

UNITED STATES SENTENCING COMMISSION
GUIDELINES MANUAL
2021

Supplement to Appendix C



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This document contains amendments to the Guidelines Manual effective November 1, 2012, November 1, 2013, November 1, 2014, November 1, 2015, August 1, 2016, November 1, 2016, and November 1, 2018.

SUPPLEMENT TO APPENDIX C

AMENDMENTS TO THE GUIDELINES MANUAL

This supplement to Appendix C presents amendments to the guidelines, policy statements, and official commentary effective November 1, 2012 (amendments 761–770); November 1, 2013 (amendments 771–779); November 1, 2014 (amendments 780–789); November 1, 2015 (amendments 790–797); August 1, 2016 (amendment 798); November 1, 2016 (amendments 799–804); and November 1, 2018 (amendments 805–813).

For amendments to the guidelines, policy statements, and official commentary effective November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; November 1, 2007; February 6, 2008; March 3, 2008; May 1, 2008; November 1, 2008; November 1, 2009; November 1, 2010; and November 1, 2011, *see* Appendix C, Volume III (amendments 663–760). For amendments effective November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; and November 5, 2003, *see* Appendix C, Volume II (amendments 576–662). For amendments effective November 1, 1997, and earlier, *see* Appendix C, Volume I (amendments 1–575).

The format under which the amendments are presented in Appendix C, including this supplement, is designed to facilitate a comparison between previously existing and amended provisions, in the event it becomes necessary to reference the former guideline, policy statement, or commentary language.

AMENDMENTS

AMENDMENT 761

AMENDMENT: The Commentary to §2B1.1 captioned “Application Notes” is amended in Note 3(E) by adding at the end the following:

“(iii) Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

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

in Note 3(F) by adding at the end the following:

“(ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities.—In a case involving the fraudulent inflation or deflation in the value of a publicly traded security

Amendment 761

or commodity, there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—

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

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

in Note 12(A) by adding at the end the following:

- “(v) One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a ‘bailout’.”;

in Note 12(B)(ii) by adding at the end the following:

- “(VII) One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a ‘bailout’.”;

in Note 19(A)(iv) by inserting before the period at the end the following: “, such as a risk of a significant disruption of a national financial market”;

and in Note 19(C) by adding after the first paragraph the following new paragraph:

“For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.”.

Section 2B1.4(b) is amended by striking “Characteristic” and inserting “Characteristics”; and by adding at the end the following:

- “(2) If the offense involved an organized scheme to engage in insider trading and the offense level determined above is less than level 14, increase to level 14.”.

The Commentary to §2B1.4 captioned “Application Note” is amended in the caption by striking “Note” and inserting “Notes”; by redesignating Note 1 as Note 2 and inserting before Note 2 (as so redesignated) the following:

- “1. Application of Subsection (b)(2).—For purposes of subsection (b)(2), an ‘organized scheme to engage in insider trading’ means a scheme to engage in insider trading that

involves considered, calculated, systematic, or repeated efforts to obtain and trade on inside information, as distinguished from fortuitous or opportunistic instances of insider trading.

The following is a non-exhaustive list of factors that the court may consider in determining whether the offense involved an organized scheme to engage in insider trading:

- (A) the number of transactions;
- (B) the dollar value of the transactions;
- (C) the number of securities involved;
- (D) the duration of the offense;
- (E) the number of participants in the scheme (although such a scheme may exist even in the absence of more than one participant);
- (F) the efforts undertaken to obtain material, nonpublic information;
- (G) the number of instances in which material, nonpublic information was obtained; and
- (H) the efforts undertaken to conceal the offense.”;

in Note 2 (as so redesignated) by striking “only”; and by adding at the end the following new paragraph:

“Furthermore, §3B1.3 should be applied if the defendant’s employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. It would apply, for example, to a hedge fund professional who regularly participates in securities transactions or to a lawyer who regularly provides professional assistance in securities transactions, if the defendant’s employment in such a position was used to facilitate significantly the commission or concealment of the offense. It ordinarily would not apply to a position such as a clerical worker in an investment firm, because such a position ordinarily does not involve special skill. See §3B1.3, comment. (n. 4).”

The Commentary to §2B1.4 captioned “Background” is amended by adding at the end the following new paragraph:

“ Subsection (b)(2) implements the directive to the Commission in section 1079A(a)(1)(A) of Public Law 111–203.”

REASON FOR AMENDMENT: This amendment responds to the two directives to the Commission in the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203 (the “Act”). The first directive relates to securities fraud and similar offenses, and the second directive relates to mortgage fraud and financial institution fraud.

Securities Fraud and Similar Offenses

Section 1079A(a)(1)(A) of the Act directs the Commission to “review and, if appropriate, amend” the guidelines and policy statements applicable to “persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of

Amendment 761

Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses.” Section 1079A(a)(1)(B) provides that in promulgating any such amendment the Commission shall—

- (i) ensure that the guidelines and policy statements, particularly section 2B1.1(b)(14) and section 2B1.1(b)(17) (and any successors thereto), reflect—
 - (I) the serious nature of the offenses described in subparagraph (A);
 - (II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and
 - (III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);
- (ii) consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;
- (iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;
- (iv) make any necessary conforming changes to guidelines; and
- (v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

The amendment responds to this directive in two ways. First, the amendment amends the fraud guideline, §2B1.1 (Theft, Property Destruction, and Fraud), to provide a special rule for determining actual loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. Case law and comments received by the Commission indicate that determinations of loss in cases involving securities fraud and similar offenses are complex and that a variety of different methods are in use, possibly resulting in unwarranted sentencing disparities.

The amendment amends §2B1.1 to provide a special rule regarding how to calculate actual loss in these types of cases. Specifically, the amendment creates a new Application Note 3(F)(ix) which establishes a rebuttable presumption that “the actual loss attributable to the change in value of the security or commodity is the amount determined by (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and (II) multiplying the difference in average price by the number of shares outstanding.” The special rule further provides that, “[i]n determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).”

The special rule is based upon what is sometimes referred to as the “modified rescissory method” and should ordinarily provide a “reasonable estimate of the loss” as required by Application Note 3(C). This special rule is intended to provide courts a workable and consistent formula for calculating loss that “resulted from the offense.” See §2B1.1, comment. (n.3(A)(i)).

By averaging the stock price during the period in which the fraud occurred and a set 90-day period after the fraud was discovered, the special rule reduces the impact on the loss calculation of factors other than the fraud, such as overall growth or decline in the price of the stock. See, e.g., United States v. Bakhit, 218 F. Supp. 2d 1232 (C.D. Cal. 2002); United States v. Snyder, 291 F.3d 1291 (11th Cir. 2002); United States v. Brown, 595 F.3d 498 (3d Cir. 2010); see also 15 U.S.C. § 78u-4(e) (statutorily setting forth a similar method for loss calculation in the context of private securities litigation). Furthermore, applying this special rule could “eliminate[], or at least reduce[], the complexity, uncertainty, and expense inherent in attempting to determine out-of-pocket losses on a case-by-case basis.” See United States v. Grabske, 260 F. Supp. 2d. 866, 873–74 (N.D. Cal. 2002).

By applying a rebuttable presumption, however, the amendment also provides sufficient flexibility for a court to consider the extent to which the amount determined under the special rule includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).

The amendment also responds to the first directive by amending the insider trading guideline, §2B1.4 (Insider Trading). First, it provides a new specific offense characteristic if the offense involved an “organized scheme to engage in insider trading.” In such a case, the new specific offense characteristic provides a minimum offense level of 14. The commentary is also amended to provide factors the court may consider in determining whether the new minimum offense level applies.

