STATUTORY INDEX

		* * *
18 U.S.C. § 249	2H1.1	
18 U.S.C. § 250	2H1.1	
18 U.S.C. § 281	2C1.3	
		* * *
18 U.S.C. § 2243(b)	2A3.3	
18 U.S.C. § 2243(c)	2A3.3	
18 U.S.C. § 2244	2A3.4	
		* * *

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

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- (a) Base Offense Level: 14
- (b) Specific Offense Characteristics
  - (1) If the offense involved the knowing misrepresentation of a participant’s identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.
  - (2) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.

### Commentary

**Statutory Provision:** 18 U.S.C. § 2243(b), 2243(c). For additional statutory provision(s), see Appendix A (Statutory Index).

### 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.

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

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

“**Ward**” means a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.

2. **Application of Subsection (b)(1).**—The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant’s identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(1) 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.

The misrepresentation to which the enhancement in subsection (b)(1) 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, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

3. **Application of Subsection (b)(2).**—Subsection (b)(2) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(2) 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.

4. **Inapplicability of §3B1.3.**—Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

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## §2H1.1. Offenses Involving Individual Rights

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- (a) Base Offense Level (Apply the Greatest):
  - (1) the offense level from the offense guideline applicable to any underlying offense;
  - (2) **12**, if the offense involved two or more participants;

(3) **10**, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or

(4) **6**, otherwise.

(b) Specific Offense Characteristic

(1) If (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by **6** levels.

**Commentary**

**Statutory Provisions:** 18 U.S.C. §§ 241, 242, 245(b), ~~246, 247, 248, 249~~, 246–250, 1091; 42 U.S.C. § 3631.

**Application Notes:**

1. “**Offense guideline applicable to any underlying offense**” means the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 1).

In certain cases, conduct set forth in the count of conviction may constitute more than one underlying offense (*e.g.*, two instances of assault, or one instance of assault and one instance of arson). In such cases, use the following comparative procedure to determine the applicable base offense level: (i) determine the underlying offenses encompassed within the count of conviction as if the defendant had been charged with a conspiracy to commit multiple offenses. *See* Application Note 4 of §1B1.2 (Applicable Guidelines); (ii) determine the Chapter Two offense level (*i.e.*, the base offense level, specific offense characteristics, cross references, and special instructions) for each such underlying offense; and (iii) compare each of the Chapter Two offense levels determined above with the alternative base offense level under subsection (a)(2), (3), or (4). The determination of the applicable alternative base offense level is to be based on the entire conduct underlying the count of conviction (*i.e.*, the conduct taken as a whole). Use the alternative base offense level only if it is greater than each of the Chapter Two offense levels determined above. Otherwise, use the Chapter Two offense levels for each of the underlying offenses (with each underlying offense treated as if contained in a separate count of conviction). Then apply subsection (b) to the alternative base offense level, or to the Chapter Two offense levels for each of the underlying offenses, as appropriate.

2. “**Participant**” is defined in the Commentary to §3B1.1 (Aggravating Role).
3. The burning or defacement of a religious symbol with an intent to intimidate shall be deemed to involve the threat of force against a person for the purposes of subsection (a)(3)(A).
4. If the finder of fact at trial or, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person, an additional 3-level enhancement from §3A1.1(a) will apply. An adjustment from §3A1.1(a) will not apply, however, if a 6-level adjustment from §2H1.1(b) applies. *See* §3A1.1(c).

5. If subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

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## Issues for Comment

1. In response to the Violence Against Women Act Reauthorization Act of 2022, Part A of the proposed amendment would reference 18 U.S.C. § 250 to §2H1.1 (Offenses Involving Individual Rights). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 250's offense conduct. Specifically, should the Commission amend §2H1.1 to provide a higher or lower base offense level if 18 U.S.C. § 250 is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add specific offense characteristics to §2H1.1 in response to section 250? If so, what should any such specific offense characteristic provide and why?

The new statute at 18 U.S.C. § 250 provides different maximum statutory terms of imprisonment, ranging from two years to any term of years or life, depending on the sexual misconduct involved in the offense. Should the Commission amend §2H1.1 to address this range of penalties? If so, how should the Commission address these different penalties and why?

2. In response to the Violence Against Women Act Reauthorization Act of 2022, Part A of the proposed amendment would reference 18 U.S.C. § 2243(c) to §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 2243(c)'s offense conduct. Specifically, should the Commission amend §2A3.3 to provide a higher or lower base offense level if 18 U.S.C. § 2243(c) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to §2A3.3 in response to section 2243(c)? If so, what should that specific offense characteristic provide and why?

(B) Sexual Abuse Offenses Committed by Law Enforcement and Correctional Personnel

Proposed Amendment:

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**§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts**

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- (a) Base Offense Level: ~~14~~ **[22]**
- (b) Specific Offense Characteristics
  - (1) If the offense involved the knowing misrepresentation of a participant’s identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.
  - (2) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.

**(c) Cross Reference**

- (1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the “consent” of the victim.

**Commentary**

**Statutory Provision:** 18 U.S.C. § 2243(b). For additional statutory provision(s), see Appendix A (Statutory Index).

**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.

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

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

**“Ward”** means a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.

2. **Application of Subsection (b)(1).**—The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant’s identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(1) 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.

The misrepresentation to which the enhancement in subsection (b)(1) 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, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

3. **Application of Subsection (b)(2).**—Subsection (b)(2) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(2) 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.

4. **Inapplicability of §3B1.3.**—Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

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## Issues for Comment

1. Part B of the proposed amendment would amend §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts) to increase the base offense level of the guideline from 14 to [22]. The proposed base offense level of [22] for §2A3.3 would result in proportionate penalties with offenses sentenced under §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), where, like §2A3.3, the victim is incapable of granting consent. Specifically, §2A3.2 provides a base offense level of 18 and a 4-level increase at §2A3.2(b)(1) that applies in cases where the victim was in the custody, care, or supervisory control of the defendant. The Commission seeks comment on whether the proposed base offense level for §2A3.3 is appropriate and, if not, what should the base offense level be and why. Are there distinctions between sexual offenses against minors and sexual offenses against wards that may warrant different base offense levels? If so, what are those distinctions and how should they be accounted for in §2A3.3?
2. Part B of the proposed amendment would also amend §2A3.3 to provide a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) for cases where the offense involved criminal sexual abuse or attempt to

commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242). This cross reference is the same as the one currently provided for in §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts). The Commission seeks comment on whether adding a cross reference to §2A3.1 in §2A3.3 is appropriate to address the presence of aggravating factors in the offenses referenced to this guideline, such as causing serious bodily injury and the use or threat of force. If not, how should the Commission take into account such aggravating factors? For example, should the Commission add specific offense characteristics to address these aggravating factors?

## ISSUES FOR COMMENT:

## ALTERNATIVES-TO-INCARCERATION PROGRAMS

In November 2022, the Commission identified as one of its policy priorities a “[m]ultiyear study of court-sponsored diversion and alternatives-to-incarceration programs (e.g., Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program), including consideration of possible amendments to the *Guidelines Manual* that might be appropriate.” U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022). As part of its work on this priority, the Commission is publishing these issues for comment on alternative-to-incarceration programs to inform the Commission’s consideration of this policy priority.

