Proposed Amendments to the Sentencing Guidelines

January 30, 2026

Closing Date for Public Comment:
March 18, 2026

This compilation contains unofficial text of proposed amendments to the sentencing guidelines, policy statements, and official commentary, and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendments can be found on the Commission's website at www.ussc.gov and will appear in the February 6, 2026 edition of the Federal Register.

The proposed amendments and issues for comment will be subject to a public comment period running through **March 18, 2026**. Public comment received after the close of the comment period may not be considered. All written comment should be sent to the Commission via any of the following two methods: (1) comments may be submitted electronically via the Commission's Public Comment Submission Portal at https://comment.ussc.gov; or (2) comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Proposed Amendments. For further information, see the full contents of the official notice published in the Federal Register (available at www.ussc.gov).

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SUPPLEMENTARY INFORMATION

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.

Additional information pertaining to the proposed amendments described in this document may be accessed through the Commission's website at www.ussc.gov.

2025–2026 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. PROPOSED AMENDMENT: SENTENCING OPTIONS

Synopsis of Proposed Amendment: In August 2025, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2026, "[e]xamination of how the guidelines can provide courts with additional guidance on selecting the appropriate sentencing option (*e.g.,* imprisonment, probation, or fine), and possible consideration of amendments that might be appropriate." U.S. Sent'g Comm'n, "Notice of Final Priorities," 90 FR 39263 (Aug. 14, 2025). As part of this examination, the Commission held a Sentencing Options Roundtable in December 2025, which was attended by a wide range of stakeholders. Participants expressed varying views on how the Commission should proceed with the sentencing options priority, ranging from no or very limited action to fundamental restructuring of the sentence type determination.

The proposed amendment is informed by feedback received from stakeholders. It 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. The proposed amendment would retain the *Guideline Manual*'s zone-based structure, which provides for flexibility in the sentencing options available for defendants whose guideline ranges fall within Zones A through C of the Sentencing Table. Part A of the proposed amendment would provide further guidance on determining the appropriate sentence type from among those authorized by the guidelines and emphasize the importance of this threshold determination. Part B of the proposed amendment would expand Zones B and C to increase the availability of sentencing options for certain defendants.

In General

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

Part A (Sentencing Table) sets forth the Sentencing Table that is used to determine the applicable guideline range based on the intersection of the offense level (determined pursuant to Chapters Two and Three) and the criminal history category (determined pursuant to Chapter Four) applicable to the defendant. The Sentencing Table sorts all sentencing ranges into four zones, labeled Zones A through D.

Part B (Probation) addresses probation, including the imposition decision itself, the length of a term of probation, and the conditions of probation.

Part C (Imprisonment) sets forth the provisions relating to how the minimum and maximum terms of the applicable guideline range may be satisfied according to the pertinent zone of the Sentencing Table.

Part D (Supervised Release) addresses supervised release, including the imposition decision itself, the length of a term of supervised release, and the conditions of supervised release.

Part E (Restitution, Fines, Assessments, Forfeitures) addresses the determination of whether to impose restitution, fines, forfeiture, and assessments.

Part F (Sentencing Options) sets forth additional conditions that the court may impose as part of the sentence.

The zones of the Sentencing Table generally provide the sentencing options that the courts consider in determining the appropriate sentence. The zones are allocated in the Sentencing Table in Part A of Chapter Five. However, the sentencing options that these zones authorize are set out in provisions distributed throughout several parts of Chapter Five. In general, each zone authorizes different sentencing options, as follows:

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

Zone B.—Sentencing ranges in Zone B are from 1–7 to 9–15 months of imprisonment. Zone B authorizes a probation term to be substituted for imprisonment, contingent upon the probation term including conditions of confinement sufficient to satisfy the minimum term specified in the guideline range. Zone B also authorizes a term of imprisonment (of at least one month) followed by a term of supervised release with a condition of confinement (*i.e.*, a "split sentence") or a term of imprisonment only.

Zone C.—Sentencing ranges in Zone C are 10–16 or 12–18 months of imprisonment. Zone C authorizes a "split sentence," which must include a term of imprisonment equivalent to at least half of the minimum of the applicable guideline range. The remaining half of the term requires supervised release with a condition of community confinement or home detention. Alternatively, the court has the option of imposing a term of imprisonment only.

Zone D.— Zone D authorizes imprisonment only, with sentencing ranges ranging from 15–21 months to life imprisonment.

Part A (Changes to Part A of Chapter Five)

Part A of the proposed amendment would generally amend Part A of Chapter Five to make two changes, either one or both of which could be promulgated. First, Part A of the proposed amendment would add new Introductory Commentary to Part A of Chapter Five. Second, it would add a new guideline at §5A1.1 (Determination of Type of Sentence) and, as a result,

would designate the Sentencing Table as §5A1.2 and make technical changes to the existing Introductory Commentary to Chapter Five. The Commission is considering a range of alternatives: only promulgating the new introductory commentary to Part A set forth below; only promulgating the new guideline at §5A1.1 set forth below; promulgating both the new introductory commentary and new §5A1.1 set forth below; or only promulgating a version of new introductory commentary to Part A that also incorporates some of the text that now appears within new §5A1.1 set forth below.

The proposed Introductory Commentary to Part A of Chapter Five draws from the legislative history of the Sentencing Reform Act, highlighting the broad range of sentencing options that are statutorily provided and the recognition that different sentencing factors may weigh differently in different cases. It emphasizes that a sentence of probation serves a punitive function, citing to the legislative history of the Sentencing Reform Act and certain Supreme Court jurisprudence.

The proposed guideline at §5A1.1 would provide an overview of the steps necessary for the court to determine an appropriate sentence pursuant to Chapter Five. New §5A1.1 would contain the following four subsections.

Subsection (a) instructs the court to determine the sentencing options that are *available* under the guidelines by determining the guideline range and zone of the Sentencing Table applicable to the defendant. Paragraphs (1) through (4) summarize the authorized sentencing options in each of Zone A through D with cross-references to the relevant provisions of Chapter Five. Application Note 1 restates the rule currently set forth in the Commentary to §5E1.2 (Fines for Individual Defendants) that "[a] fine may be the sole sanction if the guidelines do not require a term of imprisonment." USSG §5E1.2, comment. (n.1).

Subsection (b) instructs the court to determine the *appropriate* sentencing options from among those authorized in the guidelines.

Subsection (c) directs the court to the relevant provisions of Chapter Five according to the type of sentence it intends to impose for further guidance on determining the length, conditions, and other aspects of the sentence. More specifically, it directs the court to Part B (Probation) for sentences of probation, Parts C (Imprisonment) and D (Supervised Release) for sentences of imprisonment, Part E (Restitution, Fines, Assessments, Forfeitures) in all cases, Part F (Sentencing Options) in certain cases, and Part G (Implementing the Total Sentence of Imprisonment) if applicable.

Subsection (d) recognizes the court's authority and duty under 18 U.S.C. § 3553, which permits the court to impose any statutorily authorized sentence [even if that same sentence is not authorized by the guidelines].

Issues for comment are also provided.

Part B (Expansion of Zones B and C of the Sentencing Table)

Part B of the proposed amendment would expand Zones B and C of the Sentencing Table. The expanded Zone B would authorize the sentencing options described above for

sentencing ranges from four to 57 months for Criminal History Category I and sentencing ranges from one to 18 months for the other criminal history categories. The expanded Zone C would authorize the sentencing options described above for sentencing ranges from 51 to 108 months for Criminal History Category I, sentencing ranges from 15 to 24 months for Criminal History Categories II through IV, and sentencing ranges from 15 to 21 months for Criminal History Categories V and VI.

Finally, Part B makes conforming changes to §§5B1.1 (Imposition of a Term of Probation) and 5C1.1 (Imposition of a Term of Imprisonment).

Issues for comment are also provided.

(A) Changes to Part A of Chapter Five

Proposed Amendment:

CHAPTER FIVE

DETERMINING THE SENTENCING RANGE AND OPTIONS UNDER THE GUIDELINES

Introductory Commentary

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

PART A — ~~SENTENCING TABLE~~ DETERMINATION OF TYPE OF SENTENCE AND SENTENCING RANGE

Introductory Commentary

Congress charged the Commission with promulgating guidelines for sentencing courts to use in determining "whether to impose a sentence to probation, a fine, or a term of imprisonment" (*see* 28 U.S.C. § 994(a)(1)(A)), which "may be one of the most important parts of the guidelines process." *See* S. Rep. No. 225, 98th Cong., 1st Sess. 163–64 (1983). The provisions within Chapter Five, in combination, guide all aspects of determining the appropriate sentence under the guidelines, including the initial determination of sentence type. The Commission, however, adopted **[**Part A of this chapter**][**this introductory commentary**]** to further underscore the importance of this critical decision.

[In promulgating the guidelines in this part, the**][**The**]** Commission is mindful that Congress decided against establishing a presumption in favor of any particular sentence type, wary that "[a] congressional statement of a preferred type of sentence might serve only to undermine the flexibility that the criminal justice system requires in order to determine the appropriate sentence in a particular case in light of increased knowledge of human behavior." *Id.* at 92. The Commission likewise recognizes, as Congress did when it enacted the Sentencing Reform Act of 1984, "that one [sentencing] purpose may have more bearing on the imposition of sentence in a particular case than another purpose has." *Id.* at 68. For example, "the purpose of rehabilitation may play an important role in sentencing an offender to a term of probation with the condition that he participate in a particular course of study, while the purposes of just punishment and incapacitation may be important

considerations in sentencing a repeated or violent offender to a relatively long term of imprisonment." *Id.* At the same time, non-imprisonment sentences undoubtedly serve a punitive function and in many cases would adequately serve the purposes of sentencing when appropriate conditions are imposed. *See, e.g.*, *id.* at 91 ("It may very often be that release on probation under conditions designed to fit the particular situation will adequately satisfy any appropriate deterrent or punitive purpose."); *Gall v. United States*, 552 U.S. 38, 48 (2007) (recognizing that though "custodial sentences are qualitatively more severe than probationary sentences of equivalent terms[,]" individuals "on probation are nonetheless subject to several standard conditions that substantially restrict their liberty"); *Esteras v. United States*, 606 U.S. 185, 196 (2025) (juxtaposing the purposes of probation and supervised release, explaining that "[f]ines, probation, and imprisonment are a court's primary tools for ensuring that a criminal defendant receives just deserts for the original offense"). Congress recognized the important role of non-imprisonment sentences when it established probation as a sentence in itself as part of the Sentencing Reform Act. **[**As the criminal justice system continues to develop more advanced tools to assess and respond to individual defendants' unique risks and needs, the court should consider the resources available to address the defendant's needs, and the setting in which those resources can be provided, in determining the appropriate sentencing option.**]** The Commission intends for **[**§5A1.1 (Determination of Type of Sentence)**][**Chapter Five**]** to support the court's "full exercise of informed discretion in tailoring sentences to the circumstances of individual cases." S. Rep. No. 225, 98th Cong., 1st Sess. 91 (1983).