The amendment reflects the Commission’s view that a defendant who engages in considered, calculated, systematic, or repeated efforts to obtain and trade on inside information (as opposed to fortuitous or opportunistic instances of insider trading) warrants, at minimum, a short but definite period of incarceration. Sentencing data indicate that when a defendant engages in an organized insider trading scheme, the gain from the offense ordinarily triggers an enhancement under §2B1.4(b)(1) of sufficient magnitude to result in a guideline range that requires a period of imprisonment. The amendment, however, ensures that the guidelines require a period of incarceration even in such a case involving relatively little gain.

The amendment also amends the commentary to §2B1.4 to provide more guidance on the applicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in insider trading cases. In particular, the new commentary in Application Note 2 provides that §3B1.3 should be applied if the defendant’s employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. The commentary further provides examples of positions that may qualify for the adjustment, including a hedge fund professional who regularly participates in securities transactions or a lawyer who regularly provides professional assistance in securities transactions. Individuals who occupy such positions possess special knowledge regarding the financial markets and the rules prohibiting insider trading, and generally are viewed as more culpable. See §3B1.3, comment. (backg’d.). The commentary also provides as an example of a position that would not qualify for the adjustment in §3B1.4 a clerical worker in an investment firm. Such a position ordinarily does not involve special skill and is not generally viewed as more culpable.

Mortgage Fraud and Financial Institution Fraud

Section 1079A(a)(2)(A) of the Act directs the Commission to “review and, if appropriate, amend” the guidelines and policy statements applicable to “persons convicted of fraud offenses relating to financial institutions or federally related mortgage loans and any other similar provisions of law, to reflect the intent of Congress that the penalties for the offenses under the

Amendment 761

guidelines and policy statements ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions.” Section 1079A(a)(2)(B) of the Act provides that, in promulgating any such amendment, the Commission shall—

- (i) ensure that the guidelines and policy statements reflect—
 - (I) the serious nature of the offenses described in subparagraph (A);
 - (II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and
 - (III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);
- (ii) consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;
- (iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;
- (iv) make any necessary conforming changes to guidelines; and
- (v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

The amendment responds to this directive in two ways.

First, the amendment adds language to the credits against loss rule, found in Application Note 3(E) of the commentary to §2B1.1. Application Note 3(E)(i) generally provides that the determination of loss under subsection (b)(1) shall be reduced by the money returned and the fair market value of the property returned and services rendered to the victim before the offense was detected. In the context of a case involving collateral pledged or otherwise provided by the defendant, Application Note 3(E)(ii) provides that the loss to the victim shall be reduced by either “the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.”

The Commission received comment that, in cases involving mortgage fraud where the collateral has not been disposed of by the time of sentencing, the fair market value of the collateral may be difficult to determine and may require frequent updating, especially in cases involving multiple properties. The comments further indicate that the lack of a uniform process may result in unwarranted sentencing disparities.

The amendment responds to these concerns by establishing a new Application Note 3(E)(iii) applicable to fraud cases involving a mortgage loan where the underlying collateral has not been disposed of by the time of sentencing. In such a case, new Application Note 3(E)(iii) makes two changes to the calculation of credits against loss. First, the note changes the date on which the fair market value of the collateral is determined, from the time of sentencing to the date on which the guilt of the defendant has been established. This change is intended to avoid the need to reassess the fair market value of such collateral on multiple occasions up to the date of sentencing. Second, it establishes a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the tax assessment is a reasonable estimate of fair market value, the note further provides that the court may consider the recency of the tax assessment and the extent to which

the jurisdiction's tax assessment practices reflect factors not relevant to fair market value, among other factors.

By structuring the special rule in this manner, the amendment addresses the need to provide a uniform practicable method for determining fair market value of undisposed collateral while providing sufficient flexibility for courts to address differences among jurisdictions regarding how closely the most recent tax assessment correlates to fair market value. The Commission heard concerns, for example, that, in some jurisdictions, the most recent tax assessment may be outdated or based upon factors, such as the age or status of the homeowner, that have no correlation to fair market value.

The amendment also responds to the second directive by amending the commentary regarding the application of §2B1.1(b)(15)(B), which provides an enhancement of 4 levels if the offense involved specific types of financial harms (*e.g.*, jeopardizing a financial institution or organization). This commentary, contained in Application Note 12 to §2B1.1, provides a non-exhaustive list of factors the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution or an organization that was a publicly traded company or that had more than 1,000 employees was substantially jeopardized. For example, in the context of financial institutions, the court shall consider whether the financial institution became insolvent, was forced to reduce benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment, or investment, or was so depleted of its assets as to be forced to merge with another institution. Similarly, in the context of a covered organization, the court shall consider whether the organization became insolvent or suffered a substantial reduction in the value of its assets, filed for bankruptcy, suffered a substantial reduction in the value of its equity securities or its employee retirement accounts, or substantially reduced its workforce or employee pension benefits.

The amendment amends Application Note 12 to add as a new consideration whether one of the listed harms was likely to result from the offense, but did not result from the offense because of federal government intervention, such as a "bailout." This amendment reflects the Commission's intent that §2B1.1(b)(15)(B) account for the risk of harm from the defendant's conduct and its view that a defendant should not avoid the application of the enhancement because the harm that was otherwise likely to result from the offense conduct did not occur because of fortuitous federal government intervention.

Departure Provisions

Finally, the amendment also responds to the Act's directives by amending the departure provisions in §2B1.1 to provide two examples of cases in which a departure may be warranted.

First, the amendment amends Application Note 19(A)(iv), which provides that an upward departure may be warranted if the offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1). The amendment adds "risk of a significant disruption of a national financial market" as an example of such a risk. This part of the amendment responds to the requirement in the Act to consider whether the guidelines applicable to the offenses covered by the directives appropriately "account for the potential and actual harm to the public and the financial markets[.]"

The amendment also amends Application Note 19(C), which provides that a downward departure may be warranted if the offense level substantially overstates the seriousness of the offense, by adding an example of a case in which such a departure may be appropriate. The example provides that "a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims," and that, "in such

Amendment 762

a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense.” This part of the amendment responds to concerns raised in comment and case law that the cumulative impact of the loss table and the victims table may overstate the seriousness of the offense in certain cases.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 762

AMENDMENT: The Commentary to §2D1.1 captioned “Application Notes” is amended in Note 10(D) in the subdivision captioned “Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)” by inserting after the entry relating to N-N-Dimethylamphetamine the following new entry:

“1 gm of N-Benzylpiperazine = 100 gm of marijuana”.

REASON FOR AMENDMENT: This amendment responds to concerns raised by the Second Circuit Court of Appeals and others regarding the sentencing of offenders convicted of offenses involving BZP (N-Benzylpiperazine), which is a Schedule I stimulant. See United States v. Figueroa, 647 F.3d 466 (2d Cir. 2011). The amendment establishes a marijuana equivalency for BZP offenses in the Drug Equivalency Table provided in Application Note 10(D) in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The marijuana equivalency established by the amendment provides that 1 gram of BZP equals 100 grams of marijuana.

Prior to the amendment, the Drug Equivalency Table did not include a marijuana equivalency for BZP. As a result, in offenses involving BZP, the court determined the base offense level using the marijuana equivalency of “the most closely related controlled substance” referenced in §2D1.1. See §2D1.1, comment. (n. 5). In determining the most closely related controlled substance, the commentary directs the court to consider (1) whether the controlled substance not referenced in §2D1.1 has a chemical structure that is substantially similar to a controlled substance that is referenced in §2D1.1, (2) whether the controlled substance not referenced in §2D1.1 has a stimulant, depressant, or hallucinogenic effect similar to a controlled substance referenced in the guideline, and (3) whether a lesser or greater quantity of the controlled substance not referenced in §2D1.1 is needed to produce a substantially similar effect as a controlled substance that is referenced in §2D1.1.