### Issues for Comment

1. The Commission invites general comment on how it should approach any study related to this policy priority. What should be the scope, duration, and sources of information of such a study, and what specific questions should be addressed?

The Commission further seeks comment on any relevant developments in recent legal or social science literature on court-sponsored diversion and alternatives-to-incarceration programs.

2. The Commission invites general comment on whether the *Guidelines Manual* should be amended to address court-sponsored diversion and alternatives-to-incarceration programs. The Commission also seeks comment on whether it should consider amending the guidelines for such purposes during this amendment cycle, or whether it should first undertake further study of court-sponsored diversion and alternatives-to-incarceration programs. In either case, how should the Commission amend the *Guidelines Manual* to address court-sponsored diversion and alternatives-to-incarceration programs?

For example, should the Commission add to Chapter Five, Part K, Subpart 2 (Other Grounds for Departure) a new policy statement permitting a downward departure if the defendant successfully completed the necessary requirements of an alternative-to-incarceration court program? If so, what type of programs should be addressed by such departure provision? Should the Commission provide criteria for purposes of applying a departure provision related to alternative-to-incarceration court programs? If so, what criteria should the Commission use? For example, should such a downward departure only apply to defendants who successfully completed the necessary requirements of an alternative-to-incarceration court program? In the alternative, should the Commission allow the departure to apply also to defendants who productively participated in any such program without fulfilling all requirements because they were administratively discharged from the program due to reasons beyond the defendant’s control (e.g., health reasons, scheduling issues)?

## PROPOSED AMENDMENT:

## FAKE PILLS

**Synopsis of Proposed Amendment:** This proposed amendment is a result of the Commission’s consideration of miscellaneous guidelines application issues. *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022) (identifying as a priority “[c]onsideration of other miscellaneous issues, including possible amendments to (A) section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses) to address offenses involving misrepresentation or marketing of a controlled substance as another substance . . .”).

The proposed amendment responds to concerns expressed by the Drug Enforcement Administration (DEA) about the proliferation of “fake pills” (*i.e.*, illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills) containing fentanyl or fentanyl analogue.

According to the DEA, these fake pills resemble legitimately manufactured pharmaceutical pills (such as OxyContin, Xanax, and Adderall) but can result in sudden death or poisoning due to the unknown presence and quantities of dangerous substances, such as fentanyl and fentanyl analogues.

The DEA reported that it seized over 50.6 million fentanyl-laced, fake prescription pills in calendar year 2022. *See* Drug Enforcement Administration, Press Release: Drug Enforcement Administration Announces the Seizure of Over 379 million Deadly Doses of Fentanyl in 2022 (Dec. 20, 2022), <https://www.dea.gov/press-releases/2022/12/20/drug-enforcement-administration-announces-seizure-over-379-million-deadly>. DEA laboratory testing indicates that the number of fake pills laced with fentanyl have sharply increased in recent years and that six out of ten fentanyl-laced faked pills have been found to contain a potentially fatal dose of fentanyl. *See* Drug Enforcement Administration, Public Safety Alert: DEA Laboratory Testing Reveals that 6 out of 10 Fentanyl-Laced Fake Prescription Pills Now Contain a Potentially Lethal Dose of Fentanyl (2022), <https://www.dea.gov/alert/dea-laboratory-testing-reveals-6-out-10-fentanyl-laced-fake-prescription-pills-now-contain>.

According to the Centers for Disease Control and Prevention (CDC), overdose deaths from synthetic opioids containing fentanyl, including pills purporting to be legitimate pharmaceuticals, have sharply increased in recent years. *See* Christine L. Mattson et al., *Trends and Geographic Patterns in Drug and Synthetic Opioid Overdose Deaths — United States, 2013–2019*, 70 *Morb Mortal Wkly Rep* 6 (Feb. 12, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7006a4.htm>.

In order to address this issue, the DEA recommended that the Commission review the 4-level enhancement for knowingly distributing or marketing as another substance a mixture or substance containing fentanyl or fentanyl analogue as a different substance at subsection (b)(13) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking). Specifically, the DEA suggested that the Commission consider changing the *mens rea* requirement to expand the application of the enhancement to offenders who may not have known fentanyl or fentanyl analogue was in the substance but distributed or



marketed a substance without regard to whether such dangerous substances could have been present.

The proposed amendment would amend §2D1.1(b)(13) to add a new subparagraph with an alternative 2-level enhancement for cases where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug. The new provision would refer to 21 U.S.C. § 321(g)(1) for purposes of defining the term “drug.”

An issue for comment is provided.

**Proposed Amendment:**

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

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- (a) Base Offense Level (Apply the greatest):
- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
  - (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
  - (3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
  - (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
  - (5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under

subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the 4-level (“minimal participant”) reduction in §3B1.2(a), decrease to level **32**.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
- (2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by **2** levels.
- (3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
- (4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
- (5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.
- (6) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
- (7) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.

- (9) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.
- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.
- (13) If the defendant (A) knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by **4** levels; or (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug, increase by **[2]** levels. For purposes of subsection (b)(13)(B), the term “**drug**” has the meaning given that term in 21 U.S.C. § 321(g)(1).
- (14) (Apply the greatest):
- (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
- (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (C) If—
- (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

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

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

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

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

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

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

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

increase by **2** levels.

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

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

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

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

decrease by **2** levels.

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

[Subsection (c) (Drug Quantity Table) is set forth after subsection (e) (Special Instruction).]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's

knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

**(c) DRUG QUANTITY TABLE**

<b>CONTROLLED SUBSTANCES AND QUANTITY*</b>	<b>BASE OFFENSE LEVEL</b>
(1) <ul style="list-style-type: none"><li>● 90 KG or more of Heroin;</li><li>● 450 KG or more of Cocaine;</li><li>● 25.2 KG or more of Cocaine Base;</li><li>● 90 KG or more of PCP, or 9 KG or more of PCP (actual);</li><li>● 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of “Ice”;</li><li>● 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual);</li><li>● 900 G or more of LSD;</li><li>● 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);</li><li>● 9 KG or more of a Fentanyl Analogue;</li><li>● 90,000 KG or more of Marihuana;</li><li>● 18,000 KG or more of Hashish;</li><li>● 1,800 KG or more of Hashish Oil;</li><li>● 90,000,000 units or more of Ketamine;</li><li>● 90,000,000 units or more of Schedule I or II Depressants;</li><li>● 5,625,000 units or more of Flunitrazepam;</li><li>● 90,000 KG or more of <i>Converted Drug Weight</i>.</li></ul>	<b>Level 38</b>
(2) <ul style="list-style-type: none"><li>● At least 30 KG but less than 90 KG of Heroin;</li><li>● At least 150 KG but less than 450 KG of Cocaine;</li><li>● At least 8.4 KG but less than 25.2 KG of Cocaine Base;</li><li>● At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual);</li><li>● At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of “Ice”;</li><li>● At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);</li><li>● At least 300 G but less than 900 G of LSD;</li><li>● At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);</li><li>● At least 3 KG but less than 9 KG of a Fentanyl Analogue;</li><li>● At least 30,000 KG but less than 90,000 KG of Marihuana;</li><li>● At least 6,000 KG but less than 18,000 KG of Hashish;</li><li>● At least 600 KG but less than 1,800 KG of Hashish Oil;</li><li>● At least 30,000,000 units but less than 90,000,000 units of Ketamine;</li><li>● At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;</li><li>● At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam;</li><li>● At least 30,000 KG but less than 90,000 KG of <i>Converted Drug Weight</i>.</li></ul>	<b>Level 36</b>
(3) <ul style="list-style-type: none"><li>● At least 10 KG but less than 30 KG of Heroin;</li></ul>	<b>Level 34</b>