§5A1.1. Determination of Type of Sentence

(a) DETERMINING THE AVAILABLE SENTENCING OPTIONS.—Determine the guideline range and zone applicable to the defendant's offense level and criminal history category in accordance with the Sentencing Table set forth in §5A1.2 (Sentencing Table). The Sentencing Table is divided into zones (Zones A, B, C, and D), with each providing different sentencing options. Subject to any statutory limitations in an individual case (s*ee, e.g.*, §5B1.1(b) (statutory eligibility for probation), §§5G1.1, 5G1.2 (statutory minima and maxima)), the sentencing options are generally as follows:

(1) Zone A authorizes a sentence of probation with or without any conditions of confinement, in addition to the sentencing options authorized in Zones B through D. *See* §§5B1.1(a)(1), 5C1.1(a)–(b) 5C1.1, comment. (n.2).

(2) Zone B authorizes a sentence of probation, provided that the minimum term of imprisonment specified in the guideline range is satisfied by a period of intermittent confinement, community confinement, or home detention, as provided by the schedule of substitute punishments at §5C1.1(e). In addition, Zone B provides for the sentencing options authorized in Zones C and D. *See* §§5B1.1(a)(2), 5C1.1(c), 5C1.1, comment. (n.3).

(3) Zone C authorizes a "split sentence" of imprisonment, in which at least one-half of the minimum term specified in the guideline range is

satisfied by a period of imprisonment and the remainder is satisfied by a term of supervised release with a condition substituting community confinement or home detention according to the schedule of substitute punishments provided at §5C1.1(e). In addition, Zone C provides for the sentencing options authorized in Zone D. *See* §5C1.1(d); *id.*, comment. (n.4).

(4) Zone D authorizes sentences of imprisonment only. *See* §5C1.1(f).

(b) DETERMINING THE APPROPRIATE SENTENCING OPTION.—In determining the appropriate sentencing option(s) from among those authorized under the guidelines, courts should consider which option(s) will best meet the purposes of sentencing and the needs of the individual defendant.

(c) DETERMINING THE SENTENCE UNDER THE GUIDELINES.—Determine the length, conditions, and other aspects of the sentence by applying the provisions in this chapter.

(1) If the court determines that a term of probation is appropriate, proceed to Part B (Probation) of this chapter to determine the length and conditions of any term of probation. Certain conditions of probation are addressed in further detail in Part F (Sentencing Options) of this chapter.

(2) If the court determines that a term of imprisonment is appropriate, proceed to Parts C (Imprisonment) and D (Supervised Release) of this chapter to determine the length of the term of imprisonment, whether to impose a term of supervised release, and, if a term of supervised release is imposed, the length and conditions of that term. Certain conditions of supervised release are specifically addressed in further detail in Part F (Sentencing Options) of this chapter.

(3) In all cases, proceed to Part E (Restitution, Fines, Assessments, Forfeitures) to determine whether to impose restitution, fines, forfeiture, or a special assessment.

(4) If applicable, proceed to Part G (Implementing the Total Sentence of Imprisonment) to determine how to implement a sentence in a case involving multiple counts of conviction, an undischarged term of imprisonment, or an anticipated state term of imprisonment.

(d) CONSIDERATION OF FACTORS SET FORTH IN 18 U.S.C. § 3553(a).—The court shall consider the applicable factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. **[**The court may determine that a sentencing

option that is authorized by statute, but not by the guidelines, is appropriate based on the consideration of these sentencing factors.]

Commentary

Application Note:

1. **Fine-Only Sentence.**—A fine may be the sole sanction if the guidelines do not require a term of imprisonment. *See* §5E1.2, comment. (n.1).

§5A1.2. Sentencing Table

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE
(in months of imprisonment)

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

Commentary to Sentencing Table

Application Notes:

1. The Offense Level (1–43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I–VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "***Life***" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24–30 months of imprisonment.

2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

3. The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.

* * *

Issues for Comment

1. Part A of the proposed amendment would amend Part A of Chapter Five to both add new introductory commentary to Part A and a new guideline at §5A1.1 (Determination of Type of Sentence). The Commission seeks comment on whether it should adopt both the new introductory commentary and the new guideline, only the new introductory commentary, or only the new §5A1.1 guideline. If the Commission were to promulgate only the new introductory commentary to Part A, should it incorporate into the commentary any of the guidance currently provided in proposed §5A1.1?

2. Part A of the proposed amendment would add to Part A of Chapter Five a new guideline at §5A1.1 (Determination of Type of Sentence). The new guideline at §5A1.1 would provide an overview of the steps necessary for the court to determine an appropriate sentence pursuant to Chapter Five. New Subsection (b) instructs the court to determine the appropriate sentencing options from among those authorized in the guidelines. The Commission seeks comment on whether it should list factors in new §5A1.1(b) for courts to consider in determining the appropriate sentencing option under the guidelines. If so, what factors should be listed? The Commission seeks comment on whether the list of factors should include any of the factors listed below:

    - Whether a sentence of probation or a term of imprisonment best protects the public and meets the other purposes of sentencing. *See* 18 U.S.C. § 3553(a)(1), (a)(2); §5C1.1(e) (schedule of substitute punishments).

    - Whether the seriousness of the defendant's offense, and the nature and degree of harm caused by it, requires a term of imprisonment to provide just

punishment, afford adequate deterrence to criminal conduct, promote respect for the law, or adequately address public concern generated by the offense. *See* 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 994(c).

- Whether the defendant is in need of educational or vocational training, medical care, or other rehabilitative or correctional treatment, and the setting in which any such treatment would be most effectively provided. *See* 18 U.S.C. §§ 3553(a)(2)(D), 3582(a); 28 U.S.C. § 994(k).

- The nature and capacity of the penal, correctional, and other facilities and services available, the relative cost associated with available sentencing options, and how resources could be most effectively allocated to address the risks and needs of the defendant. 28 U.S.C. § 994(g), (k).

- Whether the defendant is: (1) a "first offender" who has not been convicted of a crime of violence or an otherwise serious offense, for whom a sentence other than imprisonment is generally appropriate; or (2) a person convicted of a crime of violence that results in serious bodily injury, for whom a sentence of imprisonment is generally appropriate. *See* 28 U.S.C. § 994(j).

- Whether the defendant has a history of prior criminal conduct that warrants a substantial term of imprisonment. *See* 28 U.S.C. § 994(h), (i).

- Any developing research and knowledge about the effectiveness of available sentencing options in meeting the needs of individual defendants, reducing recidivism, and protecting the public. *See* 28 U.S.C. § 991(b)(1)(C).

Should the Commission provide additional or different factors?

3. Section 3553(a) of Title 18 lists some of the factors that the court shall consider to determine a sentence that is sufficient, but not greater than necessary, to comply with the purposes of sentencing. In particular, the factors set forth in section 3553(a)(2) include "the need for the sentence imposed . . . (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; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." The Commission seeks comment on whether proposed new §5A1.1(b) should reference the factors listed in 18 U.S.C. § 3553(a), including the purposes of sentencing in section 3553(a)(2)? If so, how? Would referencing or incorporating these statutory factors into the proposed guideline inadvertently create a procedural requirement that could be subject to litigation?

(B) Expansion of Zones B and C of the Sentencing Table

Proposed Amendment:

CHAPTER FIVE

DETERMINING THE SENTENCING RANGE AND OPTIONS UNDER THE GUIDELINES

* * *

PART A — SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE
(in months of imprisonment)

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

Zone A

Current Zone B

Current Zone C

Proposed Zone B

Proposed Zone C

Current Zone D

Proposed Zone D

* * *

§5B1.1. Imposition of a Term of Probation

* * *

Commentary

Application Notes:

1. Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:

   (A) **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).** In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

   (B) **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~~four months but not more than ~~nine~~46 months in criminal history category I or at least one month but not more than 12 months in criminal history categories II through VI).** In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2–8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.

2. Where the applicable guideline range is in Zone C or D of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is ~~ten months or more~~51 months or more in criminal history category I or 15 months or more in criminal history categories II through VI), the guidelines do not authorize a sentence of probation. *See* §5C1.1 (Imposition of a Term of Imprisonment).

* * *

§5C1.1. Imposition of a Term of Imprisonment

* * *

Commentary

Application Notes:

* * *

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~~four months but not more than ~~nine~~46 months in criminal history category I or at least one month but not more than 12 months in criminal history categories II through VI), 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. **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~~51 months but not more than 87 months in criminal history category I, 15 months but not more than 18 months in criminal history categories II through IV, or 15 months in criminal history categories V and VI), 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 defendant is in criminal history category II and the guideline range is ~~10–16~~15–21 months, a sentence of ~~five~~seven and a half months imprisonment followed by a term of supervised release with a condition requiring ~~five~~seven and a half 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 defendant is in criminal history category II and the guideline range is ~~10–16~~15–21 months, both a sentence of ~~five~~seven and a half months imprisonment followed by a term of supervised release with a condition requiring ~~six~~eight 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~~five months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

* * *

8. **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~~97 months or more for criminal history category I, 21 months or more in criminal history categories II through IV, or 18 months or more in criminal history categories V and VI), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

* * *

Issues for Comment:

1. Part B of the proposed amendment would expand Zones B and C of the Sentencing Table. The Commission seeks comment on whether it should expand Zones B and C in a different manner than the one set forth in the proposed amendment. Should the Commission expand Zone B to lower or higher offense levels than proposed? Should it expand Zone C to lower or higher offense levels than proposed? What data, statutory provisions, or policy considerations should determine the scope of Zones B and C?

2. The proposed expansion of Zone B would authorize sentences of probation with conditions of confinement as a sentencing option for current Zone C defendants, an option that was not available to such defendants before. Similarly, the proposed expansion of Zone C would authorize split sentences for current Zone D defendants, an option that was not available to such defendants before. The Commission seeks comment on whether the Commission should provide additional guidance to address these new Zone B and C defendants. If so, what guidance should the Commission provide?

3. The proposed expansion of Zones B and C would result in a zone structure that authorizes different sentencing options for certain defendants who are in different criminal history categories but have the same applicable guideline range (*i.e.*, defendants whose guideline range is 15–21 or 18–24 months). The Commission seeks comment on whether authorizing different sentencing options for defendants who have the same applicable guideline range is appropriate. Would doing so raise any legal or policy concerns?