In applying these factors, courts have reached different conclusions regarding which controlled substance referenced in §2D1.1 is most closely related to BZP and have therefore used different marijuana equivalencies in sentencing BZP offenders. The Commission’s review of case law and sentencing data indicate that some district courts have found that the controlled substance most closely related to BZP is amphetamine and used the marijuana equivalency for amphetamine, see United States v. Major, 801 F. Supp. 2d 511, 514 (E.D. Va. 2011) (using the marijuana equivalency for amphetamine at full potency), while other district courts have found that the controlled substance most related to BZP is MDMA, but at varying potencies. See United States v. Bennett, 659 F.3d 711, 715–16 (8th Cir. 2011) (affirming a district court’s use of the marijuana equivalency for MDMA at full potency); United States v. Rose, 722 F. Supp. 2d 1286, 1289 (M.D. Ala. 2010) (concluding that BZP is most closely related to MDMA, but imposing a variance to reflect BZP’s reduced potency compared to MDMA). The different findings of which controlled substance is the most closely related to BZP, and the

application of different potencies of those controlled substances, have resulted in courts imposing vastly different sentence lengths for the same conduct.

The Commission reviewed scientific literature and received expert testimony and comment relating to BZP and concluded that BZP is a stimulant with pharmacologic properties similar to that of amphetamine, but is only one-tenth to one-twentieth as potent as amphetamine, depending on the particular user's history of drug abuse. Accordingly, in order to promote uniformity in sentencing BZP offenders and to reflect the best available scientific evidence, the amendment establishes a marijuana equivalency of 1 gram of BZP equals 100 grams of marijuana. This corresponds to one-twentieth of the marijuana equivalency for amphetamine, which is 1 gram of amphetamine equals 2 kilograms (or 2,000 grams) of marijuana.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 763

AMENDMENT: Section 2D1.11 is amended in subsection (b) by adding at the end the following:

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

The Commentary to 2D1.11 captioned “Application Notes” is amended by adding at the end the following:

“9. Applicability of Subsection (b)(6).—The applicability of subsection (b)(6) shall be determined without regard to the offense of conviction. If subsection (b)(6) applies, §5C1.2(b) does not apply. See §5C1.2(b)(2)(requiring a minimum offense level of level 17 if the ‘statutorily required minimum sentence is at least five years’).”.

REASON FOR AMENDMENT: This amendment adds a new specific offense characteristic at subsection (b)(6) of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) that provides a 2-level decrease if the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) (commonly referred to as the “safety valve” criteria). The new specific offense characteristic in §2D1.11 parallels the existing 2-level decrease at subsection (b)(16) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

The Commission in 1995 created the 2-level reduction in §2D1.1 for offenders who meet the safety valve criteria in response to a directive in section 80001 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322. Section 80001 provided an exception to otherwise applicable statutory minimum sentences for defendants convicted of specified drug offenses and who meet the criteria specified in 18 U.S.C. § 3553(f)(1)–(5), and directed the Commission to promulgate guidelines to carry out these purposes. The reduction in §2D1.1 initially was limited to defendants whose offense level was level 26 or greater, see USSG App. C, Amendment 515 (effective November 1, 1995), but was subsequently expanded to apply to offenders with an offense level lower than level 26 to address proportionality concerns. See USSG App. C, Amendment 624 (effective November 1, 2001). Specifically, the Commission determined that limiting the applicability of the reduction to defendants with an offense level of level 26 or greater “is inconsistent with the general principles underlying the two-level reduction . . . to provide lesser punishment for first time, nonviolent offenders.” Id.

Amendment 764

For similar reasons of proportionality, this amendment expands application of the 2-level reduction to offenses involving list I and list II chemicals sentenced under §2D1.11. List I chemicals are important to the manufacture of a controlled substance and usually become part of the final product, while list II chemicals are generally used as solvents, catalysts, and reagents. See USSG §2D1.11, comment. (backg'd.). Section 2D1.11 is generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in §2D1.1 for offenses involving the final product. The Commission determined that adding the 2-level reduction for meeting the safety valve criteria in §2D1.11 would promote the proportionality the Commission has intended to achieve between §§2D1.1 and 2D1.11.

The amendment also adds new commentary relating to the “safety valve” reduction in §2D1.11 that is consistent with the commentary relating to the “safety valve” reduction in §2D1.1. See USSG §2D1.1, comment. (n. 21). The commentary makes clear that the new 2-level reduction in §2D1.11 applies regardless of the offense of conviction, and that the minimum offense level of 17 in subsection (b) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) does not apply. Section 5C1.2(b) provides for an offense level not less than level 17 for defendants who meet the criteria of subdivisions (1) – (5) of section (a) in §5C1.2 and for whom the statutorily required minimum sentence is at least 5 years. See USSG App. C, Amendment 624 (effective November 1, 2001). Since none of the offenses referenced to §2D1.11 carries a statutory mandatory minimum, the minimum offense level of 17 at §5C1.2(b) does not affect application of the new 2-level reduction in §2D1.11.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 764

AMENDMENT: The Commentary to §2L1.2 captioned “Application Notes” is amended in Note 1(B)(vii) by inserting before the period at the end the following: “, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States”.

REASON FOR AMENDMENT: This amendment responds to a circuit conflict over the application of the enhancements found at §2L1.2(b)(1)(A) and (B) to a defendant who was sentenced on two or more occasions for the same drug trafficking conviction (e.g., because of a revocation of probation, parole, or supervised release), such that there was a sentence imposed before the defendant’s deportation, then an additional sentence imposed after the deportation. The amendment resolves the conflict by amending the definition of “sentence imposed” in Application Note 1(B)(vii) to §2L1.2 (Unlawfully Entering or Remaining in the United States) to state that the length of the sentence imposed includes terms of imprisonment given upon revocation of probation, parole, or supervised release, but “only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.”

Section 2L1.2(b)(1) generally reflects the Commission’s determination that both the seriousness and the timing of the prior offense for which the defendant was deported are relevant to assessing the defendant’s culpability for the illegal reentry offense. A defendant who was deported after a conviction for a felony drug trafficking offense receives an enhancement under either prong (A) or (B) of subsection (b)(1), depending on the length of the sentence imposed. If the sentence imposed was more than 13 months, the defendant receives a 16-level enhancement to the base offense level under prong (A). If the sentence imposed was 13 months or less, the defendant receives a 12-level enhancement under prong (B). However, for defendants whose prior convictions are remote in time and thus do not receive criminal history points, these enhancements are reduced to 12 levels and 8 levels, respectively.

The majority of circuits that have considered the meaning of “sentence imposed” in this context have held that the later, additional sentence imposed after deportation does not lengthen the sentence imposed for purposes of the subsection (b)(1) enhancement. *See United States v. Bustillos-Pena*, 612 F.3d 863 (5th Cir. 2010); *United States v. Lopez*, 634 F.3d 948 (7th Cir. 2011); *United States v. Rosales-Garcia*, 667 F.3d 1348 (10th Cir. 2012); *United States v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000). Under the majority approach, if the sentence imposed was 13 months or less before the defendant was deported, and was only increased to more than 13 months after the deportation, the defendant is not subject to the enhancement in prong (A) because the “sentence imposed” includes only the sentence imposed before the deportation. Under this approach, such a defendant receives the enhancement in prong (B) instead.