- At least 50 KG but less than 150 KG of Cocaine;
- At least 2.8 KG but less than 8.4 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or  
at least 1 KG but less than 3 KG of PCP (actual);
- At least 5 KG but less than 15 KG of Methamphetamine, or  
at least 500 G but less than 1.5 KG of Methamphetamine (actual), or  
at least 500 G but less than 1.5 KG of “Ice”;
- At least 5 KG but less than 15 KG of Amphetamine, or  
at least 500 G but less than 1.5 KG of Amphetamine (actual);
- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]  
Propanamide);
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam;
- At least 10,000 KG but less than 30,000 KG of **Converted Drug Weight**.

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

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

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

(6) **Level 28**

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

(7) **Level 26**

- At least 400 G but less than 700 G of Heroin;
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 112 G but less than 196 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of “Ice”;
- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;



- At least 25,000 but less than 43,750 units of Flunitrazepam;
- At least 400 KG but less than 700 KG of *Converted Drug Weight*.

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

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

- (10) **Level 20**
- At least 60 G but less than 80 G of Heroin;
  - At least 300 G but less than 400 G of Cocaine;
  - At least 16.8 G but less than 22.4 G of Cocaine Base;
  - At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
  - At least 30 G but less than 40 G of Methamphetamine, or

- at least 3 G but less than 4 G of Methamphetamine (actual), or  
at least 3 G but less than 4 G of “Ice”;
- At least 30 G but less than 40 G of Amphetamine, or  
at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD;
- At least 24 G but less than 32 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]  
Propanamide);
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- 60,000 units or more of Schedule III substances (except Ketamine);
- At least 3,750 but less than 5,000 units of Flunitrazepam;
- At least 60 KG but less than 80 KG of **Converted Drug Weight**.

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

- (12) **Level 16**
- At least 20 G but less than 40 G of Heroin;
  - At least 100 G but less than 200 G of Cocaine;
  - At least 5.6 G but less than 11.2 G of Cocaine Base;
  - At least 20 G but less than 40 G of PCP, or  
at least 2 G but less than 4 G of PCP (actual);
  - At least 10 G but less than 20 G of Methamphetamine, or  
at least 1 G but less than 2 G of Methamphetamine (actual), or  
at least 1 G but less than 2 G of “Ice”;
  - At least 10 G but less than 20 G of Amphetamine, or  
at least 1 G but less than 2 G of Amphetamine (actual);
  - At least 200 MG but less than 400 MG of LSD;
  - At least 8 G but less than 16 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]  
Propanamide);

- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
- At least 1,250 but less than 2,500 units of Flunitrazepam;
- At least 20 KG but less than 40 KG of *Converted Drug Weight*.

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

- (14) **Level 12**
- Less than 10 G of Heroin;
  - Less than 50 G of Cocaine;
  - Less than 2.8 G of Cocaine Base;
  - Less than 10 G of PCP, or  
less than 1 G of PCP (actual);
  - Less than 5 G of Methamphetamine, or  
less than 500 MG of Methamphetamine (actual), or  
less than 500 MG of “Ice”;
  - Less than 5 G of Amphetamine, or  
less than 500 MG of Amphetamine (actual);
  - Less than 100 MG of LSD;
  - Less than 4 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
  - Less than 1 G of a Fentanyl Analogue;
  - At least 5 KG but less than 10 KG of Marihuana;
  - At least 1 KG but less than 2 KG of Hashish;
  - At least 100 G but less than 200 G of Hashish Oil;
  - At least 5,000 but less than 10,000 units of Ketamine;
  - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
  - At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);
  - At least 312 but less than 625 units of Flunitrazepam;

- 80,000 units or more of Schedule IV substances (except Flunitrazepam);
- At least 5 KG but less than 10 KG of **Converted Drug Weight**.

- (15) ● At least 2.5 KG but less than 5 KG of Marihuana; **Level 10**
- At least 500 G but less than 1 KG of Hashish;
  - At least 50 G but less than 100 G of Hashish Oil;
  - At least 2,500 but less than 5,000 units of Ketamine;
  - At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
  - At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine);
  - At least 156 but less than 312 units of Flunitrazepam;
  - At least 40,000 but less than 80,000 units of Schedule IV substances (except Flunitrazepam);
  - At least 2.5 KG but less than 5 KG of **Converted Drug Weight**.

- (16) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 8**
- At least 200 G but less than 500 G of Hashish;
  - At least 20 G but less than 50 G of Hashish Oil;
  - At least 1,000 but less than 2,500 units of Ketamine;
  - At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
  - At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine);
  - Less than 156 units of Flunitrazepam;
  - At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam);
  - 160,000 units or more of Schedule V substances;
  - At least 1 KG but less than 2.5 KG of **Converted Drug Weight**.

- (17) ● Less than 1 KG of Marihuana; **Level 6**
- Less than 200 G of Hashish;
  - Less than 20 G of Hashish Oil;
  - Less than 1,000 units of Ketamine;
  - Less than 1,000 units of Schedule I or II Depressants;
  - Less than 1,000 units of Schedule III substances (except Ketamine);
  - Less than 16,000 units of Schedule IV substances (except Flunitrazepam);
  - Less than 160,000 units of Schedule V substances;
  - Less than 1 KG of **Converted Drug Weight**.

**\*Notes to Drug Quantity Table:**

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.
- (B) The terms “**PCP (actual)**”, “**Amphetamine (actual)**”, and “**Methamphetamine (actual)**” refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level

determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The terms “**Hydrocodone (actual)**” and “**Oxycodone (actual)**” refer to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

- (C) “**Ice**,” for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) “**Cocaine base**,” for the purposes of this guideline, means “crack.” “**Crack**” is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marijuana plants, treat each plant, regardless of sex, as equivalent to 100 grams of marijuana. *Provided*, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one “**unit**” means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one “**unit**” means 0.5 milliliters. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.*, patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 milligrams of an anabolic steroid is one “unit”.
- (G) In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 milligrams of LSD for the purposes of the Drug Quantity Table.
- (H) **Hashish**, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabidiol, cannabichromene, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) **Hashish oil**, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (*e.g.*, plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

- (J) ***Fentanyl analogue***, for the purposes of this guideline, means any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).
- (K) The term “***Converted Drug Weight***,” for purposes of this guideline, refers to a nominal reference designation that is used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.

\* \* \*

### Issue for Comment

1. The proposed amendment would amend subsection (b)(13) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking)) to add an alternative 2-level enhancement applicable if the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug. The Commission seeks comment on whether the proposed alternative enhancement at §2D1.1(b)(13)(B) is appropriate to address the concerns raised by the Drug Enforcement Agency. If not, is there an alternative approach that the Commission should consider? Should the Commission expand the scope of §2D1.1(b)(13)(B) to include other synthetic opioids? If so, what other synthetic opioids should be included?