2. PROPOSED AMENDMENT: CAREER OFFENDER

Synopsis of Proposed Amendment: In August 2025, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2026, "[c]ontinued examination of the career offender guidelines, including (A) evaluating the impact, feasibility, and uniformity in application of alternative approaches to the 'categorical approach' through workshops, field testing, and updating the data analyses set forth in the Commission's 2016 report to Congress, titled *Career Offender Sentencing Enhancements;* and (B) possible consideration of amendments that might be appropriate." U.S. Sent'g Comm'n, "Notice of Final Priorities," 90 FR 39263 (Aug. 14, 2025).

The proposed amendment addresses recurrent criticism of the categorical approach and modified categorical approach in the context of §4B1.1 (Career Offender). It sets forth options that would eliminate the use of the categorical approach for purposes of determining whether a federal offense is a "crime of violence" or "controlled substance offense" by listing federal offenses that qualify as a "crime of violence" or a "controlled substance offense." The proposed amendment also provides options that would set forth an approach for purposes of determining whether a state offense is a "crime of violence" or "controlled substance offense" that does not impose some of the limitations of the "categorical approach" and "modified categorical approach" adopted by the Supreme Court in the context of certain statutory provisions. These changes are intended to correct some of the "odd" and "arbitrary" results that the categorical approach has produced relating to the "crime of violence" definition (*see*, *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)). The proposed amendment also sets forth options to limit the scope of the "controlled substance offense" definition.

The Commission anticipates that the revised "crime of violence" definition set forth in the proposed amendment will identify offenses as presumptively violent in an overbroad manner. To counteract this overbreadth, each option provides necessary and critical exclusions and limitations to ensure that §4B1.2 is properly tailored to capture offenses that are actually violent. These exclusions and limitations are necessary to the overall operation of the options set forth in the proposed amendment.

The Categorical Approach as Developed by Supreme Court Jurisprudence

Several 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 and modified categorical approaches require courts to look only to the elements of the offense, 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 may 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 contains multiple offenses with different offense elements).

Application of the Categorical Approach in the Guidelines

Supreme Court jurisprudence on this subject pertains to statutory provisions (*e.g.*, 18 U.S.C. § 924(e)), but courts have applied the categorical and modified categorical approaches to guideline provisions. For example, courts have used these approaches to determine if a conviction is a "crime of violence" for purposes of applying the career offender guideline at §4B1.1.

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

The Commission has received comment over the years regarding the complexity and limitations of the categorical approach as developed by Supreme Court jurisprudence. Courts have criticized the categorical approach as a "legal fiction," in which an offense that a defendant in fact commits violently is deemed to be a legally non-violent offense because the offense *could* have been committed 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)).

Feedback from Stakeholders

The Commission also has received input in roundtable discussions with several stakeholders with diverse perspectives and expertise within the criminal justice system. Some stakeholders have suggested that the Commission should eliminate the categorical approach to capture violent offenses that are currently excluded while also narrowing the scope of the "controlled substance offense" definition, particularly its reach over predicate offenses. Some stakeholders also have remarked that the Commission should limit the number of qualifying prior offenses overall for purposes of the career offender guideline. Some stakeholders have suggested that the Commission should condition which convictions qualify as predicate offenses by establishing a minimum sentence length threshold.

Changes Relating to "Crime of Violence"

The proposed amendment would make several changes to the definition of "crime of violence."

First, the proposed amendment would place all provisions related to the definition of "crime of violence" in subsection (a). This includes moving the provision on "inchoate offenses included" as it relates to "crime of violence" into subsection (a) without substantive changes.

Second, the proposed amendment would delete the "force clause" from §4B1.2(a).

Third, the proposed amendment would eliminate the use of the categorical approach for purposes of federal offenses by listing specific federal statutes proscribing violent offenses that qualify as "crime of violence."

Fourth, the proposed amendment sets forth two options for amending the definition of "crime of violence" for purposes of state offenses.

> **Crime of Violence Option 1** would eliminate the use of the categorical approach for purposes of state offenses by providing a definition that is based on how an offense is designated (*i.e.*, labeled) under federal or state law. It sets forth a list of violent offenses. A conviction for an offense that is labeled as one of the listed offenses is presumptively a qualifying "crime of violence." This approach is intended to avoid an analysis requiring a categorical matching between statutory elements, instead capturing convictions for certain types of offenses based on how they are labeled. This option brackets a preliminary list of offense labels, highlighting the Commission's interest in appropriately tailoring the scope of the offenses included in the list. The Commission also recognizes that jurisdictions name each of these offenses in various ways that may be appropriate to include in the list of qualifying labels. The proposed amendment includes issues for comment regarding any other offenses or labels that should be included in the definition to adequately capture these offenses in Crime of Violence Option 1.
>
> **Crime of Violence Option 2** would set forth an approach for purposes of determining whether a state offense is a "crime of violence" that does not impose some of the limitations of the "categorical approach" and "modified categorical approach." It would provide that a state offense is presumptively a "crime of violence" if the statute of conviction **[**meets each of the elements (other than federal jurisdictional requirements)**] [**proscribes [conduct][an act or omission] that [is described by][satisfies][meets] the elements (other than federal jurisdictional requirements)**]** of an offense set forth in the proposed definition, regardless of whether the statute of conviction includes additional elements (or means of committing any such elements) that are broader than those of the offense. It sets forth a list of violent offenses and defines most of these enumerated offenses by referring to a federal statute. Many of the listed offenses qualify as a "serious violent felony" under 18 U.S.C. § 3559(c). Crime of Violence Option 2 also brackets the possibility of including additional offenses. It would define some of these additional offenses, either by referring to a statutory provision or providing a guidelines definition of such an offense. These changes are intended to eliminate the categorical approach's requirement that courts compare only the elements of the predicate offense as described in the statute of conviction to the elements of a generic, contemporary definition of the applicable enumerated offense. Instead, courts would be allowed to look to any part of a statute of conviction—the elements of any offense, *and* the means of committing any element of such offense, as described in the statute—and determine whether any part of the statute of conviction includes an offense that constitutes one of the enumerated offenses as defined in §4B1.2.

Finally, the proposed amendment includes exclusions and limitations to the scope of the "crime of violence" definition. These exclusions and limitations are integral to the operation

of the proposed amendment. For example, the proposed amendment adopts as an exclusion sentence length criteria similar to those relating to petty and minor offenses from subsection (c)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History). In addition, as an important step in determining whether an offense is a "crime of violence," the proposed amendment provides that, after the government has met its burden to establish that an offense presumptively qualifies as a "crime of violence" under subsections (a)(1) through (a)(3), the defendant may rebut such presumption by establishing any of the following: (i) the conviction for the offense resulted in a sentence for which the defendant served less than [60 days][30 days] in prison; (ii) the acts for which the defendant is criminally liable [did not inflict, did not intend to inflict, and did not threaten to inflict [serious] bodily injury to another person][did not cause, did not intend to cause, and did not create a serious risk of physical harm to another person] during the commission of the offense; or (iii) the defendant's conduct during the commission of the offense was limited to reckless or negligent conduct.

Changes Relating to "Controlled Substance Offense"

The proposed amendment would make several changes to §4B1.2 relating to the definition of "controlled substance offense."

First, the proposed amendment would place all provisions related to the definition of "controlled substance offense" in subsection (b). This includes moving the provision on "inchoate offenses included" as it relates to "controlled substance offense" into subsection (b) without substantive changes. In addition, it would move to subsection (b) the provision currently located in the Commentary to §4B1.2 stating that a violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was a "controlled substance offense."

Second, the proposed amendment sets forth two options for limiting the scope of the "controlled substance offense" definition.

> **Controlled Substance Offense Option 1** would revise the definition of "controlled substance offense" to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. It lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo with respect to federal drug trafficking statutes. The list includes the federal drug trafficking statutes that are specifically referenced in the career offender directive at 28 U.S.C. § 994(h). The federal drug trafficking statutes that appear in brackets are not cited in the directive.
>
> **Controlled Substance Offense Option 2** would maintain the current definition of "controlled substance offense" but would limit its scope by setting a minimum sentence length requirement for a prior conviction to qualify as a "controlled substance offense." It provides three suboptions for limiting prior convictions. ***Controlled Substance Offense Suboption 2A*** would limit qualifying prior "controlled substance offense" convictions to only those convictions that are counted separately under §4A1.1(a). ***Controlled Substance Offense Suboption 2B*** would limit qualifying prior convictions to only convictions of a controlled substance offense that resulted in a sentence imposed of [five years][three years][one year] or more

that are counted separately under §4A1.1(a) [or (b)]. Both Controlled Substance Offense Suboptions 2A and 2B bracket the possibility of including a provision that provides that a conviction for a controlled substance offense shall not qualify as a prior felony conviction under §4B1.2 if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than [five years][three years][one year] in prison. ***Controlled Substance Offense Suboption 2C*** would limit qualifying prior convictions to only convictions of a controlled substance offense that resulted in a sentence for which the defendant served [five years][three years][one year] or more in prison and that are counted separately under §4A1.1(a) [or (b)].

Changes to Other Guidelines

The current definitions of "crime of violence" and "controlled substance offense" at §4B1.2 are incorporated by reference in several other guidelines in the *Guidelines Manual*. *See* 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), §7B1.1 (Classification of Violations (Policy Statement)), and §7C1.1 (Classification of Violations (Policy Statement)).

Absent additional changes to these other guideline provisions, all revisions to the definitions in §4B1.2 would be incorporated into those guidelines that currently reference the "crime of violence" and "controlled substance offense" definitions found in §4B1.2.

Thus, the proposed amendment effectively sets forth three alternatives for addressing the references to "crime of violence" and "controlled substance offense" in §2K2.1. First, absent additional changes to §2K2.1, any revisions to the definitions in §4B1.2 would be incorporated by reference to §2K2.1. In addition to this approach of maintaining the current operation of §2K2.1 by incorporating the definitions from §4B1.2, two options are presented. **Firearms Option 1** would maintain the status quo by amending the Commentary to §2K2.1 to incorporate the relevant part or parts of the current definitions from §4B1.2. **Firearms Option 2** would amend the Commentary to §2K2.1 to provide that "controlled substance offense" has the meaning given the term "serious drug offense" in 18 U.S.C. § 924(e) and "crime of violence" has the meaning given the term "violent felony" in 18 U.S.C. § 924(e). The proposed amendment also provides an issue for comment on how the references to "crime of violence" and "controlled substance" in the other guidelines cited above should be addressed.

Issues for Comment

The proposed amendment also sets forth issues for comment.