The Second Circuit has reached the contrary conclusion, holding that defendants who had their sentences increased to more than 13 months upon revocation after deportation are subject to the enhancement in prong (A) because the “sentence imposed” includes the additional revocation sentence imposed after deportation. *See United States v. Compres-Paulino*, 393 F.3d 116 (2d Cir. 2004).

The amendment adopts the approach taken by the majority of circuits, with the result that the term of imprisonment imposed upon revocation counts toward the calculation of the offense level in §2L1.2 only if it was imposed before the defendant was deported or unlawfully remained in the United States. According to public comment and testimony received by the Commission, and as courts have observed, the circumstances under which persons are found present in this country and have their probation, parole, or supervised release revoked for a prior offense vary widely. *See Bustillos-Pena*, 612 F.3d at 867–68 (describing differences among revocation proceedings). In some jurisdictions, the revocation is typically based on the offender’s illegal return, while in others, the revocation is typically based on the offender’s committing an additional crime. Furthermore, in some cases revocation proceedings commonly occur before the offender is sentenced on the illegal reentry offense, while in other cases the revocation occurs after the federal sentencing. *See Rosales-Garcia*, 667 F.3d at 1354 (observing that considering post-deportation revocation sentences could result in disparities based on the “happencance” of whether that revocation occurred before or after the prosecution for the illegal reentry offense). Therefore, assessing the seriousness of the prior crime based on the sentence imposed before deportation should result in more consistent application of the enhancements in §2L1.2(b)(1)(A) and (B) and promote uniformity in sentencing.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 765

AMENDMENT: Section 2L2.2 is amended in subsection (b) by adding at the end the following:

“(4) (Apply the Greater):

- (A) If the defendant committed any part of the instant offense to conceal the defendant’s membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense during the period in which the defendant was such a member or had such authority, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

Amendment 765

- (B) If the defendant committed any part of the instant offense to conceal the defendant's participation in (i) the offense of incitement to genocide, increase by 6 levels; or (ii) any other serious human rights offense, increase by 10 levels. If clause (ii) applies and the resulting offense level is less than level 25, increase to level 25."

The Commentary to 2L2.2 captioned "Application Notes" is amended by redesignating Notes 4 and 5 as Notes 5 and 6, respectively; and by inserting after Note 3 the following:

"4. Application of Subsection (b)(4).—For purposes of subsection (b)(4):

'Serious human rights offense' means (A) violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code, see 28 U.S.C. § 509B(e); and (B) conduct that would have been a violation of any such law if the offense had occurred within the jurisdiction of the United States or if the defendant or the victim had been a national of the United States.

'The offense of incitement to genocide' means (A) violations of 18 U.S.C. § 1091(c); and (B) conduct that would have been a violation of such section if the offense had occurred within the jurisdiction of the United States or if the defendant or the victim had been a national of the United States."

Chapter Three, Part A is amended by adding at the end the following new guideline and accompanying commentary:

"§3A1.5. Serious Human Rights Offense

If the defendant was convicted of a serious human rights offense, increase the offense level as follows:

- (a) If the defendant was convicted of an offense under 18 U.S.C. § 1091(c), increase by 2 levels.
- (b) If the defendant was convicted of any other serious human rights offense, increase by 4 levels. If (1) death resulted, and (2) the resulting offense level is less than level 37, increase to level 37.

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, 'serious human rights offense' means violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code. See 28 U.S.C. § 509B(e).
2. Application of Minimum Offense Level in Subsection (b).—The minimum offense level in subsection (b) is cumulative with any other provision in the guidelines. For example, if death resulted and this factor was specifically incorporated into the Chapter Two offense guideline, the minimum offense level in subsection (b) may also apply.

Background: This guideline covers a range of conduct considered to be serious human rights offenses, including genocide, war crimes, torture, and the recruitment or use of child soldiers. See generally 28 U.S.C. § 509B(e).

Serious human rights offenses generally have a statutory maximum term of imprisonment of 20 years, but if death resulted, a higher statutory maximum term of imprisonment of any term of years or life applies. See 18 U.S.C. §§ 1091(b), 2340A(a), 2442(b). For the offense of war crimes, a statutory maximum term of imprisonment of any term of years or life always applies. See 18 U.S.C. § 2441(a). For the offense of incitement to genocide, the statutory maximum term of imprisonment is five years. See 18 U.S.C. § 1091(c).”.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 2425 the following:

“18 U.S.C. § 2441 2X5.1”.

REASON FOR AMENDMENT: This amendment results from the Commission’s multi-year review to ensure that the guidelines provide appropriate guidelines penalties for cases involving human rights violations. This amendment addresses human rights violators in two areas: defendants who are convicted of a human rights offense, and defendants who are convicted of immigration or naturalization fraud to conceal the defendant’s involvement, or possible involvement, in a human rights offense.

Serious Human Rights Offenses

First, the amendment addresses defendants whose instant offense of conviction is a “serious human rights offense.” In the Human Rights Enforcement Act of 2009, Pub. L. 111–122 (Dec. 22, 2009), Congress defined “serious human rights offenses” as “violations of Federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code.” In that legislation, Congress authorized a new section within the Department of Justice “with responsibility for the enforcement of laws against suspected participants in [such] offenses.” That section was established the following year, when the Human Rights and Special Prosecutions Section was created in the Justice Department’s Criminal Division. Serious human rights offenses generally have a statutory maximum term of imprisonment of 20 years, but if death resulted, a higher statutory maximum term of imprisonment of any term of years or life applies. See 18 U.S.C. §§ 1091(b), 2340A(a), 2442(b). For the offense of war crimes, a statutory maximum term of imprisonment of any term of years or life always applies. See 18 U.S.C. § 2441(a). For the offense of incitement to genocide, the statutory maximum term of imprisonment is five years. See 18 U.S.C. § 1091(c).

Serious human rights offenses can be committed in a variety of ways, including, for example, assault, kidnapping, and murder. As a result, the guidelines generally have addressed these offenses by referencing them to a number of different Chapter Two offense guidelines, such as §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault) and 2A4.1 (Kidnapping, Abduction, Unlawful Restraint). In addition, certain of these Chapter Two offense guidelines use as a base offense level the offense level from another guideline applicable to the underlying conduct (e.g., §2H1.1 (Offenses Involving Individual Rights), which is the guideline to which genocide offenses are referenced). The offense of committing a war crime in violation of 18 U.S.C. § 2441, however, has not been referenced to any guideline prior to this amendment. The amendment amends Appendix A (Statutory Index) to reference these offenses to §2X5.1 (Other Felony Offenses). Section 2X5.1 addresses the variety of ways in which a war crimes

Amendment 765

offense may be committed by generally directing the court to apply the most analogous offense guideline.

The amendment also establishes a new Chapter Three adjustment at §3A1.5 (Serious Human Rights Offense) if the defendant was convicted of a serious human rights offense. The new guideline provides two tiers of adjustments, corresponding to the differing statutory penalties that apply to such offenses. The adjustment generally provides a 4-level increase if the defendant was convicted of a serious human rights offense, and a minimum offense level of 37 if death resulted. If the defendant was convicted of an offense under 18 U.S.C. § 1091(c) for inciting genocide, however, the adjustment provides a 2-level increase in light of the lesser statutory maximum penalty such offenses carry compared to the other offenses covered by this adjustment.

The new Chapter Three adjustment accounts for the particularly egregious nature of serious human rights offenses while generally maintaining the proportionality provided by the various Chapter Two guidelines that cover such offenses.