The Commission also seeks comment on whether the *mens rea* requirement proposed for §2D1.1(b)(13)(B) is appropriate. Should the Commission provide a different *mens rea* requirement for the new provision? If so, what *mens rea* requirement should the Commission provide? Should the Commission instead make §2D1.1(b)(13)(B) an offense-based enhancement as opposed to exclusively defendant-based?

## PROPOSED AMENDMENT:

## MISCELLANEOUS

**Synopsis of Proposed Amendment:** This proposed amendment is a result of the Commission’s consideration of miscellaneous guidelines application issues. *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 87 FR 67756 (Nov. 9, 2022) (identifying as a priority “[c]onsideration of other miscellaneous issues, including possible amendments to . . . (B) section 3D1.2 (Grouping of Closely Related Counts) to address the interaction between section 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) and section 3D1.2(d); and (C) section 5F1.7 (Shock Incarceration Program (Policy Statement)) to reflect that the Bureau of Prisons no longer operates a shock incarceration program.”). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

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

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

## **(A) Grouping of Offenses Covered by §2G1.3**

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

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

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

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

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

### **Proposed Amendment:**

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#### **§3D1.2. Groups of Closely Related Counts**

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



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

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

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

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Specifically excluded from the operation of this subsection are:

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

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

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

\* \* \*

## **(B) Policy Statement on Shock Incarceration Programs**

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

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

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

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

### **Proposed Amendment:**

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

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

#### **Commentary**

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

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

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

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

\* \* \*

## PROPOSED AMENDMENT:

## TECHNICAL

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

**Part A** of the proposed amendment makes technical changes to provide updated references to certain sections in the United States Code that were redesignated in legislation. The Frank LoBiondo Coast Guard Authorization Act of 2018, Pub. L. 115–282 (Dec. 4, 2018) (hereinafter “the Act”), among other things, established a new chapter 700 (Ports and Waterway Safety) in subtitle VII (Security and Drug Enforcement) of title 46 (Shipping) of the United States Code. Section 401 of the Act repealed the Ports and Waterways Safety Act of 1972, previously codified in 33 U.S.C. § 1221–1232b, and restated its provisions with some revisions in the new chapter 700 of title 46, specifically at 46 U.S.C. §§ 70001–70036. Appendix A (Statutory Index) includes references to Chapter Two guidelines for both former 33 U.S.C. §§ 1227(b) and 1232(b). Specifically, former section 1227(b) is referenced to §§2J1.1 (Contempt) and 2J1.5 (Failure to Appear by Defendant), while former section 1232(b) is referenced to §2A2.4 (Obstructing or Impeding Officers). Part A of the proposed amendment amends Appendix A to delete the references to 33 U.S.C. §§ 1227(b) and 1232(b) and replace them with updated references to 46 U.S.C. § 70035(b) and 70036(b). The Act did not make substantive revisions to either of these provisions.

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

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

title of the “Drug Equivalency Tables” to “Drug Conversion Tables.” *See* USSG App. C, amend. 808 (effective Nov. 1, 2018).

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

**Part E** of the proposed amendment makes technical changes to the commentary of several guidelines in Chapter Eight (Sentencing of Organizations). First, the proposed amendment replaces the term “prior criminal adjudication,” as found and defined in Application Note 3(G) of §8A1.2 (Application Instructions — Organizations), with “criminal adjudication” to better reflect how that term is used throughout Chapter Eight. In addition, the proposed amendment makes conforming changes to the Commentary to §8C2.5 (Culpability Score) to account for the new term. Part E of the proposed amendment also makes changes to the Commentary to §8C3.2 (Payment of the Fine — Organizations). Section 207 of the Mandatory Victims Restitution Act of 1996, Pub. L. 104–132 (Apr. 24, 1996), amended 18 U.S.C. § 3572(d) to eliminate the requirement that if the court permits something other than the immediate payment of a fine or other monetary payment, the period for payment shall not exceed five years. Part E of the proposed amendment would revise Application Note 1 of §8C3.2 to reflect the current language of 18 U.S.C. § 3572(d) by providing that if the court permits other than immediate payment of a fine or other monetary payment, the period provided for payment shall be the shortest time in which full payment can reasonably be made.

**Part F** of the proposed amendment makes clerical changes to correct typographical errors in: §1B1.1 (Application Instructions); §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)); §1B1.4 (Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)); §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)); §2D2.3 (Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs); §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); §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information); §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition); §2M1.1 (Treason); §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents); the Introductory Commentary to Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes); the Introductory Commentary to Chapter Two, Part T, Subpart 3 (Customs Taxes); the Introductory Commentary to Chapter Three, Part A (Victim-Related Adjustments); §3A1.1 (Hate Crime Motivation or Vulnerable Victim); the Introductory Commentary to Chapter Three, Part B (Role in the Offense); §3C1.1 (Obstructing or Impeding the Administration of Justice); the Introductory Commentary to Chapter Three, Part D (Multiple Counts); §3D1.1 (Procedure for Determining Offense Level on Multiple Counts); §3D1.2 (Groups of Closely Related Counts); §3D1.3 (Offense Level Applicable to Each Group of Closely Related Counts); §3D1.4 (Determining the Combined Offense Level); §4A1.3 (Departures Based on Inadequacy of

Criminal History Category (Policy Statement)); §4B1.1 (Career Offender); §5C1.1 (Imposition of a Term of Imprisonment); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); the Introductory Commentary to Chapter Five, Part H (Specific Offender Characteristics); the Introductory Commentary to Chapter Six, Part A (Sentencing Procedures); Chapter Seven, Part A (Introduction to Chapter Seven); §8B1.1 (Restitution — Organizations); §8B2.1 (Effective Compliance and Ethics Program); §8C3.3 (Reduction of Fine Based on Inability to Pay); and §8E1.1 (Special Assessments — Organizations).

**Part G** of the proposed amendments also makes clerical changes to the Commentary to §§1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)) and 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment), to update the citation of Supreme Court cases. In addition, Part G of the proposed amendment amends (1) the Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to add a missing reference to 18 U.S.C. § 844(o); (2) the Commentary to §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), to delete the definitions of two terms that are not currently used in the guideline; (3) the Commentary to §§2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose) and 2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), to correct references to the Code of Federal Regulations; and (4) the Commentary to §3A1.2 (Official Victim), to add missing content in Application Note 3.

**Proposed Amendment:**

**(A) Frank LoBiondo Coast Guard Authorization Act of 2018**

**APPENDIX A**

**STATUTORY INDEX**

\* \* \*

~~33 U.S.C. § 1227(b)~~ ————— ~~2J1.1, 2J1.5~~

~~33 U.S.C. § 1232(b)(2)~~ ————— ~~2A2.4~~

\* \* \*

46 U.S.C. App. § 1903(j) 2D1.1

46 U.S.C. § 70035(b) 2J1.1, 2J1.5

46 U.S.C. § 70036(b) 2A2.4

47 U.S.C. § 223(a)(1)(C) 2A6.1

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(B) Reclassification of Sections of United States Code

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

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**Commentary**

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

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

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**Commentary**

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

**Application Notes:**

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3. In addition to the provisions for imprisonment, ~~50 U.S.C. App. § 2410~~ 50 U.S.C. § 4610 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is \$250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or \$1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.
4. For purposes of subsection (a)(1)(B), “*a country supporting international terrorism*” means a country designated under section 6(j) of the Export Administration Act (~~50 U.S.C. App. 2405~~ 50 U.S.C. § 4605).