Proposed Amendment:

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

(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) 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).~~

(A) FEDERAL OFFENSES.—

(i) An offense under any of the following—

18 U.S.C. §§ 113(a), **[**844(i)**]**, 1111, 1112, 1201, 1951, **[**2111,**]** **[**2113,**]** **[**2118,**]** **[**2119,**]** 2241, 2242, 2244(a)(1)–(a)(2)**[**; 49 U.S.C. § 46502**]**.

(ii) An offense under federal law, punishable by imprisonment for a term exceeding one year, that involves 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).

[Crime of Violence Option 1 for Definition Applicable to State Offenses (List of Offense Labels):

(B) STATE OFFENSES.—Any offense, punishable by imprisonment for a term exceeding one year, that is designated under state law as one of the following:

[Aggravated Assault;
Arson;
Extortion;
Kidnapping;
Murder;
Rape;
Robbery;

Sexual assault;
Voluntary manslaughter.**]]**

[Crime of Violence Option 2 for Definition Applicable to State Offenses (List of Enumerated Offenses as Described in Federal Statutes with Bracketed Additional Offenses):

(B) STATE OFFENSES.—An offense under state law by whatever designation, punishable by imprisonment for a term exceeding one year, is presumptively a "crime of violence" if the statute of conviction **[**meets each of the elements (other than federal jurisdictional requirements)**]** **[**proscribes [conduct][an act or omission] that [is described by] [satisfies][meets] the elements (other than federal jurisdictional requirements)**]** of one of the following offenses, regardless of whether the statute of conviction includes additional elements (or means of committing any such elements) that are broader than those of the offense:

Murder (as described in 18 U.S.C. § 1111); manslaughter other than involuntary manslaughter (as described in 18 U.S.C. § 1112); aggravated assault or battery (as described in 18 U.S.C. § 113(a) (but not to include a state offense that would otherwise be simple or misdemeanor assault or simple or misdemeanor battery but for the identity of the victim or perpetrator)); **[**assault with intent to commit rape (as described below);**]** rape or aggravated sexual abuse (as described in 18 U.S.C. §§ 2241); **[**sexual abuse (as described in 18 U.S.C. § 2242);**]** abusive sexual contact (as described in 18 U.S.C. § 2244(a)(1), (a)(2)); **[**child abuse (as described below);**]** **[**domestic violence (as described below);**]** kidnapping (as described in 18 U.S.C. § 1201); **[**hostage taking (as described below);**]** **[**human trafficking (as described below);**]** **[**aircraft piracy (as described in 49 U.S.C. § 46502);**]** robbery (as described in 18 U.S.C. § 1951(b)**[**, § 2111, § 2113, or § 2118**]**); carjacking (as described in 18 U.S.C. § 2119); **[**extortion (as described in 18 U.S.C. § 1951(b)(2));**]** **[**coercion (as described below);**]** **[**arson (as described in 18 U.S.C. § 844(i) (but not to include arson of property other than a building));**]** **[**firearms use (as described below);**]** **[**firearms possession (as described in 18 U.S.C. § 924(c));**]** **[**or using weapons of mass destruction (as described in 18 U.S.C. §2332a)**]**.

For purposes of offenses listed in subsection (a)(1)(B), use the following descriptions:

["***Assault with intent to commit rape***" is engaging in physical contact with another person or using or brandishing a weapon against another person with intent to commit aggravated sexual

abuse or sexual abuse (as described in 18 U.S.C. § 2241 and 2242).**]**

["***Child abuse***" is any of the following: the intentional infliction of physical injury to a minor; the commission of any sexual act against a child under the age of 14 by any person 18 years of age or older; online enticement or coercion of a minor to engage in illegal sexual activity; or the production of child pornography or livestreaming of child sexual abuse.**]**

["***Coercion***" is causing the performance or non-performance of any act by another person, which such other person has a legal right to do or to abstain from doing, by the use of actual or threatened force, violence, or fear thereof, including the use, or an express or implicit threat of use, of violence to cause harm to the person, reputation, or property of any person.**]**

["***Domestic violence***" is committing any act with the intent to kill or injure a spouse, intimate partner, or dating partner.**]**

["***Firearms use***" is an offense described in 18 U.S.C. § 924(c) or § 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon during and relation to the offense in which the firearm was used.**]**

["***Hostage taking***" is the seizure or detention with threats to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained.**]**

["***Human trafficking***" is any of the following: the recruitment, harboring, transportation, provision, or obtaining of a person for labor, services, or a commercial sex act, through the use of force, threat of force, fraud, or coercion; the recruitment, harboring, transportation, provision, or obtaining of a minor for the purpose of a commercial sex act; or the subjection of a person to involuntary servitude, peonage, debt bondage, or slavery.**]]**

(2) AIDING AND ABETTING, INCHOATE OFFENSES INCLUDED.—The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(3) EXCLUSION.—The term "crime of violence" under subsections (a)(1) and (a)(2) does not include any offense where the sentence imposed was (i) a term of unsupervised probation; (ii) a term of **[**supervised**]**

probation **[**of less than **[**one year**][**three years**][**five years**]]**; or (iii) a term of imprisonment of less than **[**60 days**][**30 days**]**.

(4) LIMITATIONS.—An offense of conviction shall not qualify as a "crime of violence" under subsections (a)(1) and (a)(2) if the defendant can establish any of the following:

(A) SENTENCE SERVED.—The conviction for the offense resulted in a sentence for which the defendant served less than **[**60 days**][**30 days**]** in prison.

(B) **[[**SERIOUS**]** BODILY INJURY.—During the commission of the offense, the acts for which the defendant is criminally liable did not inflict, did not intend to inflict, and did not threaten to inflict **[**serious**]** bodily injury to another person**[**. *Provided*, however, that this limitation shall not apply to extortion and arson offenses**]**.**][**PHYSICAL HARM.—During the commission of the offense, the acts for which the defendant is criminally liable did not cause, did not intend to cause, and did not create a serious risk of physical harm to another person**[**. *Provided*, however, that this limitation shall not apply to extortion and arson offenses**]**.**]**

(C) RECKLESSNESS AND NEGLIGENCE.—The defendant's conduct during the commission of the offense was limited to reckless or negligent conduct. **[**However, an offense is not excluded under this provision if the defendant's conduct included extreme reckless conduct.**]**

(b) CONTROLLED SUBSTANCE OFFENSE.—

[Controlled Substance Offense Option 1 for Limiting Scope of Controlled Substance Offense Definition (Limiting Definition to Federal Offenses):

(1) IN GENERAL.—The term "controlled substance offense" means an offense under 21 U.S.C. § 841, § 952(a), § 955, or § 959, or 46 U.S.C. § 70503(a) or § 70506(b), **[**or 21 U.S.C. § 843(a)(6), § 843(b), § 846 (if the object of the conspiracy or attempt was to commit an offense covered by this provision), § 856, § 860, § 960, or § 963 (if the object of the conspiracy or attempt was to commit an offense covered by this provision)**]**~~federal or state law, punishable by imprisonment for a term exceeding one year, that~~

~~(1) 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; or~~

~~(2) is an offense in conduct described in 46 U.S.C. § 70503(a) or § 70506(b)~~.

(2) AIDING AND ABETTING, INCHOATE OFFENSES INCLUDED.—The term "controlled substance offense" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(3) ADDITIONAL CONSIDERATION.—**{**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."**}***

(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*.**]**

[Controlled Substance Offense Option 2 for Limiting Scope of Controlled Substance Offense Definition (Limiting Prior Convictions for Controlled Substance Offenses):

(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—

(~~1~~A) 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; or

(~~2~~B) is an offense in conduct described in 46 U.S.C. § 70503(a) or § 70506(b).

(2) AIDING AND ABETTING, INCHOATE OFFENSES INCLUDED.—The term "controlled substance offense" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

* The text in braces currently appears in Application Note 1 of the Commentary to §4B1.2. The proposed amendment would place the text here with the changes shown in revision marks.

(3) ADDITIONAL CONSIDERATION.—{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."}*

[*Controlled Substance Offense Suboption 2A (Limiting Prior Convictions to Sentences Receiving Points under §4A1.1(a))*:

(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*. For purposes of determining whether the defendant sustained a felony conviction of a "crime of violence," use only any such felony conviction that is counted separately under §4A1.1(a), (b), or (c). For purposes of determining whether the defendant sustained a felony conviction of a "controlled substance offense," use only any such felony conviction that is counted separately under §4A1.1(a).

[A conviction for a controlled substance offense shall not qualify as a prior felony conviction under this provision if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than **[**five years**]** **[**three years**]** **[**one year**]** in prison.**]]**

[*Controlled Substance Offense Suboption 2B (Limiting Prior Convictions Through a Sentence-Imposed Approach)*:

(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

* The text in braces currently appears in Application Note 1 of the Commentary to §4B1.2. The proposed amendment would place the text here with the changes shown in revision marks.

established, whether by guilty plea, trial, or plea of *nolo contendere*. For purposes of determining whether the defendant sustained a felony conviction of a "crime of violence," use only any such felony conviction that is counted separately under §4A1.1(a), (b), or (c). For purposes of determining whether the defendant sustained a felony conviction of a "controlled substance offense," use only any such felony conviction that (1) is counted separately under §4A1.1(a) **[**or (b)**]**, and (2) resulted in a sentence imposed of **[**five years**][**three years**][**one year**]** or more. For purposes of this provision, "***sentence imposed***" has the meaning given the term "sentence of imprisonment" in §4A1.2(b) and Application Note 2 of the Commentary to §4A1.2. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred.

[A conviction for a controlled substance offense shall not qualify as a prior felony conviction under this provision if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than **[**five years**][**three years**][**one year**]** in prison.**]]**

[Controlled Substance Offense Suboption 2C (Limiting Prior Convictions Through a Time-Served Approach):

(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*. For purposes of determining whether the defendant sustained a felony conviction of a "crime of violence," use only any such felony conviction that is counted separately under §4A1.1(a), (b), or (c). For purposes of determining whether the defendant sustained a felony conviction of a "controlled substance offense," use only any such felony conviction that (1) is counted separately under §4A1.1(a) **[**or (b)**]**, and (2) resulted in a sentence for which the defendant served **[**five years**][**three years**][**one year**]** or more in prison.**]]**

~~(d) INCHOATE OFFENSES INCLUDED. 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.~~

~~(c) 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~~d) 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 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~~Note:

~~1. **Further Considerations Regarding "Crime of Violence" and "Controlled Substance Offense".** For purposes of this guideline—~~

~~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).)~~

~~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~~1. **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 ~~(Definitions and Instructions for Computing Criminal History).)~~**}***

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 **[**amendment year**]**, to determine if an offense met the definition of "crime of violence" 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 **[**amendment year**]**, the Commission amended §4B1.2 to set forth an approach for determining whether an offense is a "crime of violence" or "controlled substance offense" that does not require the application of the *categorical approach* and *modified categorical approach* established by Supreme Court jurisprudence, or the use of a generic-offense analysis, where courts must determine whether the elements of the instant offense or prior offense match the elements of the "generic definition" of certain offenses. *See* USSG App. C, Amendment **[___]** (effective **[**Date**]**).