Immigration Fraud

Second, the amendment addresses cases in which the offense of conviction is for immigration or naturalization fraud and the defendant committed any part of the instant offense to conceal the defendant's involvement, or possible involvement, in a serious human rights offense. These offenders are sentenced under §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). The offenders covered by this amendment fall into two categories. In the first category are defendants who concealed their connection to a military, paramilitary, or police organization that was involved in a serious human rights offense. In the second category are defendants who concealed having participated in a serious human rights offense.

The amendment adds a new specific offense characteristic to §2L2.2 at subsection (b)(4) that contains two subparagraphs. Subparagraph (A) applies if the defendant committed any part of the instant offense to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense during the period in which the defendant was such a member or had such authority, and provides a 2-level increase and a minimum offense level of 13. Subparagraph (B) applies if the defendant committed any part of the instant offense to conceal the defendant's participation in a serious human rights offense, and provides a 6-level increase if the offense was incitement to genocide, or a 10-level increase and minimum offense level of 25 if the offense was any other serious human rights offense. The amendment also adds an application note defining the terms "serious human rights offense" and "the offense of incitement to genocide."

The new enhancement reflects the impact that such immigration fraud offenses can have on the ability of immigration and naturalization authorities to make fully informed decisions regarding the defendant's immigration petition, application or other request and is intended to ensure that the United States is not a safe haven for those who have committed serious human rights offenses.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 766

AMENDMENT: The Commentary to §4A1.2 captioned “Application Notes” is amended in Note 5 by striking “counted. Such offenses are not minor traffic infractions within the meaning of §4A1.2(c).” and inserting “always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply.”.

REASON FOR AMENDMENT: This amendment resolves differences among circuits regarding when prior sentences for the misdemeanor offenses of driving while intoxicated and driving under the influence (and any similar offenses by whatever name they are known) are counted toward the defendant’s criminal history score.

Convictions for driving while intoxicated and similar offenses encompass a range of offense conduct. For example, convictions for driving while intoxicated and similar offenses can be classified as anything from traffic infractions to misdemeanors and felonies, and they are subject to a broad spectrum of penalties (ranging from a fine to years in custody for habitual offenders). When the prior offense is a felony, the sentence clearly counts toward the defendant’s criminal history score because “[s]entences for all felony offenses are counted.” See subsection (c) of §4A1.2 (Definitions and Instructions for Computing Criminal History). However, when the prior sentence is for a misdemeanor or petty offense, circuits have taken different approaches, in part because of language added to §4A1.2(c)(1). See USSG App. C, Amendment 352 (effective November 1, 1990) (adding “careless or reckless driving” to the offenses listed in §4A1.2(c)(1)).

When the prior sentence is a misdemeanor or petty offense, §4A1.2(c) specifies that the offense is counted, but with two exceptions, limited to cases in which the prior offense is on (or similar to an offense that is on) either of two lists. On the first list are offenses from “careless or reckless driving” to “trespassing.” In such a case, the sentence is counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least 30 days, or (B) the prior offense was similar to the instant offense. See §4A1.2(c)(1). On the second list are offenses from “fish and game violations” to “vagrancy.” In such a case, the sentence is never counted. See §4A1.2(c)(2).

Most circuits have held that driving while intoxicated convictions, including misdemeanors and petty offenses, always count toward the criminal history score, without exception, even if the offense met the criteria for either of the two lists. These circuits have relied on Application Note 5 to §4A1.2, which has provided:

Sentences for Driving While Intoxicated or Under the Influence.—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are counted. Such offenses are not minor traffic infractions within the meaning of §4A1.2(c).

See United States v. Pando, 545 F.3d 682, 683–85 (8th Cir. 2008) (holding that a conviction for driving while ability impaired was properly included in defendant’s criminal history, and rejecting defendant’s argument that his offense was similar to careless or reckless driving); United States v. Thornton, 444 F.3d 1163, 1165–67 (9th Cir. 2006) (holding that driving with high blood alcohol level was properly included in defendant’s criminal history, and rejecting defendant’s argument that his conviction was “similar” to minor traffic infraction or public intoxication). See also United States v. LeBlanc, 45 F.3d 192, 195 (7th Cir. 1995) (“[A]pplication note [5] reflects the Sentencing Commission’s conclusion ‘that driving while intoxicated offenses are of sufficient gravity to merit inclusion in the defendant’s criminal history, however they might be classified under state law.’”); United States v. Deigert, 916 F.2d 916, 918

Amendment 767

(4th Cir. 1990) (holding that defendant’s alcohol-related traffic offenses are counted under Application Note 5).

The Second Circuit took a different approach in United States v. Potes-Castillo, 638 F.3d 106 (2d Cir. 2011), holding that Application Note 5 could be read either (1) to “mean that, like felonies, driving while ability impaired sentences are always counted, without possibility of exception” or (2) “as setting forth the direction that driving while ability impaired sentences must not be treated as minor traffic infractions or local ordinance violations and excluded under section 4A1.2(c)(2).” Id. at 110–11. The Second Circuit adopted the second reading and, accordingly, held that a prior sentence for driving while ability impaired “should be treated like any other misdemeanor or petty offense, except that they cannot be exempted under section 4A1.2(c)(2).” Id. at 113. According to the Second Circuit, such a sentence can qualify for an exception, and therefore not be counted, under the first list (e.g., if it was similar to “careless or reckless driving” and the other criteria for a first-list exception were met).

The amendment resolves the issue by amending Application Note 5 to clarify that convictions for driving while intoxicated and similar offenses are always counted, without regard to how the offenses are classified. Further, the amendment states plainly that paragraphs (1) and (2) of §4A1.2(c) do not apply.

This amendment reflects the Commission’s view that convictions for driving while intoxicated and other similar offenses are sufficiently serious to always count toward a defendant’s criminal history score. The amendment clarifies the Commission’s intent and should result in more consistent calculation of criminal history scores among the circuits.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 767

AMENDMENT: Section 5G1.2 is amended in subsection (b) by striking “Except as otherwise required by law (see §5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.” and inserting “For all counts not covered by subsection (a), the court shall determine the total punishment and shall impose that total punishment on each such count, except to the extent otherwise required by law.”.

The Commentary to §5G1.2 captioned “Application Notes” is amended in Note 1, in the first paragraph, by inserting before the period at the end of the first sentence the following: “and determining the defendant’s guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table)”; and

after the first paragraph, by inserting the following new paragraph:

“Note that the defendant’s guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, see §5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. See Note 3, below.”; and

by redesignating Note 3 as Note 4 and inserting after Note 2 the following:

“3. Application of Subsection (b).—

- (A) In General.—Subsection (b) provides that, for all counts not covered by subsection (a), the court shall determine the total punishment (*i.e.*, the combined length of the sentences to be imposed) and shall impose that total punishment on each such count, except to the extent otherwise required by law (such as where a statutorily required minimum sentence or a statutorily authorized maximum sentence otherwise requires).
- (B) Effect on Guidelines Range of Mandatory Minimum or Statutory Maximum.—The defendant’s guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* §5G1.1, but also in a multiple-count case.

In particular, where a statutorily required minimum sentence on any count is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence on that count shall be the guideline sentence on all counts. *See* §5G1.1(b). Similarly, where a statutorily required minimum sentence on any count is greater than the minimum of the applicable guideline range, the guideline range for all counts is restricted by that statutorily required minimum sentence. *See* §5G1.1(c)(2) and accompanying Commentary.

However, where a statutorily authorized maximum sentence on a particular count is less than the minimum of the applicable guideline range, the sentence imposed on that count shall not be greater than the statutorily authorized maximum sentence on that count. *See* §5G1.1(a).