\* \* \*

**APPENDIX A**

**STATUTORY INDEX**

\* \* \*

22 U.S.C. § 8512

2M5.1, 2M5.2, 2M5.3

25 U.S.C. <del>§ 450a</del> § 5306	2B1.1
26 U.S.C. § 5148(1)	2T2.1
	* * *
50 U.S.C. § 3121	2M3.9
<del>50 U.S.C. App. § 462</del> 50 U.S.C. § 3811	2M4.1
<del>50 U.S.C. App. § 527(e)</del> 50 U.S.C. § 3937(e)	2X5.2
<del>50 U.S.C. App. § 2410</del> 50 U.S.C. § 4610	2M5.1
52 U.S.C. § 10307(c)	2H2.1
	* * *

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

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

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\* \* \*

**Commentary**

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**Application Notes:**

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

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

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

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

\* \* \*

**(D) Drug Conversion Tables.—**

SCHEDULE I OR II OPIATES*	CONVERTED DRUG WEIGHT
1 gm of Heroin =	1 kg
1 gm of Dextromoramide =	670 gm
1 gm of Dipipanone =	250 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	700 gm
1 gm of Alphaprodine =	100 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg
1 gm of a Fentanyl Analogue =	10 kg
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg

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

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

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

1 gm of Aminorex =	100 gm
1 gm of Amphetamine =	2 kg
1 gm of Amphetamine (actual) =	20 kg
1 gm of Cocaine =	200 gm
1 gm of Cocaine Base (“Crack”) =	3,571 gm
1 gm of Fenethylamine =	40 gm
1 gm of “Ice” =	20 kg
1 gm of Khat =	.01 gm
1 gm of Methamphetamine =	2 kg
1 gm of Methamphetamine (actual) =	20 kg
1 gm of Methylphenidate (Ritalin) =	100 gm
1 gm of N-Benzylpiperazine =	100 gm
1 gm of N-Ethylamphetamine =	80 gm
1 gm of N-N-Dimethylamphetamine =	40 gm
1 gm of Phenmetrazine =	80 gm
1 gm of Phenylacetone (P <sub>2</sub> P) (when possessed for the purpose of manufacturing methamphetamine) =	416 gm
1 gm of Phenylacetone (P <sub>2</sub> P) (in any other case) =	75 gm

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

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

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

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

1 gm of Bufotenine =	70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide (LSD) =	100 kg
1 gm of Diethyltryptamine (DET) =	80 gm
1 gm of Dimethyltryptamine (DM) =	100 gm
1 gm of Mescaline =	10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (dry) =	1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (wet) =	0.1 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg
1 gm of Paramethoxymethamphetamine (PMA) =	500 gm
1 gm of Peyote (dry) =	0.5 gm
1 gm of Peyote (wet) =	0.05 gm
1 gm of Phencyclidine (PCP) =	1 kg
1 gm of Phencyclidine (PCP) (actual) =	10 kg
1 gm of Psilocin =	500 gm
1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine (PHP) =	1 kg
1 gm of Thiophene Analog of Phencyclidine (TCP) =	1 kg

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

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

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

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

“**Synthetic eCannabinoid,**” for purposes of this guideline, means any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB<sub>1</sub> receptors).

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

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

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

GAMMA-HYDROXYBUTYRIC ACID	CONVERTED DRUG WEIGHT
1 ml of Gamma-hydroxybutyric Acid =	8.8 gm

SCHEDULE III SUBSTANCES (EXCEPT <del>K</del> KETAMINE)***	CONVERTED DRUG WEIGHT
1 unit of a Schedule III Substance =	1 gm

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

KETAMINE	CONVERTED DRUG WEIGHT
1 unit of <del>k</del> Ketamine =	1 gm

SCHEDULE IV SUBSTANCES (EXCEPT <del>F</del> FLUNITRAZEPAM)****	CONVERTED DRUG WEIGHT
1 unit of a Schedule IV Substance (except Flunitrazepam) =	0.0625 gm

\*\*\*\**Provided*, that the combined converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of converted drug weight.

SCHEDULE V SUBSTANCES*****	CONVERTED DRUG WEIGHT
1 unit of a Schedule V Substance =	0.00625 gm

\*\*\*\*\**Provided*, that the combined converted weight of Schedule V substances shall not exceed 2.49 kilograms of converted drug weight.

LIST I CHEMICALS (RELATING TO THE MANUFACTURE OF <del>A</del> AMPHETAMINE OR <del>M</del> METHAMPHETAMINE)*****	CONVERTED DRUG WEIGHT
1 gm of Ephedrine =	10 kg
1 gm of Phenylpropanolamine =	10 kg
1 gm of Pseudoephedrine =	10 kg

\*\*\*\*\**Provided*, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

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

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

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

1 gm = 1,000 mg  
1 grain = 64.8 mg.

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

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

HALLUCINOGENS	
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*	3 mg
MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP*	5 mg
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg
<del>2,5-Dimethoxy 4 methylamphetamine (STP, DOM)*</del>	<del>3 mg</del>
MARIHUANA	
1 marihuana cigarette	0.5 gm
STIMULANTS	
Amphetamine*	10 mg
Methamphetamine*	5 mg
Phenmetrazine (Preludin)*	75 mg

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

\* \* \*

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

\* \* \*



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

\* \* \*

Subsection (b)(14)(A) implements the instruction to the Commission in section 303 of Public Law ~~103~~<sup>104</sup>-237.

\* \* \*

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

(D) References to 18 U.S.C. § 876

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**§2A4.2. Demanding or Receiving Ransom Money**

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\* \* \*

**Commentary**

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

\* \* \*

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

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\* \* \*

**Commentary**

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

\* \* \*

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

---

\* \* \*

**Commentary**

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

\* \* \*

**APPENDIX A**

**STATUTORY INDEX**

\* \* \*

18 U.S.C. § 875(a)	2A4.2, 2B3.2
18 U.S.C. § 875(b)	2B3.2
18 U.S.C. § 875(c)	2A6.1

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

\* \* \*

## (E) Technical Changes to Commentary in Chapter Eight

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### §8A1.2. Application Instructions – Organizations

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\* \* \*

#### Commentary

##### Application Notes:

3. The following are definitions of terms used frequently in this chapter:

- (G) “~~Prior criminal~~**Criminal** adjudication” means conviction by trial, plea of guilty (including an *Alford* plea), or plea of *nolo contendere*.

\* \* \*

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### §8C2.5. Culpability Score

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\* \* \*

#### Commentary

##### Application Notes:

1. **Definitions.**—For purposes of this guideline, “*condoned*”, “~~prior criminal~~ *adjudication*”, “*similar misconduct*”, “*substantial authority personnel*”, and “*willfully ignorant of the offense*” have the meaning given those terms in Application Note 3 of the Commentary to §8A1.2 (Application Instructions – Organizations).