* * *

* The text in braces currently appears in Application Note 1 of the Commentary to §4B1.2. The proposed amendment would place the text here with the changes shown in revision marks.

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

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

(1) **26**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) **22**, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) **20**, if—

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d), § 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

* * *

(6) (Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. § 933(a)(2) or (a)(3), increase by **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; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received a firearm or any ammunition as a result of inducing the conduct described in clause (i), increase by **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 at the time of the offense; or (III) intended to use or dispose of the firearms unlawfully; (ii) attempted or conspired to commit the conduct described in clause (i); or (iii) received two or more firearms as a result of inducing the conduct described in clause (i), increase by **5** levels.

Provided, however, that subsection (b)(6)(C)(i)(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 met the criteria set forth in the proviso of 18 U.S.C. § 921(a)(33)(C).

* * *

Commentary

* * *

Application Notes:

[Firearms Option 1 (Preserving Current Definitions of "Crime of Violence" and "Controlled Substance Offense" for §2K2.1):

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.~~

* * *

"***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).

* * *

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. **"Crime of Violence" and "Controlled Substance Offense".—**

(A) **Crime of Violence.—**

(i) **Definition.—**"***Crime of violence***" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (II) 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).

(ii) **Additional Considerations.—**

(I) The term "crime of violence" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

(II) "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 (aa) an offense described in 18 U.S.C. § 2241(c) or (bb) 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.

(III) "Extortion" is obtaining something of value from another by the wrongful use of (aa) force, (bb) fear of physical injury, or (cc) threat of physical injury.

(IV) "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.

(V) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "crime of violence" if the offense of conviction established that the underlying offense was a "crime of violence." (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).)

(VI) In determining whether an offense is a crime of violence, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

(B) **Controlled Substance Offense.—**

(i) **Definition.—**"***Controlled substance offense***" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (I) 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; or (II) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

(ii) **Additional Considerations.—**

(I) The term "controlled substance offense" includes the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

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

(III) 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."

(IV) 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."

(V) 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."

(VI) A violation of 18 U.S.C. § 924(c) or § 929(a) is a "controlled substance offense" if the offense of conviction established that the underlying offense was 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).)

(VII) In determining whether an offense is a controlled substance offense, the offense of conviction (*i.e.*, the conduct of which the defendant was convicted) is the focus of inquiry.

~~3~~4. **Definition of "Prohibited Person".—**For purposes of subsections (a)(4)(B), (a)(6), and (b)(6), "***prohibited person***" means any person described in 18 U.S.C. § 922(g) or § 922(n).

[Firearms Option 1 would renumber the rest of the application notes accordingly]

* * *

~~10~~11. **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).

* * *

~~12~~13. **Application of Subsection (b)(6).—**

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

~~"***Crime of violence***" and "***controlled substance offense***" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~**]**

* * *

[Firearms Option 2 (Providing Statutory Definitions of "Crime of Violence" and "Controlled Substance Offense" for §2K2.1):

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)~~the term "serious drug offense" in 18 U.S.C. § 924(e).

"***Crime of violence***" has the meaning given ~~that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2~~the term "violent felony" in 18 U.S.C. § 924(e).

* * *

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

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

~~"***Crime of violence***" and "***controlled substance offense***" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~ **]**

* * *

Issues for Comment:

1. As explained in the synopsis of the proposed amendment, courts use the "categorical approach" and the "modified categorical approach," as set forth in Supreme Court jurisprudence, to determine whether a conviction is a "crime of violence" or a "controlled substance offense" for purposes of §4B1.2 (Definitions of Terms Used in Section 4B1.1). These Supreme Court cases, however, involved statutory provisions (*e.g.*, 18 U.S.C. § 924(e)) rather than guideline provisions.

   The Commission seeks comment on whether determinations under the career offender guideline should use a different approach, such as the approaches provided above. What are the advantages and disadvantages of the "categorical approach" as opposed to the approaches set forth in the proposed amendment above?

2. The proposed amendment would amend §4B1.2(a) to eliminate the use of the categorical approach, for purposes of federal offenses, by listing specific federal statutes that qualify as a "crime of violence." Are there federal offenses that are covered by the proposed "crime of violence" definition but should not be? Are there federal offenses that are not covered by the proposed definition but should be?

3. The proposed amendment sets forth two options for amending the definition of "crime of violence" for purposes of state offenses. Crime of Violence Option 1 would eliminate the use of the categorical approach for purposes of state offenses by identifying a crime of violence solely based on how an offense is designated (*i.e.*, labeled) under state law. Crime of Violence Option 2 would provide that a state offense is presumptively a "crime of violence" if the statute of conviction **[**meets each of the elements (other than federal jurisdictional requirements)**] [**proscribes [conduct][an act or omission] that [is described by] [satisfies][meets] the elements (other than federal jurisdictional requirements)**]** of an offense set forth in the proposed definition, regardless of whether the statute of conviction includes additional elements (or means of committing any such elements) that are broader than those of the offense. It sets forth a list of violent offenses and defines most of these enumerated offenses by referring to how that offense is described in a federal statute. Many of the listed offenses qualify as a "serious violent felony" under 18 U.S.C. § 3559(c). Crime of Violence Option 2 also brackets the possibility of including additional offenses. It would define some of these additional offenses, either by referring to how that offense is described in a statute or by providing a guidelines definition of such an offense.

   The Commission seeks comment generally on each option and whether either of the approaches provided for purposes of the "crime of violence" definition is appropriate and would cover most violent offenses under state law. Which of the options, if either, should the Commission adopt? Should the Commission consider a different approach to revise the "crime of violence" definition? Are there specific state offenses that would be included in the definition of "crime of violence" set forth in these options that should not be considered crimes of violence? Are there specific state offenses that would not be included in the definition set forth in these options, but should be? For example, should the Commission include offenses such as terroristic

threats and resisting arrest in the list of offenses that should qualify as a "crime of violence"?

The Commission also seeks comment on whether the list of offenses included for purposes of federal offenses and state offenses should generally capture the same offenses. Should the Commission differentiate between the types of federal offenses and state offenses that should qualify as crimes of violence by providing different list of offenses?

Finally, the Commission seeks comment on the proposed definitions for the enumerated offenses listed in Crime of Violence Option 2. Are these definitions appropriate? Should the Commission provide different definitions? If so, what definitions should the Commission provide?

4. Crime of Violence Option 1 for amending the definition of "crime of violence" for purposes of state offenses would eliminate the use of the categorical approach by providing a definition that is based on how an offense is designated (*i.e.*, labeled) under state law. This option brackets a preliminary list of offense labels. The Commission recognizes that jurisdictions name each of these offenses in various ways that may be appropriate to include in the definition of crime of violence. For example, the Commission has identified that jurisdictions use different labels for the highest degree of murder, including such labels as *First Degree Murder*, *Murder in the First Degree*, *Deliberate Homicide*, *First Degree Intentional Homicide*, *Aggravated Murder*, and *Capital Murder*. Similarly, the Commission has identified the same issue with robbery; states and United States territories use different labels such as *Robbery in the First Degree*, *Robbery in the Second Degree*, *Robbery in the Third Degree*, *Aggravated Robbery*, *First Degree Aggravated Robbery*, *Armed Robbery*, *Carjacking*, *Armed Carjacking*, *Robbery Involving Occupied Motor Vehicle*, *Aggravated Vehicular Hijacking*, *Vehicular Hijacking*, *Robbery by Intimidation*, *Robbery with a Dangerous Weapon*, *Assault with Intent to Rob*, and *Robbery with Firearms or Other Dangerous Weapons*. The Commission anticipates identifying similar issues with the other offenses listed in Crime of Violence Option 1.

For purposes of Crime of Violence Option 1, the Commission intends that violent offenses, such as aggravated assault, arson, extortion, kidnapping, murder, rape, robbery, sexual assault, and voluntary manslaughter, by whatever name they are known under state law, are included in the crime of violence definition. The Commission seeks comment on whether the list of offenses provided as part of the "crime of violence" definition should include the different ways in which these offenses are labeled by different jurisdictions. If so, to what level of specificity should the Commission include any such offense labels? The Commission also seeks comment on how each of the states and United States territories name each of these offenses. Finally, the Commission seeks comment on whether other labels should be included in the definition to adequately capture these offenses in Crime of Violence Option 1. Are there states that do not include names, labels, or titles in their criminal code that would need to be addressed in another way? As an alternative, instead of listing offense labels, should the Commission provide a list of the specific state statutes that should qualify as "crime of violence"? Would an approach that

lists specific state statutes as crimes of violence be more easily administered? If so, which state statutes should be included?

5. The proposed amendment provides an exclusion to limit the scope of the definition of "crime of violence" by adopting a sentence length criteria similar to the one relating to petty and minor offenses from subsection (c)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History), and sets limitations if the defendant can establish that: (i) the conviction for the offense resulted in a sentence for which the defendant served less than [60 days][30 days] in prison; (ii) the acts for which the defendant is criminally liable [did not inflict, did not intend to inflict, and did not threaten to inflict [serious] bodily injury to another person][did not cause, did not intend to cause, and did not create a serious risk of physical harm to another person] during the commission of the offense; or (iii) the defendant's conduct during the commission of the offense was limited to reckless or negligent conduct.

   The Commission seeks comment on whether these limitations are appropriate. Do these limitations appropriately exclude prior convictions that should not qualify as crimes of violence under §4B1.2? Are there additional or different limitations that the Commission should include? For example, should the Commission exclude prior convictions for robbery and extortion offenses if the defendant can establish that no firearm or other dangerous weapon was used in the offense, no threat of use of a firearm or other dangerous weapon was involved in the offense, and the offense did not result in death or serious bodily injury to any person? Should the Commission exclude prior convictions for arson offenses if the defendant can establish that the offense posed, and the defendant reasonably believed the offense posed, no threat to human life?

   One of the limitations provides that an offense of conviction shall not qualify as a "crime of violence" if the defendant can establish that the defendant's conduct during the commission of the offense was limited to reckless or negligent conduct. With this limitation, the Commission intends to require a *mens rea* more culpable than recklessness or negligence for the offense to qualify as a crime of violence. The Commission seeks comment on whether the language of this limitation accomplishes this goal or whether there is a better way to do so.