- (C) Examples.—The following examples illustrate how subsection (b) applies, and how the restrictions in subparagraph (B) operate, when a statutorily required minimum sentence is involved.

Defendant A and Defendant B are each convicted of the same four counts. Counts 1, 3, and 4 have statutory maximums of 10 years, 20 years, and 2 years, respectively. Count 2 has a statutory maximum of 30 years and a mandatory minimum of 10 years.

For Defendant A, the court determines that the final offense level is 19 and the defendant is in Criminal History Category I, which yields a guideline range on the Sentencing Table of 30 to 37 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant A’s guideline sentence is 120 months. *See* subparagraph (B), above. After considering that guideline sentence, the court determines that the appropriate ‘total punishment’ to be imposed on Defendant A is 120 months. Therefore, subsection (b) requires that the total punishment of 120 months be imposed on each of Counts 1, 2, and 3. The sentence imposed on Count 4 is limited to 24 months, because a statutory maximum of 2 years applies to that particular count.

For Defendant B, in contrast, the court determines that the final offense level is 30 and the defendant is in Criminal History Category II, which yields a guideline range on the Sentencing Table of 108 to 135 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant B’s guideline range is restricted to 120 to 135 months. *See* subparagraph (B), above. After

Amendment 767

considering that restricted guideline range, the court determines that the appropriate ‘total punishment’ to be imposed on Defendant B is 130 months. Therefore, subsection (b) requires that the total punishment of 130 months be imposed on each of Counts 2 and 3. The sentences imposed on Counts 1 and 4 are limited to 120 months (10 years) and 24 months (2 years), respectively, because of the applicable statutory maximums.

- (D) Special Rule on Resentencing.—In a case in which (i) the defendant’s guideline range on the Sentencing Table was affected or restricted by a statutorily required minimum sentence (as described in subparagraph (B)), (ii) the court is resentencing the defendant, and (iii) the statutorily required minimum sentence no longer applies, the defendant’s guideline range for purposes of the remaining counts shall be redetermined without regard to the previous effect or restriction of the statutorily required minimum sentence.”

REASON FOR AMENDMENT: This amendment responds to an application issue regarding the applicable guideline range in a case in which the defendant is sentenced on multiple counts of conviction, at least one of which involves a mandatory minimum sentence that is greater than the minimum of the otherwise applicable guideline range. The issue arises under §5G1.2 (Sentencing on Multiple Counts of Conviction) when at least one count in a multiple-count case involves a mandatory minimum sentence that affects the otherwise applicable guideline range. In such cases, circuits differ over whether the guideline range is affected only for the count involving the mandatory minimum or for all counts in the case.

The Fifth Circuit has held that, in such a case, the effect on the guideline range applies to all counts in the case. See United States v. Salter, 241 F.3d 392, 395–96 (5th Cir. 2001). In that case, the guideline range on the Sentencing Table was 87 to 108 months, but one of the three counts carried a mandatory minimum sentence of 10 years (120 months), which resulted in a guideline sentence of 120 months. The Fifth Circuit instructed the district court that the appropriate guideline sentence was 120 months on each of the three counts.

The Ninth Circuit took a different approach in United States v. Evans-Martinez, 611 F.3d 635 (9th Cir. 2010), holding that, in such a case, “a mandatory minimum sentence becomes the starting point for any count that carries a mandatory minimum sentence higher than what would otherwise be the Guidelines sentencing range,” but “[a]ll other counts . . . are sentenced based on the Guidelines sentencing range, regardless [of] the mandatory minimum sentences that apply to other counts.” See id. at 637. The Ninth Circuit stated that it would be more “logical” to follow the Fifth Circuit’s approach but “such logic is overcome by the precise language of the Sentencing Guidelines.” See id.

The District of Columbia Circuit appears to follow an approach similar to the Ninth Circuit. See United States v. Kennedy, 133 F.3d 53, 60–61 (D.C. Cir. 1998) (one of two counts carried a mandatory sentence of life imprisonment; district court treated life imprisonment as the guidelines sentence for both counts; Court of Appeals reversed, holding that the appropriate guidelines range for the other count was 262 to 327 months).

The amendment adopts the approach followed by the Fifth Circuit and makes three changes to §5G1.2. First, it amends §5G1.2(b) to clarify that the court is to determine the total punishment and impose that total punishment on each count, except to the extent otherwise required by law.

Second, it amends the Commentary to clarify that the defendant’s guideline range in a multiple-count case may be restricted by a mandatory minimum penalty or statutory maximum penalty (i.e., a mandatory minimum may increase the bottom of the otherwise applicable

guideline range and a statutory maximum may decrease the top of the otherwise applicable guideline range) in a manner similar to how the guideline range in a single-count case may be restricted by a minimum or maximum penalty under §5G1.1 (Sentencing on a Single Count of Conviction). Specifically, it clarifies that when any count involves a mandatory minimum that restricts the defendant’s guideline range, the guideline range is restricted as to all counts. It also provides examples of how these restrictions operate.

Third, it amends the commentary to clarify that in a case in which (1) a defendant’s guideline range was affected or restricted by a mandatory minimum penalty, (2) the court is resentencing the defendant, and (3) the mandatory minimum sentence no longer applies, the court shall redetermine the defendant’s guideline range for purposes of the remaining counts without regard to the mandatory minimum penalty.

These changes resolve the application issue by clarifying the manner in which the Commission intended this guideline to operate, and by providing examples similar to those used in training probation officers and judges. When there is only one count, the guidelines provide a single guideline range, and that range may be restricted if a mandatory minimum is involved, as described in §5G1.1 (Sentencing on a Single Count of Conviction). When there is more than one count, the guidelines also provide a single guideline range, and that range also may be restricted if a mandatory minimum is involved. These changes provide clarity and consistency for cases in which a mandatory minimum is present and are intended to ensure that sentencing courts resolve multiple-count cases in a straightforward, logical manner, with a single guideline range, a single set of findings and reasons, and a single set of departure and variance considerations.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 768

AMENDMENT: Chapter Five, Part K, Subpart 2 is amended by striking §5K2.19 and its accompanying commentary as follows:

“§5K2.19. Post-Sentencing Rehabilitative Efforts (Policy Statement)

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. § 3583(e)(1).)

Commentary

Background: The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resentenced de novo.”

REASON FOR AMENDMENT: The Commission’s policy statement at §5K2.19 (Post-Sentencing Rehabilitative Efforts) (Policy Statement) prohibits the consideration of post-sentencing rehabilitative efforts as a basis for downward departure when resentencing a defendant. Section

Amendment 769

5K2.19 was promulgated in 2000 in response to a circuit conflict regarding whether sentencing courts may consider such rehabilitative efforts while in prison or on probation as a basis for downward departure at resentencing following an appeal. See USSG App. C, Amendment 602 (effective November 1, 2000). This amendment repeals §5K2.19. The amendment responds to the Supreme Court's decision in Pepper v. United States, 131 S. Ct. 1229 (2011), which, in part relying on 18 U.S.C. § 3661, held among other things that “when a defendant’s sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant’s postsentencing rehabilitation.” The amendment repeals the policy statement in light of the Pepper decision.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 769

AMENDMENT: Section 2P1.2 is amended in subsection (a)(3) by inserting after “currency,” the following: “a mobile phone or similar device,”.

The Commentary to §2P1.2 captioned “Application Notes” is amended by redesignating Notes 1 and 2 as Notes 2 and 3, respectively, and by inserting at the beginning the following:

“1. In this guideline, the term ‘mobile phone or similar device’ means a phone or other device as described in 18 U.S.C. § 1791(d)(1)(F).”.