\* \* \*

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### §8C3.2. Payment of the Fine – Organizations

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\* \* \*

#### Commentary

##### Application Note:

1. When the court permits other than immediate payment, the period provided for payment ~~shall in no event exceed five years~~ shall be the shortest time in which full payment can reasonably be made. 18 U.S.C. § 3572(d).

\* \* \*

## (F) Clerical Changes to Correct Typographical Errors

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### §1B1.1. Application Instructions

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\* \* \*

#### Commentary

##### Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

\* \* \*

- (E) “*Dangerous weapon*” means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (*e.g., e.g.*, a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

\* \* \*

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

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\* \* \*

#### Commentary

\* \* \*

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

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by §1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those ~~Chapters~~ **chapters** are explicit as to the specific factors to be considered.

\* \* \*

---

**§1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)**

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\* \* \*

**Commentary**

**Background:** This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing a sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for an upward departure. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.*, Chapter Five, Part H (Specific Offender Characteristics).

\* \* \*

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

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**Commentary**

\* \* \*

**Background:** Section 3582(c)(2) of Title 18, United States Code, provides: “[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”

\* \* \*

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

---

\* \* \*

**Commentary**

\* \* \*

**Background:** This section implements the direction to the Commission in Section 6482 of the Anti-Drug Abuse Act of 1988. Offenses covered by this guideline may vary widely with regard to harm and risk of harm. The offense levels assume that the offense involved the operation of a common carrier carrying a number of passengers, e.g., a bus. If no or only a few passengers were placed at risk, a downward departure may be warranted. If the offense resulted in the death or serious bodily injury of a large number of persons, such that the resulting offense level under subsection (b) would not adequately reflect the seriousness of the offense, an upward departure may be warranted.

\* \* \*

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**§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**

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\* \* \*

(b) Specific Offense Characteristics

\* \* \*

- (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 in 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.

\* \* \*

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

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\* \* \*

**Commentary**

\* \* \*

**Application Notes:**

\* \* \*

5. **Upward Departure.**—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:

\* \* \*

- (B) The offense caused or risked substantial non-monetary harm (~~e.g.~~ **e.g.**, physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.

\* \* \*

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

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\* \* \*

**Commentary**

\* \* \*

**Application Notes:**

\* \* \*

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).

\* \* \*

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**§2M1.1. Treason**

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\* \* \*

**Commentary**

\* \* \*



**Background:** Treason is a rarely prosecuted offense that could encompass a relatively broad range of conduct, including many of the more specific offenses in this Partpart. The guideline contemplates imposition of the maximum penalty in the most serious cases, with reference made to the most analogous offense guideline in lesser cases.

\* \* \*

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**§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents**

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\* \* \*

**Commentary**

\* \* \*

**Application Notes:**

\* \* \*

7. **Aggregation of Individual and Corporate Tax Loss.**—If the offense involved both individual and corporate tax returns, the tax loss is the aggregate tax loss from the individual tax offense and the corporate tax offense added together. Accordingly, in a case in which a defendant fails to report income derived from a corporation on both the defendant’s individual tax return and the defendant’s corporate tax return, the tax loss is the sum of (A) the unreported or diverted amount multiplied by (i) 28%; or (ii) the tax rate for the individual tax offense, if sufficient information is available to make a more accurate assessment of that tax rate; and (B) the unreported or diverted amount multiplied by (i) 34%; or (ii) the tax rate for the corporate tax offense, if sufficient information is available to make a more accurate assessment of that tax rate. For example, the defendant, the sole owner of a Subchaptersubchapter C corporation, fraudulently understates the corporation’s income in the amount of \$100,000 on the corporation’s tax return, diverts the funds to the defendant’s own use, and does not report these funds on the defendant’s individual tax return. For purposes of this example, assume the use of 34% with respect to the corporate tax loss and the use of 28% with respect to the individual tax loss. The tax loss attributable to the defendant’s corporate tax return is \$34,000 (\$100,000 multiplied by 34%). The tax loss attributable to the defendant’s individual tax return is \$28,000 (\$100,000 multiplied by 28%). The tax loss for the offenses are added together to equal \$62,000 (\$34,000 + \$28,000).

\* \* \*

**Background:** This guideline relies most heavily on the amount of loss that was the object of the offense. Tax offenses, in and of themselves, are serious offenses; however, a greater tax loss is obviously more harmful to the treasuryTreasury and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from the offense increases, the sanction necessary to deter also increases.

\* \* \*

**PART T — OFFENSES INVOLVING TAXATION**

\* \* \*

## 2. ALCOHOL AND TOBACCO TAXES

### Introductory Commentary

This subpart deals with offenses contained in Parts parts I–IV of Subchapter subchapter J of Chapter 51 of Subtitle subtitle E of Title title 26, United States Code, chiefly 26 U.S.C. §§ 5601–5605, 5607, 5608, 5661, 5671, 5691, and 5762, where the essence of the conduct is tax evasion or a regulatory violation. No effort has been made to provide a section-by-section set of guidelines. Rather, the conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.

\* \* \*

## 3. CUSTOMS TAXES

### Introductory Commentary

This Subpart subpart deals with violations of 18 U.S.C. §§ 496, 541–545, 547, 548, 550, 551, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b), and 3907, and is designed to address violations involving revenue collection or trade regulation. It is intended to deal with some types of contraband, such as certain uncertified diamonds, but is not intended to deal with the importation of other types of contraband, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, the importation of which is prohibited or restricted for non-economic reasons. Other, more specific criminal statutes apply to most of these offenses. Importation of contraband or stolen goods not specifically covered by this Subpart subpart would be a reason for referring to another, more specific guideline, if applicable, or for departing upward if there is not another more specific applicable guideline.

\* \* \*

# CHAPTER THREE

# ADJUSTMENTS

## PART A — VICTIM-RELATED ADJUSTMENTS

### Introductory Commentary

The following adjustments are included in this Part part because they may apply to a wide variety of offenses.

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### §3A1.1. Hate Crime Motivation or Vulnerable Victim

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\* \* \*

### Commentary

\* \* \*

**Background:** Subsection (a) reflects the directive to the Commission, contained in ~~Section~~ **section** 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation. To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines are hate crimes. In section 4703(a) of Public Law 111–84, Congress broadened the scope of that directive to include gender identity; to reflect that congressional action, the Commission has broadened the scope of this enhancement to include gender identity.

\* \* \*

## PART B — ROLE IN THE OFFENSE

### Introductory Commentary

This ~~Part~~ **part** provides adjustments to the offense level based upon the role the defendant played in committing the offense. The determination of a defendant’s role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), *i.e.*, all conduct included under §1B1.3(a)(1)–(4), and not solely on the basis of elements and acts cited in the count of conviction.

\* \* \*

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

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\* \* \*

#### Commentary

#### Application Notes:

\* \* \*

4. **Examples of Covered Conduct.**—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:

\* \* \*

- (I) other conduct prohibited by obstruction of justice provisions under ~~Title~~ **title** 18, United States Code (*e.g.*, 18 U.S.C. §§ 1510, 1511);

\* \* \*

## PART D — MULTIPLE COUNTS

### Introductory Commentary

This ~~Part~~ **part** provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. These rules apply to multiple counts of conviction (A) contained in the same indictment or information; or (B) contained in different indictments or

informations for which sentences are to be imposed at the same time or in a consolidated proceeding. The single, “combined” offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.