6. The proposed amendment sets forth two options for limiting the scope of the "controlled substance offense" definition. Controlled Substance Offense Option 1 would revise the definition of "controlled substance offense" to exclude state drug offenses from the scope of its application by listing specific federal statutes relating to drug offenses. The proposed amendment lists the federal statutes that are controlled substance offenses under the current definition to maintain the status quo. The list includes the federal drug trafficking statutes that are specifically referenced in the career offender directive at 28 U.S.C. § 994(h). The federal drug trafficking statutes that appear in brackets are not cited in the directive. The Commission seeks comment generally on whether the approach set forth in this option is appropriate. Are there federal drug offenses that are covered by the proposed amendment but should not be? Are there federal drug offenses that are not covered by the proposed amendment but should be?

7. Controlled Substance Offense Option 2 for limiting the scope of the "controlled substance offense" definition would maintain the current definition but would limit its scope by setting a minimum sentence length requirement for a prior conviction to qualify as a "controlled substance offense." It provides three suboptions for such limitation. The Commission seeks comment on whether it should adopt Controlled Substance Offense Option 2 by keeping the current definition of "controlled substance offense" and limiting qualifying prior convictions to only convictions that received a certain number of criminal history points or a certain length of sentence imposed or served. If so, how should the Commission set that limit and on what basis? The Commission also seeks comment on whether including a minimum sentence length requirement for prior offenses to qualify as a "controlled substance offense" is consistent with the Commission's authority under 28 U.S.C. § 994(h). Should the Commission differentiate between "crimes of violence" and "controlled substance offenses" in setting a minimum sentence length requirement?

   The Commission also seeks comment on each of the suboptions. Which suboption, if any, should the Commission adopt?

8. Controlled Substance Offense Suboptions 2A and 2B for setting a minimum sentence length requirement for a prior conviction to qualify as a "controlled substance offense" bracket the possibility of including a provision that states that a conviction of a controlled substance offense shall not qualify as a prior felony conviction under §4B1.2 if the defendant can establish that the conviction resulted in a sentence for which the defendant served less than [five years][three years][one year] in prison. The Commission seeks comment on what types of sentences should be counted for purposes of this provision. For example, should revocation sentences count to determine whether the defendant served less than [five years][three years][one year] in prison?

9. The Commission seeks comment on whether the definitions of "crime of violence" and "controlled substance offense" should still address the offenses of attempting to commit a substantive offense and conspiracy to commit a substantive offense. Should the Commission provide additional requirements or guidance to address these types of offenses?

10. As indicated above, several guidelines use the terms "crime of violence" and "controlled substance offense" and define these terms by making specific reference to §4B1.2. *See* 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), §7B1.1 (Classification of Violations (Policy Statement)), and §7C1.1 (Classification of Violations (Policy Statement)).

The proposed amendment effectively sets forth three alternatives for addressing the references to "crime of violence" and "controlled substance offense" in §2K2.1. First, absent additional changes to §2K2.1, any revisions to the definitions in §4B1.2 would be incorporated by reference to §2K2.1. In addition to the approach of maintaining the current operation of §2K2.1 by incorporating the definitions from §4B1.2, two options are presented. Firearms Option 1 would maintain the status quo by amending the Commentary to §2K2.1 to incorporate the relevant part or parts of the current definitions from §4B1.2. Firearms Option 2 would amend the Commentary to §2K2.1 to provide that "controlled substance offense" has the meaning given the term "serious drug offense" in 18 U.S.C. § 924(e) and "crime of violence" has the meaning given the term "violent felony" in 18 U.S.C. § 924(e). The Commission seeks comment on each of these options, or, in the alternative, whether §2K2.1 should continue to define the terms "crime of violence" and "controlled substance offense" by making specific references to §4B1.2 if the Commission were to promulgate the proposed amendment.

Similarly, the Commission seeks comment on the approach it should take to address the references to "crime of violence" and "controlled substance offense" in the other guidelines cited above. Should the Commission maintain the status quo by amending the Commentary to any or all of these guidelines to incorporate the relevant parts of §4B1.2? Should the Commission instead continue to define these terms by making specific references to §4B1.2 if the Commission were to promulgate the proposed amendment making changes to the "crime of violence" and "controlled substance offense" definitions contained in §4B1.2? Should the Commission consider moving these definitions from the commentary of these guidelines to the guidelines themselves?

3. PROPOSED AMENDMENT: CIRCUIT CONFLICTS CONCERNING §4B1.2(b)

Synopsis of Proposed Amendment: The proposed amendment addresses two circuit conflicts involving the definition of "controlled substance offense" in subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1).

Section §4B1.2(b) 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." 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), 7B1.1 (Classification of Violations (Policy Statement)), and 7C1.1 (Classification of Violations (Policy Statement)).

The first circuit conflict concerns whether the definition of a "controlled substance offense" in §4B1.2(b) only includes substances controlled by the federal Controlled Substances Act ("CSA") (21 U.S.C. § 801 *et seq*.), or whether the definition also includes 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); Wiggins v. United States, 145 S. Ct. 2621, 2622 (2025) (statement of Sotomayor, J., with whom Barrett, J. joins, respecting denial of certiorari) (collecting cases).

The Second, Fifth, and Ninth Circuits have held that a "controlled substance offense" only includes offenses involving substances controlled by federal law (the CSA), not offenses that include substances that a state schedule lists as a controlled substance, but the CSA does not. *See* United States v. Minor, 121 F.4th 1085, 1089–1090 (5th Cir. 2024) (holding that state-law offense counts only if it is a categorical match for a federal offense); 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). In these circuits, a state drug offense will not qualify as a "controlled substance offense" if the state statute includes any substance not controlled under federal law, even if the offense involved a controlled substance that is covered by the CSA. Because the lists of substances controlled under federal and state law rarely match, and many state statutes do not require proof of the exact substance as an element of the offense, this approach has the practical effect of eliminating many state offenses involving controlled substances under federal law.

By contrast, the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that a state conviction that includes a controlled substance that is not identified in the CSA can qualify as a "controlled substance offense" under the guidelines. *See* United States v. Dubois, 94 F.4th 1284, 1294–96 (11th Cir. 2024) ("A drug regulated by state law is a 'controlled substance' for state predicate offenses, even if federal law does not regulate that drug."), *cert. granted, judgment vacated sub nom*. Dubois v. United States, 145 S. Ct. 1041 (2025), reinstated by 139 F.4th 887 (11th Cir. 2025); United States v. Lewis, 58 F.4th 764, 771 (3d Cir. 2023) ("a 'controlled substance' under [§4B1.2(b)] is a drug regulated by either state or federal law"); United States v. Jones, 81 F.4th 591, 598-99 (6th Cir. 2023) (controlled substance offense includes "state-law controlled substance offense[s]"); 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"); 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."); United States v. Ward, 972 F.3d 364, 374 (4th Cir. 2020) ("[T]he 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]."); 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)).

The second circuit conflict concerns which temporal version of the applicable drug schedule (whether federal or state) should be used to decide if a prior offense qualifies as a predicate "controlled substance offense": (1) the schedule in place at the time of defendant's prior conviction; or (2) the schedule in place at the time of the instant offense or sentencing for the instant federal offense. The interpretations of the Third, Fourth, Sixth, Eighth, and Eleventh Circuits conflict with those of the First, Second, Fifth, and Ninth Circuits. *Compare* United States v. Nelson, 151 F.4th 577 (4th Cir. 2025); *Dubois*, 94 F.4th at 1296; *Lewis*, 58 F.4th at 771–73; United States v. Perez, 46 F.4th 691, 703 (8th Cir. 2022); United States v. Clark, 46 F.4th 404, 408 (6th Cir. 2022) (all using time of the prior convictions), *with* United States v. Minor, 121 F.4h 1085 (5th Cir. 2024); United States v. Bautista, 989 F.3d 698, 703 (9th Cir. 2021), *and* United States v. Abdulaziz, 998 F.3d 519, 523 (1st Cir. 2021) (all using time of sentencing); *see also* United States v. Gibson, 55 F.4th 153, 165 (2d Cir. 2022), *adhered to on reh'g*, 60 F.4th 720 (2d Cir. 2023) (*not* time of prior conviction).

The Sixth Circuit has concluded that courts should use the drug schedule in place at the time of defendant's prior conviction, reasoning that the guideline's language "indicates that the court should take a backward-looking approach and assess the nature of the predicate offenses at the time the convictions for those offenses occurred." *See* United States v. Clark, 46 F.4th 404, 408 (6th Cir. 2022) ("controlled substance" should be defined with reference to "the drug schedules in place at the time of the prior convictions at issue"). Likewise, the Third, Eighth, and Eleventh Circuits have held that whether a conviction qualifies as a controlled substance offense depends on the law at the time of the prior conviction. *Dubois*, 94 F.4th at 1298 ("We adopt a time-of-state-conviction rule: the term 'controlled substance,' . . . means a substance regulated by state law when the defendant was convicted of the state drug offense, even if it is no longer regulated when the defendant is sentenced for the federal firearm offense."); *Lewis*, 58 F.4th at 771–73 ("Simply put, controlled

substances include those regulated at the time of the predicate conviction."); United States v. Perez, 46 F.4th 691, 703 (8th Cir. 2022) ("And this court has also held that whether a prior state conviction is a controlled substance offense for Guidelines purposes is based on the law at the time of conviction, without reference to current state law." (citation omitted)). More recently, the Fourth Circuit held that courts must consult the federal drug schedules in effect at the time of the prior conviction when determining whether a prior offense qualifies as a "controlled substance offense" under §4B1.2(b). United States v. Nelson, 151 F.4th 577 (4th Cir. 2025).

By contrast, the First, Fifth, and Ninth Circuits use the schedule in place at the time of sentencing for the instant federal offense. Accordingly, these circuits compare the elements of the statute of conviction with the current version of the CSA and do not treat a prior conviction as a controlled substance offense if the statute of conviction encompasses conduct that is not currently criminalized by the CSA. *See Minor*, 121 F.4th 1085 (holding that the term "controlled substance" hinges on the definition of "controlled substance" in the CSA "in place at the time of sentencing for the instant offense."); United States v. Bautista, 989 F.3d 698, 703 (9th Cir. 2021) ("[A] court must ask whether [a] prior crime qualifies as a 'controlled substance offense' under the CSA and the corresponding [g]uideline *at the time of sentencing*."); United States v. Abdulaziz, 998 F.3d 519, 523 (1st Cir. 2021) ("[I]nsofar as the CSA's drug schedules were incorporated into the guideline itself at the time of [] sentencing, . . . we must look to the version of those drug schedules that were 'in effect' at that time to determine what constituted a 'controlled substance' at that time." (citations omitted)).