The Commentary to §2T2.1 captioned “Statutory Provisions” is amended by inserting “15 U.S.C. § 377,” before “26 U.S.C.”.

The Commentary to §2T2.2 captioned “Statutory Provisions” is amended by inserting “15 U.S.C. § 377,” before “26 U.S.C.”.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 15 U.S.C. § 158 the following:

“15 U.S.C. § 377 2T2.1, 2T2.2”;

by inserting after the line referenced to 18 U.S.C. § 43 the following:

“18 U.S.C. § 48 2G3.1”;

by inserting after the line referenced to 18 U.S.C. § 1153 the following:

“18 U.S.C. § 1158 2B1.1, 2B5.3

18 U.S.C. § 1159 2B1.1”;

by inserting after the line referenced to 18 U.S.C. § 1716D the following:

“18 U.S.C. § 1716E 2T2.2”; and

by striking the lines referenced to 41 U.S.C. § 53, 54, and 423(e) as follows:

“41 U.S.C. § 53 2B4.1

41 U.S.C. § 54	2B4.1
41 U.S.C. § 423(e)	2B1.1, 2C1.1”; and by inserting the following:
“41 U.S.C. § 2102	2B1.1, 2C1.1
41 U.S.C. § 2105	2B1.1, 2C1.1
41 U.S.C. § 8702	2B4.1
41 U.S.C. § 8707	2B4.1”.

REASON FOR AMENDMENT: This amendment responds to miscellaneous issues arising from recently enacted legislation.

Cell Phone Contraband Act of 2010

First, the amendment responds to the Cell Phone Contraband Act of 2010, Pub. L. 111–225 (enacted August 10, 2010), which amended 18 U.S.C. § 1791 (Providing or possessing contraband in prison) to make it a class A misdemeanor to provide a mobile phone or similar device to an inmate, or for an inmate to possess a mobile phone or similar device. Offenses under section 1791 are referenced in Appendix A (Statutory Index) to §2P1.2 (Providing or Possessing Contraband in Prison). The penalty structure of section 1791 is based on the type of contraband involved, and the other class A misdemeanors in section 1791 receive a base offense level of 6 in §2P1.2. Under the amendment, the class A misdemeanor in section 1791 that applies when the contraband is a cell phone will also receive a base offense level of 6 in §2P1.2. This change maintains the relationship between the penalty structures of the statute and the guideline.

Prevent All Cigarette Trafficking Act of 2009

Second, the amendment responds to the Prevent All Cigarette Trafficking Act of 2009 (PACT Act), Pub. L. 111–154 (enacted March 31, 2010). The PACT Act made a series of revisions to the Jenkins Act, 15 U.S.C. § 375 *et seq.*, which is one of several laws governing the sale, shipment and taxation of cigarettes and smokeless tobacco.

The PACT Act raised the criminal penalty at 15 U.S.C. § 377 for a knowing violation of the Jenkins Act from a misdemeanor to a felony with a statutory maximum term of imprisonment of 3 years. The amendment amends Appendix A (Statutory Index) to reference section 377 offenses to §2T2.1 (Non-Payment of Taxes) and §2T2.2 (Regulatory Offenses). These two guidelines are the most analogous guidelines for a section 377 offense because the offense may involve either non-payment of taxes or regulatory offenses. Accordingly, the amendment also amends the Commentary to §§2T2.1 and 2T2.2 to add section 377 to their lists of statutory provisions. These lists indicate that §2T2.1 applies if the conduct constitutes non-payment, evasion, or attempted evasion of taxes, and §2T2.2 applies if the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes.

The PACT Act also created a new class A misdemeanor at 18 U.S.C. § 1716E, prohibiting the knowing shipment of cigarettes and smokeless tobacco through the United States mail. The amendment amends Appendix A (Statutory Index) to reference section 1716E offenses to §2T2.2. Section 2T2.2 is the most analogous guideline because offenses under section 1716E are regulatory offenses.

Amendment 769

Animal Crush Video Prohibition Act of 2010

Third, the amendment responds to the Animal Crush Video Prohibition Act of 2010, Pub. L. 111–294 (enacted December 9, 2010), which substantially revised the criminal offense at 18 U.S.C. § 48 (Animal crush videos). Section 48 makes it a crime to create or distribute an “animal crush video,” which is defined by the statute in a manner that requires, among other things, that the depiction be obscene. The maximum term of imprisonment for a section 48 offense is 7 years. The amendment amends Appendix A (Statutory Index) to reference section 48 offenses to §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names). Section 2G3.1 is the most analogous guideline because obscenity is an element of section 48 offenses.

Indian Arts and Crafts Amendments Act of 2010

Fourth, the amendment responds to the Indian Arts and Crafts Amendments Act of 2010, Pub. L. 111–211 (enacted July 29, 2010), which amended the criminal offense at 18 U.S.C. § 1159 (Misrepresentation of Indian produced goods and services) to reduce penalties for first offenders when the value of the goods involved is less than \$1,000. The maximum term of imprisonment under section 1159 had been 5 years for a first offender and 15 years for a repeat offender. The Act retained this penalty structure, except that the statutory maximum term of imprisonment for a first offender was reduced to 1 year in a case in which the value of the goods involved is less than \$1,000. The amendment amends Appendix A (Statutory Index) to reference section 1159 offenses to §2B1.1 (Theft, Property Destruction, and Fraud). Section 2B1.1 is the most analogous guideline because an offense under section 1159 has elements of fraud and deceit.

The amendment also addresses an existing offense, 18 U.S.C. § 1158 (Counterfeiting Indian Arts and Crafts Board trade mark), which makes it a crime to counterfeit or unlawfully affix a Government trademark used or devised by the Indian Arts and Crafts Board or to make any false statement for the purpose of obtaining the use of any such mark. The maximum term of imprisonment under section 1158 is 5 years for a first offender and 15 years for a repeat offender. The amendment amends Appendix A (Statutory Index) to reference section 1158 offenses to both §§2B1.1 and 2B5.3 (Criminal Infringement of Copyright or Trademark). These two guidelines are the most analogous guidelines because an offense under section 1158 contains alternative sets of elements, one of which involves trademark infringement and one of which involves false statements.

Public Contracting Offenses

Finally, the amendment responds to Public Law 111–350 (enacted January 4, 2011), which enacted certain laws relating to public contracts as a new positive-law title of the Code — title 41, “Public Contracts.” As part of this codification, two criminal offenses, 41 U.S.C. §§ 53 and 423(a)–(b), and their respective penalty provisions, 41 U.S.C. §§ 54 and 423(e), were given new title 41 section numbers: sections 8702 and 8707 for sections 53 and 54, respectively, and sections 2102 and 2105 for sections 423(a)–(b) and 423(e), respectively. The substantive offenses and their related penalties did not change. The amendment makes changes to Appendix A (Statutory Index) to reflect the renumbering and includes a reference for the new section 2102, whose predecessor section 423(a)–(b) was not referenced in Appendix A. The changes are technical.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 770

AMENDMENT: The Commentary to §1B1.10 captioned “Application Notes” is amended in Note 4 by striking “Application Note 10 to §2D1.1” and inserting “the Drug Equivalency Tables in the Commentary to §2D1.1 (see §2D1.1, comment. (n.8))”.

The Commentary to §2D1.1 captioned “Application Notes” is amended by renumbering Notes 1 through 29 according to the following table:

<u>Before Amendment</u>	<u>After Amendment</u>
1	1
17	2
13	3
2	4
12	5
5	6
6	7
10	8
11	9
15	10
3	11
18	12
23	13
25	14
26	15
27	16
28	17
19	18(A)
20	18(B)
29	19
21	20

Amendment 770

24	21
8	22
7	23
22	24
4	25
14	26(A)
16	26(B)
9	26(C);

and by rearranging those Notes, as so renumbered, to place them in proper numerical order.