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

\* \* \*

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

\* \* \*

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

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

\* \* \*

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

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\* \* \*

#### **Commentary**

#### **Application Notes:**

\* \* \*

2. Subsection (b)(1) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.*, 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However,

a count covered by subsection (b)(1) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory minimum five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. *See* §5G1.2(a).

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

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

\* \* \*

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### §3D1.2. Groups of Closely Related Counts

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\* \* \*

#### Commentary

##### Application Notes:

\* \* \*

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

\* \* \*

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

resolving ambiguities, the court should look to the underlying policy of this Partpart as stated in the Introductory Commentary.

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

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\* \* \*

#### Commentary

\* \* \*

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

\* \* \*

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### §3D1.4. Determining the Combined Offense Level

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\* \* \*

#### Commentary

\* \* \*

**Background:** When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17. Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units.

In unusual circumstances, the approach adopted in this section could produce adjustments for the additional counts that are inadequate or excessive. If there are several groups and the most serious offense is considerably more serious than all of the others, there will be no increase in the offense level resulting from the additional counts. Ordinarily, the court will have latitude to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines. Conversely, it is possible that if there are several minor offenses that are not grouped together, application of the rules in this Partpart could result in an excessive increase in the sentence range. Again, such situations should be infrequent and can be handled through departure. An alternative method for ensuring more precise adjustments would have been to determine the appropriate offense

level adjustment through a more complicated mathematical formula; that approach was not adopted because of its complexity.

\* \* \*

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### §4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

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\* \* \*

#### Commentary

#### Application Notes:

\* \* \*

#### 2. Upward Departures.—

\* \* \*

- (C) **Upward Departures Based on Tribal Court Convictions.**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

\* \* \*

- (v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this ~~Chapter~~ **chapter**.

\* \* \*

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### §4B1.1. Career Offender

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\* \* \*

#### Commentary

\* \* \*

**Background:** Section 994(h) of ~~Title~~ **title** 28, United States Code, mandates that the Commission assure that certain “career” offenders receive a sentence of imprisonment “at or near the maximum term authorized.” Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)–(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . .” 28 U.S.C. § 991(b)(1)(B). The Commission’s refinement of this definition over time is consistent with Congress’s choice of a directive to the Commission rather than a mandatory minimum sentencing statute (“The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee’s view that

substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.” S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

\* \* \*

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### §5C1.1. Imposition of a Term of Imprisonment

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\* \* \*

#### Commentary

#### Application Notes:

1. Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapterchapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33–41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.

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### §5E1.1. Restitution

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\* \* \*

#### Commentary

#### Application Note:

1. The court shall not order community restitution under subsection (d) if it appears likely that such an award would interfere with a forfeiture under Chapterchapter 46 or 96 of Titletitle 18, United States Code, or under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*). See 18 U.S.C. § 3663(c)(4).

Furthermore, a penalty assessment under 18 U.S.C. § 3013 or a fine under Subchaptersubchapter C of Chapterchapter 227 of Titletitle 18, United States Code, shall take precedence over an order of community restitution under subsection (d). See 18 U.S.C. § 3663(c)(5).

**Background:** Section 3553(a)(7) of Titletitle 18, United States Code, requires the court, “in determining the particular sentence to be imposed,” to consider “the need to provide restitution to any victims of the offense.” Orders of restitution are authorized under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327, 3663, and 3663A, and 21 U.S.C. § 853(q). For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation or supervised release.

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### §5E1.3. Special Assessments

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## Commentary

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**Background:** Section 3013 of Title 18, United States Code, added by the Victims of Crimes Act of 1984, Pub. L. No. 98–473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.

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### §5E1.4. Forfeiture

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\* \* \*

## Commentary

**Background:** Forfeiture provisions exist in various statutes. For example, 18 U.S.C. § 3554 requires the court imposing a sentence under 18 U.S.C. § 1962 (proscribing the use of the proceeds of racketeering activities in the operation of an enterprise engaged in interstate commerce) or Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (proscribing the manufacture and distribution of controlled substances) to order the forfeiture of property in accordance with 18 U.S.C. § 1963 and 21 U.S.C. § 853, respectively. Those provisions require the automatic forfeiture of certain property upon conviction of their respective underlying offenses.

\* \* \*

## PART H — SPECIFIC OFFENDER CHARACTERISTICS

### Introductory Commentary

This Part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the “Act”) contains several provisions regarding specific offender characteristics:

\* \* \*

Accordingly, the purpose of this Part is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help “secure nationwide consistency,” *see Gall v. United States*, 552 U.S. 38, 49 (2007), “avoid unwarranted sentencing disparities,” *see* 28 U.S.C. § 991(b)(1)(B), 18 U.S.C. § 3553(a)(6), “provide certainty and fairness,” *see* 28 U.S.C. § 991(b)(1)(B), and “promote respect for the law,” *see* 18 U.S.C. § 3553(a)(2)(A).

This Part allocates specific offender characteristics into three general categories.

\* \* \*

## CHAPTER SIX

### SENTENCING PROCEDURES, PLEA AGREEMENTS, AND CRIME VICTIMS' RIGHTS

\* \* \*

#### PART A — SENTENCING PROCEDURES

##### Introductory Commentary

This Part addresses sentencing procedures that are applicable in all cases, including those in which guilty or *nolo contendere* pleas are entered with or without a plea agreement between the parties, and convictions based upon judicial findings or verdicts. It sets forth the procedures for establishing the facts upon which the sentence will be based. Reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing.

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## CHAPTER SEVEN

### VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

#### PART A — INTRODUCTION TO CHAPTER SEVEN

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#### 3. Resolution of Major Issues

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##### (b) Choice Between Theories.

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Further, the sanctions available to the courts upon revocation are, in many cases, more significantly restrained by statute. Specifically, the term of imprisonment that may be imposed upon revocation of supervised release is limited by statute to not more than five years for persons convicted of Class A felonies, except for certain Title 21 drug offenses; not more than three years for Class B felonies; not more than two years for Class C or D felonies; and not more than one year for Class E felonies. 18 U.S.C. § 3583(e)(3).

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### §8B1.1. Restitution – Organizations

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\* \* \*

#### Commentary

**Background:** Section 3553(a)(7) of Title 18, United States Code, requires the court, “in determining the particular sentence to be imposed,” to consider “the need to provide restitution to any victims of the offense.” Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation.

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### §8B2.1. Effective Compliance and Ethics Program

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\* \* \*

#### Commentary

##### Application Notes:

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

\* \* \*

“**Governing authority**” means ~~the~~ (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

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### §8C3.3. Reduction of Fine Based on Inability to Pay

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- (a) The court shall reduce the fine below that otherwise required by §8C1.1 (Determining the Fine – Criminal Purpose Organizations), or §8C2.7 (Guideline Fine Range – Organizations) and §8C2.9 (Disgorgement), to the extent that imposition of such fine would impair its ability ~~its ability~~ the ability of the organization to make restitution to victims.

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### §8E1.1. Special Assessments – Organizations

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\* \* \*

#### Commentary

\* \* \*

**Background:** Section 3013 of ~~Title~~ **title** 18, United States Code, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.