The proposed amendment would amend §4A1.2(b) to address both circuit conflicts.

The proposed amendment would first address the circuit conflict relating to whether a substance involved in an offense must be controlled under federal law by the CSA to qualify as a "controlled substance offense" under §4B1.2(b). Two options are provided:

> **Option 1** would set forth a definition of "controlled substance" that adopts the approach of the Second, Fifth, and Ninth Circuits. It would limit the definition of the term to substances that are specifically included in the CSA. This option would resolve the circuit conflict so as to preserve the status quo in circuits that categorically exclude violations of those state statutes that control substances not included in the CSA.
>
> **Option 2** would set forth a definition of "controlled substance" that adopts the approach of the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits. It would provide that the term "controlled substance" refers to substances either included in the CSA or otherwise controlled under applicable state law.

The proposed amendment would then address the circuit conflict relating to which version of the applicable drug schedule determines whether a prior conviction qualifies as a "controlled substance offense" under §4B1.2(b). Two options are provided.

> **Option 1** would adopt the First, Fifth, and Ninth Circuits' approach of using the schedule in place at the time of sentencing for the instant federal offense.

Option 2 would adopt the Third, Fourth, Sixth, Eighth, and Eleventh Circuits' approach of using the schedule in place at the time of defendant's original conviction.

The proposed amendment would also amend the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States), which contains a definition for the term "drug trafficking offense" that closely tracks the definition of "controlled substance offense" in §4B1.2(b). It sets forth the same options discussed above for §4B1.2(b).

Issues for comment are also provided.

Proposed Amendment:

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

* * *

(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—

(1) 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; or

(2) is an offense described in 46 U.S.C. § 70503(a) or § 70506(b).

CIRCUIT CONFLICT 1
(WHETHER A SUBSTANCE INVOLVED IN AN OFFENSE MUST BE CONTROLLED BY THE CONTROLLED SUBSTANCES ACT TO QUALIFY AS A "CONTROLLED SUBSTANCE OFFENSE" UNDER §4B1.2(b))

[Option 1 (Second, Fifth, and Ninth Circuits—Controlled Substances under Federal Law):

For purposes of this provision, the term "***controlled substance***" refers to a drug or other substance, or immediate precursor, listed in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq*.).**]**

[Option 2 (Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits—Controlled Substances under Federal or State Law):

For purposes of this provision, the term "***controlled substance***" refers to a drug or other substance, or immediate precursor, either listed 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.**]**

CIRCUIT CONFLICT 2
(WHICH VERSION OF THE APPLICABLE DRUG SCHEDULE DETERMINES WHETHER A PRIOR CONVICTION QUALIFIES AS A "CONTROLLED SUBSTANCE OFFENSE" UNDER §4B1.2(b))

[Option 1 (First, Fifth, and Ninth Circuits—Schedule at Time of Sentencing of Instant Offense):

For purposes of this provision, the term "***controlled substance***" refers to a drug or other substance, or immediate precursor, that is controlled under the applicable law at the time of sentencing for the instant offense.**]**

[Option 2 (Third, Fourth, Sixth, Eighth, and Eleventh Circuits—Schedule at Time of Original Conviction):

For purposes of this provision, the term "***controlled substance***" refers to a drug or other substance, or immediate precursor, that was controlled under the applicable law at the time the defendant was originally convicted for the offense.**]**

(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) INCHOATE OFFENSES INCLUDED.—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.

* * *

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

* * *

Commentary

* * *

Application Notes:

* * *

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

* * *

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

CIRCUIT CONFLICT 1
(WHETHER A SUBSTANCE INVOLVED IN AN OFFENSE MUST BE CONTROLLED BY THE CONTROLLED SUBSTANCES ACT TO QUALIFY AS A "DRUG TRAFFICKING OFFENSE" UNDER §2L1.2)

[Option 1 (Second, Fifth, and Ninth Circuits—Controlled Substances under Federal Law):
For purposes of this provision, the term "***controlled substance***" refers to a drug or other substance, or immediate precursor, listed in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. § 801 *et seq*.).**]**

[Option 2 (Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits—Controlled Substances under Federal or State Law):
For purposes of this provision, the term "***controlled substance***" refers to a drug or other substance, or immediate precursor, either listed 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.**]**

CIRCUIT CONFLICT 2
(WHICH VERSION OF THE APPLICABLE DRUG SCHEDULE DETERMINES WHETHER A PRIOR CONVICTION QUALIFIES AS A "DRUG TRAFFICKING OFFENSE" UNDER §2L1.2)

[Option 1 (First, Fifth, and Ninth Circuits—Schedule at Time of Sentencing of Instant Offense):
For purposes of this provision, the term "***controlled substance***" refers to a drug or other substance, or immediate precursor, that is controlled under the applicable law at the time of sentencing for the instant offense.**]**

[Option 2 (Third, Fourth, Sixth, Eighth, and Eleventh Circuits—Schedule at Time of Original Conviction):
For purposes of this provision, the term "***controlled substance***" refers to a drug or other substance, or immediate precursor, that was controlled under the applicable law at the time the defendant was originally convicted for the offense.**]**

* * *

Issues for Comment

1. The proposed amendment would amend subsection (b) of §4B1.2 (Definitions of Terms Used in Section 4B1.1) to address the circuit conflicts described in the synopsis above by providing two options for each circuit conflict. The Commission seeks comment on whether it should address the circuit conflicts in a manner other than the options provided in the proposed amendment. If so, how?

2. Several guidelines use the term "controlled substance offense" and define the terms by making specific reference to §4B1.2. *See, e.g.*, 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), §4B1.4 (Armed Career Criminal), §7B1.1 (Classification of Violations (Policy Statement)), and §7C1.1 (Classification of Violations (Policy Statement)).

If the Commission were to promulgate any of the options set forth in the proposed amendment for each circuit conflict, should any or all of these guidelines continue to define the term "controlled substance offense" by making specific references to §4B1.2? Should the Commission maintain the status quo by amending the Commentary to these guidelines to incorporate the relevant parts of §4B1.2? Should the Commission consider moving these definitions from the commentary of these guidelines to the guidelines themselves?

4. PROPOSED AMENDMENT: HUMAN SMUGGLING

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's "[e]xamination of §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) to ensure the guidelines appropriately account for the consideration of factors such as the number of humans smuggled and whether the offense involved bodily injury or sexual assault." *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 90 FR 39264 (Aug. 14, 2025).

Offenses involving the smuggling, transporting, and harboring of unlawful aliens and aiding, abetting, and conspiring to commit such offenses, are referenced to §2L1.1. The guideline contains a specific offense characteristic that provides a tiered enhancement based on the number of unlawful aliens who were smuggled, transported, or harbored. USSG §2L1.1(b)(2). Offenses involving 6–24 aliens receive a 3-level increase, those involving 25–99 aliens receive a 6-level increase, and those involving 100 or more aliens receive a 9-level increase. *Id.* Commission data show that almost sixty percent (59%) of cases sentenced under §2L1.1 in fiscal year 2024 did not receive an enhancement under §2L1.1(b)(2) for the number of aliens involved in the offense. On average, those cases involved three aliens. When the enhancement was applied, the substantial majority of cases received the 3-level increase at subsection (b)(2)(A) (6–24 aliens). In those cases that received the 3-level enhancement, the offense involved an average of 12 aliens, while cases that received the 6-level enhancement at subsection (b)(2)(B) involved an average of 50 aliens. For those cases that received the highest increase of nine levels at subsection (b)(2)(C) because the offense involved 100 or more aliens, the average number of aliens was 832. However, the median number of aliens for that group was 175.

For an offense in which any person died or sustained a bodily injury, §2L1.1(b)(7) provides a tiered enhancement based on the severity of the injury sustained. USSG §2L1.1(b)(7). Under the tiered enhancement, "bodily injury" results in a 2-level increase, "serious bodily injury" results in a 4-level increase, "permanent or life-threatening injury" results in a 6-level increase, and "death" results in a 10-level increase. *Id.* The Commentary to §2L1.1 refers to the definition of "serious bodily injury" in Application Note 1 of §1B1.1 (Application Instructions). That definition provides that "'serious bodily injury' is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 [(Aggravated sexual abuse)] or § 2242 [(Sexual abuse)] or any similar offense under state law." USSG §1B1.1, comment. (n.1(L)).

In comments to the Commission, the Department of Justice expressed concerns regarding §2L1.1. The Department opined that the guideline does not reflect a congressional intent "to provide increased punishment for each alien smuggled." Letter from Scott Meisler, Deputy Chief, Crim. Div., U.S. Dep't of Just., to the Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, 14 (July 18, 2025), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202507/90FR24170_public-comment_R.pdf#page=97. The Department also expressed that §2L1.1 does not adequately address human smuggling cases in which a victim was sexually abused or otherwise sexually assaulted. *Id.*

The proposed amendment would revise §2L1.1 to respond to these concerns.

The proposed amendment would amend §2L1.1(b)(2) based on the Commission's sentencing data by creating more tiers based on the number of aliens involved and decreasing the number of aliens in each tier. Under the proposed amendment, offenses involving [6]–12 aliens would receive a 3-level enhancement, offenses involving 13–18 aliens would receive a [4]-level enhancement, offenses involving 19–24 aliens would receive a [5]-level enhancement, offenses involving 25–49 aliens would receive a [6]-level enhancement, offenses involving 50–99 aliens would receive a [7]-level enhancement, and offenses involving 100 or more aliens would receive a 9-level enhancement.

The proposed amendment would insert a new subsection (b)(6) applying a 2-level enhancement if the offense involved concealing persons in the trunk or engine compartment of a motor vehicle or carrying substantially more passengers than the rated capacity of a motor vehicle or vessel. If the resulting offense level is less than 18, then the new provision would provide that the offense level be increased to level 18. The existing subsection (b)(6) would be renumbered as subsection (b)(7) and would be amended to provide that it does not apply to conduct for which the defendant received an enhancement under subsection (b)(5) or new subsection (b)(6). Subsection (b)(7) (as renumbered) would also expressly provide that "serious bodily injury" includes criminal sexual abuse.

The proposed amendment would amend subsection (b)(8) (as renumbered) providing an enhancement for an offense involving death or bodily injury. It would bracket the possibility of amending subsection (b)(8) (as renumbered) so that a 2-level enhancement would apply to an offense in which a person was subjected to conduct constituting criminal sexual contact under 18 U.S.C. § 2244. It would also clarify that the 4-level enhancement for serious bodily injury applies to cases involving criminal sexual abuse.

The proposed amendment provides two options for adding a provision to subsection (b)(8) (as renumbered) providing for an enhancement for cases in which multiple people die or sustain an injury.

> **Option 1** would add a new subdivision to (b)(8) (as renumbered) providing a new tiered enhancement if additional people died or sustained an injury. It contains two bracketed possibilities for the enhancement. The first bracketed possibility would apply if the offense resulted in death, any degree of bodily injury[, or criminal sexual contact] to additional people. The second bracketed possibility would apply if the defendant intentionally or knowingly caused death, any degree of bodily injury[, or criminal sexual contact] to additional people. Under both possibilities, an offense would be subject to a [1]-level increase if one or two additional people died or sustained any degree of bodily injury; and an offense would be subject to a [2]-level increase if three or more people died or sustained any degree of bodily injury.
>
> **Option 2** would add a new subdivision to (b)(8) (as renumbered) providing a new tiered enhancement if additional people died or sustained permanent or life-threatening injury. It contains two bracketed possibilities for the enhancement. The first bracketed possibility would apply if the offense resulted in death or permanent or life-threatening bodily injury to additional people. The second bracketed possibility would apply if the defendant intentionally or knowingly caused death or permanent or life-threatening bodily injury to additional people. Under both

possibilities, an offense would be subject to a [3]-level increase if one or two additional people died or sustained permanent or life-threatening injury; and an offense would be subject to a [6]-level increase if three or more people died or sustained permanent or life-threatening injury.

Finally, the proposed amendment brackets two possibilities for adding a new cross reference at §2L1.1(c)(2) instructing courts to apply the appropriate guideline from Chapter Two, Part A, Subpart 3 depending on whether there was conduct described in 18 U.S.C. §§ 2241–2244. Under the first bracketed possibility, the cross reference would apply if the offense involved such conduct. Under the second bracketed possibility, the cross reference would apply if the defendant engaged in such conduct.

Issues for comment are also provided.

Proposed Amendment:

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

(a) Base Offense Level:

(1) **25**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);

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

(3) **12**, otherwise.

(b) Specific Offense Characteristics

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

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

	Number of Unlawful Aliens Smuggled, Transported, or Harbored	Increase in Level
(A)	**[**6**]**–~~24~~12	add **3**
(B)	~~25–99~~13–18	add ~~6~~**[4]**
(C)	19–24	add **[5]**
(D)	25–49	add **[6]**
(E)	50–99	add **[7]**
(F)	100 or more	add **9**.

* * *

(5) (Apply the Greatest):

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

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

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

(6) If the offense involved (A) concealing persons in the trunk or engine compartment of a motor vehicle, or (B) carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, increase by **[2]** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

(~~6~~7) If the offense involved conduct (other than conduct for which the defendant received an enhancement under subsection (b)(5) or (b)(6)) that intentionally or recklessly ~~creating~~created a substantial risk of death or serious bodily injury (including criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law) to another person, increase by **2** levels, but if the resulting offense level is less than level **18**, increase to level **18**.

(~~7~~8) (A) If any person died, ~~or~~ sustained bodily injury (including criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law)**[**, or was subjected to conduct constituting criminal sexual contact under 18 U.S.C. § 2244**]**, increase the offense level according to the seriousness of the injury:

DEATH OR DEGREE OF INJURY	INCREASE IN LEVEL
(~~A~~i) Bodily Injury **[**or Criminal Sexual Contact**]**	add **2** levels
(~~B~~ii) Serious Bodily Injury (Including Criminal Sexual Abuse)	add **4** levels
(~~C~~iii) Permanent or Life-Threatening Bodily Injury	add **6** levels
(~~D~~iv) Death	add **10** levels.

[Option 1 (increase for any additional injuries):

(B) If subsection (b)(8)(A) applies and **[**the offense resulted in**][**the defendant intentionally or knowingly caused**]** death, any degree of injury listed above**[**, or criminal sexual contact under 18 U.S.C. § 2244**]**—

(i) to one or two additional people, increase by **[1]** level; or

(ii) to three or more additional people, increase by **[2]** levels.**]**

[Option 2 (increase for additional deaths or permanent or life-threatening injuries):

(B) If subsection (b)(8)(A) applies and **[**the offense resulted in**][**the defendant intentionally or knowingly caused**]** death or permanent or life-threatening bodily injury—

(i) to one or two additional people, increase by **[3]** levels; or

(ii) to three or more additional people, increase by **[6]** levels.**]**

[The following changes would apply to Options 1 and 2:]

(~~8~~9) (Apply the greater):

(A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by **2** levels. If the resulting offense level is less than level **18**, increase to level **18**.

(B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by **2** levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by **6** levels.

(~~9~~10) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by **2** levels.

(c) Cross Reference

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

(2) If the **[**offense involved**][**defendant engaged in**]** conduct described in 18 U.S.C. §§ 2241–2244, apply the appropriate guideline from Chapter Two, Part A, Subpart 3, if the resulting offense level is greater than that determined under this guideline.

Commentary

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

Application Notes:

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

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

"***Number of unlawful aliens smuggled, transported, or harbored***" does not include the defendant.

"***Aggravated felony***" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

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

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

"***Immigration and naturalization offense***" means any offense covered by Chapter Two, Part L.

"***Minor***" means an individual who had not attained the age of 18 years.

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

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

2. **Prior Convictions Under Subsection (b)(3).**—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

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

(A) **Reckless Conduct.**—Reckless conduct to which the adjustment from subsection (b)(~~6~~7) applies includes a wide variety of conduct (*e.g.*, ~~transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel;~~ harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements).

(B) **Interaction with Other Guideline Provisions.**—If subsection (b)(~~6~~7) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). ~~Additionally, do not apply the adjustment in subsection (b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(5).~~

4. **[Application of Subsections (b)(7) and (b)(8) to Conduct Constituting Criminal Sexual Abuse.** ~~Consistent with Application Note 1(L) of §1B1.1 (Application Instructions), "serious bodily injury" is deemed to have occurred if the offense involved~~If subsection (b)(8) applies on the basis of conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law, then subsection (b)(7) should also apply.**]**

5. **Inapplicability of §3A1.3.**—If an enhancement under subsection (b)(~~8~~9)(A) applies, do not apply §3A1.3 (Restraint of Victim).

6. **Interaction with §3B1.1.**—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.

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

* * *

Issues for Comment

1. The proposed amendment would amend the table at §2L1.1(b)(2) providing an enhancement based on the number of unlawful aliens involved in the offense. Is the proposed number of unlawful aliens in each category appropriate given the corresponding offense-level enhancement? Should the Commission revise the number of unlawful aliens for any of the categories? If so, what should the number of unlawful aliens be for each category? Should an enhancement apply to offenses involving fewer than six aliens? If so, what number of aliens should trigger application of the enhancement? Is the proposed level enhancement for each category appropriate? If not, what should each level enhancement be?

2. The proposed amendment brackets the possibility of amending §2L1.1(b)(8) (as renumbered) to apply a 2-level enhancement to an offense involving criminal sexual contact under 18 U.S.C. § 2244. The Commission seeks comment on whether offenses involving criminal sexual contact should receive an enhancement. If so, what level should the enhancement be?

3. The proposed amendment provides two options for adding an enhancement at §2L1.1(b)(8)(B) (as renumbered) that would apply if there were multiple deaths or injuries. Option 1, which would apply if there were multiple people who sustained an injury of any type covered under the existing table in subsection (b)(8)(A) (as renumbered), would apply a [1]-level enhancement if there were one or two additional injured persons, or a [2]-level enhancement if there were three or more injured persons. Option 2, which would apply if there were multiple people who died or sustained a permanent or life-threatening bodily injury, would apply a [3]-level enhancement if one or two people died or sustained such an injury, or a [6]-level enhancement if three or more people died or sustained such an injury. Both options

bracket the possibility of either making the enhancement offense-based or defendant-based. The Commission seeks comment on the following:

(A) Does either of the options appropriately account for offenses resulting in multiple deaths or injuries? Do the enhancements appropriately account for the severity of any additional injuries?

(B) Should the enhancement be either offense-based or defendant-based, or should the Commission consider another approach? If the enhancement is defendant-based, should the Commission include the *mens rea* requirement that the defendant "intentionally or knowingly" caused the injury?

(C) Is there another approach the Commission should consider? For example, should the Commission create an enhancement that treats an offense resulting in multiple injuries of a lesser degree the same as an offense resulting in fewer, but more severe, injuries? If so, how should that enhancement work?

4. The Commission seeks comment on whether it should add—either in addition to or in lieu of the changes in the proposed amendment—a specific offense characteristic to §2L1.1 to further address the risks associated with human smuggling offenses committed by members of transnational criminal organizations. For example, should the Commission add a specific offense characteristic providing an enhancement if the defendant "committed the offense in connection with the defendant's participation in an organization, knowing [or with reckless disregard of the fact] that the organization was a transnational criminal organization (as defined in 21 U.S.C. § 2341(5))"? The Commission seeks comment on the following:

(A) Should the Commission add a specific offense characteristic to §2L1.1 addressing transnational criminal organizations, such as the language proposed above? If so, at what level should the Commission set the enhancement?

(B) The proposed language above would apply to offenses involving a "transnational criminal organization," as defined in 21 U.S.C. § 2341(5). That statutory definition comprises three subsections, each describing a type of criminal organization. Is this an appropriate definition for purposes of the proposed enhancement? If so, should the Commission use the full statutory definition, or should the Commission use only part of the statutory definition? Should the Commission use a different definition? If so, what definition should the Commission use? Alternatively, should the Commission limit application of the enhancement to specifically enumerated criminal organizations, such as those listed in 21 U.S.C. § 2341(5)(B) or a list of organizations specifically identified by the Commission?

(C) The proposed language above would apply to a defendant who participates in a transnational criminal organization. Should the Commission limit application of the enhancement to a defendant who receives an adjustment

under §3B1.1 (Aggravating Role), or who holds a leadership or organizing role (or some other role) within a transnational criminal organization?

(D) The proposed language would include a requirement that the defendant participated in an organization "knowing [or with reckless disregard of the fact]" that the organization was a transnational criminal organization. Is this *mens rea* requirement appropriate, or should the Commission revise or remove the requirement?

(E) If the Commission were to promulgate a new specific offense characteristic related to transnational criminal organizations, could it result in unwarranted sentencing disparities? If so, how should the Commission address those disparities?

5. Are there any other aggravating or mitigating circumstances in cases sentenced under §2L1.1 that the Commission should address? If so, what are those circumstances, and how might the Commission account for them?