(G) Additional Clerical Changes to Guideline Commentary

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

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**Commentary**

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

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

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\* \* \*

**Commentary**

**Statutory Provisions:** 18 U.S.C. §§ 844(h), (o), 924(c), 929(a).

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**§2M5.3. Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose**

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\* \* \*

**Commentary**

\* \* \*

**Application Notes:**

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

\* \* \*

“*Specially designated global terrorist*” has the meaning given that term in 31 C.F.R. § ~~594.513~~594.310.

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**§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**

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- (a) Base Offense Level (Apply the Greatest):
- (1) **42**, if the offense was committed with intent (A) to injure the United States; or (B) to aid a foreign nation or a foreign terrorist organization;
  - (2) **28**, if subsections (a)(1), (a)(3), and (a)(4) do not apply;
  - (3) **22**, if the defendant is convicted under 18 U.S.C. § 175b; or
  - (4) **20**, if (A) the defendant is convicted under 18 U.S.C. § 175(b); or (B) the offense (i) involved a threat to use a nuclear weapon, nuclear material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (ii) did not involve any conduct evidencing an intent or ability to carry out the threat.
- (b) Specific Offense Characteristics
- (1) If (A) subsection (a)(2) or (a)(4)(A) applies; and (B) the offense involved a threat to use, or otherwise involved (i) a select biological agent; (ii) a listed precursor or a listed toxic chemical; (iii) nuclear material or nuclear byproduct material; or (iv) a weapon of mass destruction that contains any agent, precursor, toxic chemical, or material referred to in subdivision (i), (ii), or (iii), increase by **2** levels.
  - (2) If (A) subsection (a)(2), (a)(3), or (a)(4)(A) applies; and (B)(i) any victim died or sustained permanent or life-threatening bodily injury, increase by **4** levels; (ii) any victim sustained serious bodily injury, increase by **2** levels; or (iii) the degree of injury is between that specified in subdivisions (i) and (ii), increase by **3** levels.
  - (3) If (A) subsection (a)(2), (a)(3), or (a)(4) applies; and (B) the offense resulted in (i) substantial disruption of public, governmental, or business functions or services; or (ii) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by **4** levels.

(c) Cross References

- (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.
- (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction

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

**Commentary**

**Statutory Provisions:** 18 U.S.C. §§ 175, 175b, 175c, 229, 831, 832, 842(p)(2) (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)), 1992(a)(2), (a)(3), (a)(4), (b)(2), 2283, 2291, 2332h; 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).

**Application Notes:**

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

“**Biological agent**” has the meaning given that term in 18 U.S.C. § 178(1).

“**Chemical weapon**” has the meaning given that term in 18 U.S.C. § 229F(1).

“**Foreign terrorist organization**” (A) means an organization that engages in terrorist activity that threatens the security of a national of the United States or the national security of the United States; and (B) includes an organization designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. § 1189). “National of the United States” has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(22)).

“**Listed precursor or a listed toxic chemical**” means a precursor or a toxic chemical, respectively, listed in Schedule I of the Annex on Chemicals to the Chemical Weapons Convention. See 18 U.S.C. § 229F(6)(B), (8)(B). “Precursor” has the meaning given that term in 18 U.S.C. § 229F(6)(A). “Toxic chemical” has the meaning given that term in 18 U.S.C. § 229F(8)(A).

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

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

~~“*Restricted person*” has the meaning given that term in 18 U.S.C. § 175b(d)(2).~~

“*Select biological agent*” means a biological agent or toxin identified (A) by the Secretary of Health and Human Services on the select agent list established and maintained pursuant to section 351A of the Public Health Service Act (42 U.S.C. § 262a); or (B) by the Secretary of Agriculture on the list established and maintained pursuant to section 212 of the Agricultural Bioterrorism Protection Act of 2002 (7 U.S.C. § 8401).

“*Toxin*” has the meaning given that term in 18 U.S.C. § 178(2).

~~“*Vector*” has the meaning given that term in 18 U.S.C. § 178(4).~~

“*Weapon of mass destruction*” has the meaning given that term in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D).

2. **Threat Cases.**—Subsection (a)(4)(B) applies in cases that involved a threat to use a weapon, agent, or material covered by this guideline but that did not involve any conduct evidencing an intent or ability to carry out the threat. For example, subsection (a)(4)(B) would apply in a case in which the defendant threatened to contaminate an area with anthrax and also dispersed into the area a substance that appeared to be anthrax but that the defendant knew to be harmless talcum powder. In such a case, the dispersal of talcum powder does not evidence an intent on the defendant’s part to carry out the threat. In contrast, subsection (a)(4)(B) would not apply in a case in which the defendant threatened to contaminate an area with anthrax and also dispersed into the area a substance that the defendant believed to be anthrax but that in fact was harmless talcum powder. In such a case, the dispersal of talcum powder was conduct evidencing an intent to carry out the threat because of the defendant’s belief that the talcum powder was anthrax.

Subsection (a)(4)(B) shall not apply in any case involving both a threat to use any weapon, agent, or material covered by this guideline and the possession of that weapon, agent, or material. In such a case, possession of the weapon, agent, or material is conduct evidencing an intent to use that weapon, agent, or material.

3. **Application of Special Instruction.**—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection (c).

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**§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents**

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\* \* \*

**Commentary**

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**Application Notes:**

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6. **Other Definitions.**—For purposes of this section:

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“*Gross income*” has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § ~~1.61-1~~ 1.61-1.

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**§3A1.2. Official Victim**

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(Apply the greatest):

- (a) If (1) the victim was (A) a government officer or employee; (B) a former government officer or employee; or (C) a member of the immediate family of a person described in subdivision (A) or (B); and (2) the offense of conviction was motivated by such status, increase by **3** levels.
- (b) If subsection (a)(1) and (2) apply, and the applicable Chapter Two guideline is from Chapter Two, Part A (Offenses Against the Person), increase by **6** levels.
- (c) If, in a manner creating a substantial risk of serious bodily injury, the defendant or a person for whose conduct the defendant is otherwise accountable—
  - (1) knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom; or
  - (2) knowing or having reasonable cause to believe that a person was a prison official, assaulted such official while the defendant (or a person for whose conduct the defendant is otherwise accountable) was in the custody or control of a prison or other correctional facility,

increase by **6** levels.

**Commentary**

**Application Notes:**

\* \* \*

3. **Application of Subsections (a) and (b).**—“*Motivated by such status*”, for purposes of subsections (a) and (b), means that the offense of conviction was motivated by the fact that the

victim was a government officer or employee, a former government officer or employee, or a member of the immediate family thereof. This adjustment would not apply, for example, where both the defendant and victim were employed by the same government agency and the offense was motivated by a personal dispute. This adjustment also would not apply in the case of a robbery of a postal employee because the offense guideline for robbery contains an enhancement (§2B3.1(b)(1)) that takes such conduct into account.

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

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#### Commentary

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**Background:** Federal courts generally “have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings.” *See Setser v. United States*, ~~132 S. Ct. 1463~~, 1468566 U.S. 231, 236 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. *See Setser*, ~~132 S. Ct. at 1468~~566 U.S. at 236. Exercise of that discretion, however, is predicated on the court’s consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

\* \* \*