The Commentary to §2D1.1 captioned “Application Notes”, as so renumbered and rearranged, is further amended by inserting headings at the beginning of certain notes, as follows (with Notes referred to by their new numbers):

<u>Note</u>	<u>Heading to Be Inserted at the Beginning</u>
1	“Mixture or Substance”.—
2	“Plant”.—
3	Classification of Controlled Substances.—
4	Applicability to “Counterfeit” Substances.—
5	Determining Drug Types and Drug Quantities.—
7	Multiple Transactions or Multiple Drug Types.—
9	Determining Quantity Based on Doses, Pills, or Capsules.—
10	Determining Quantity of LSD.—
12	Application of Subsection (b)(5).—
18	Application of Subsection (b)(13).—
23	Cases Involving Mandatory Minimum Penalties.—
25	Cases Involving “Small Amount of Marihuana for No Remuneration”.—
26	Departure Considerations.—
26(A)	Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations.—
26(B)	Upward Departure Based on Drug Quantity.—

26(C) Upward Departure Based on Unusually High Purity.—

The Commentary to §2D1.1 captioned “Application Notes”, as so renumbered and rearranged and amended, is further amended as follows (with Notes referred to by their new numbers):

in Note 8(A) by striking “Note 5” and inserting “Note 6”;

in Note 15 by redesignating (i), (ii), and (iii) as (A), (B), and (C), respectively;

in Note 18(A) by inserting before the period at the end of the heading the following: “(Subsection (b)(13)(A))”; and

in Note 18(B) by inserting before the period at the end of the heading the following: “(Subsection (b)(13)(C)B(D))”, by redesignating its component subdivision (A) (beginning “Factors to Consider”) as (i), and that subdivision’s component subdivisions (i) through (iv) as (I) through (IV), respectively, and by redesignating its component subdivision (B) (beginning “Definitions”) as (ii).

The Commentary to §2D1.1 captioned “Background” is amended by striking the fifth through eighth undesignated paragraphs as follows:

“ The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

Subsection (b)(3) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).”;

in the paragraph beginning “The dosage weight” by striking “111 S.Ct. 1919” and inserting “500 U.S. 453”; and

by inserting before the paragraph beginning “Subsection (b)(11)” the following:

“ Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

Subsection (b)(3) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.”.

The Commentary to §2D1.6 captioned “Application Note” is amended in Note 1 by striking “Note 12” and inserting “Note 5”.

Amendment 770

The Commentary to §2D1.11 captioned “Application Notes”, as amended by Amendment 763, is further amended by renumbering Notes 1 through 9 according to the following table:

<u>Before Amendment</u>	<u>After Amendment</u>
4	1
1	2
5	3
6	4
7	5
8	6
9	7
2	8
3	9;

and by rearranging those Notes, as so renumbered, to place them in proper numerical order.

The Commentary to §2D1.11 captioned “Application Notes”, as so renumbered and rearranged, is further amended by inserting headings at the beginning of certain notes, as follows (with Notes referred to by their new numbers):

<u>Note</u>	<u>Heading to Be Inserted at the Beginning</u>
2	Application of Subsection (b)(1).—
3	Application of Subsection (b)(2).—
4	Application of Subsection (b)(3).—
8	Application of Subsection (c)(1).—
9	Offenses Involving Immediate Precursors or Other Controlled Substances Covered Under §2D1.1.—

The Commentary to §2D1.11 captioned “Application Notes”, as so renumbered and rearranged and amended, is further amended in Note 9 (as so renumbered) by striking “Note 12” and inserting “Note 5”.

The Commentary to §5G1.2 captioned “Application Notes”, as amended by Note 767, is further amended by amending Note 1 to read as follows:

- “1. In General.—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences (“total punishment”) is determined by the court after determining the adjusted combined offense level and the Criminal History Category and determining

the defendant's guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table).

Note that the defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, see §5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. See Note 3, below.

Except as otherwise required by subsection (e) or any other law, the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.

This section applies to multiple counts of conviction (A) contained in the same indictment or information, or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence. If no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment.”.

Section 5K2.0 is amended in subsection (d)(1) by striking “the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts)” and inserting “and the last sentence of 5K2.12 (Coercion and Duress)”.

REASON FOR AMENDMENT: This amendment makes certain technical and conforming changes to commentary in the Guidelines Manual.

First, it reorganizes the commentary to the drug trafficking guideline, §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), so that the order of the application notes better reflects the order of the guidelines provisions to which they relate. The amendment also makes stylistic changes to the Commentary to §2D1.1, such as by adding headings to certain application notes. To reflect the renumbering of application notes in §2D1.1, conforming changes are also made to the Commentary to §1B1.10 and §2D1.6.

Second, it makes certain clerical and stylistic changes in connection with certain recently promulgated amendments. See 77 Fed. Reg. 28226 (May 11, 2012). The clerical and stylistic changes are as follows:

- (1) Amendment 763 made revisions to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy). This amendment reorganizes the commentary to §2D1.11 so that the order of the application notes better reflects the order of the guidelines provisions to which they relate. The amendment also makes stylistic changes to the Commentary to §2D1.11 by adding headings to certain application notes.
- (2) Amendment 767 made revisions to §5G1.2 (Sentencing on Multiple Counts of Conviction), including a revision to Application Note 1. However, the amendatory instructions published in the Federal Register to implement those revisions included an erroneous instruction. This amendment restates Application Note 1 in its entirety to ensure that

Amendment 771

it conforms with the version of Application Note 1 that appears in the unofficial, “reader-friendly” version of Amendment 7 that the Commission made available in May 2012.

- (3) Amendment 768 repealed the policy statement at §5K2.19 (Post-Sentencing Rehabilitative Efforts). However, a reference to that policy statement is contained in §5K2.0 (Grounds for Departure). This amendment revises §5K2.0 to reflect the repeal of §5K2.19.

Effective Date: The effective date of this amendment is November 1, 2012.

AMENDMENT 771

AMENDMENT: Section 2B1.1(b) is amended by striking paragraph (5) as follows:

- “(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.”;

by renumbering paragraphs (6) through (8) as (5) through (7); by renumbering paragraphs (13) through (18) as (14) through (19); by inserting after paragraph (12) the following:

- “(13) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended—
- (A) that the trade secret would be transported or transmitted out of the United States, increase by 2 levels; or
 - (B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 4 levels.

If subparagraph (B) applies and the resulting offense level is less than level 14, increase to level 14.”; and

in paragraph (16) (as so renumbered) by striking “(b)(15)(B)” and inserting “(b)(16)(B)”.

The Commentary to §2B1.1 captioned “Application Notes” is amended in Note 6 by striking “(b)(7)” both places it appears and inserting “(b)(6)”; in Note 10 by striking “(b)(13)” both places it appears and inserting “(b)(14)”; in Note 11 by striking “(b)(15)(A)” both places it appears and inserting “(b)(16)(A)”; in Note 12 by striking “(b)(15)(B)” and inserting “(b)(16)(B)”; in Note 12(A) by striking “(b)(15)(B)(i)” and inserting “(b)(16)(B)(i)”; in Note 12(B) by striking “(b)(15)(B)(ii)” and inserting “(b)(16)(B)(ii)”; in Note 13 by striking “(b)(17)” both places it appears and inserting “(b)(18)”; in Note 13(B) by striking “(b)(17)(A)(iii)” both places it appears and inserting “(b)(18)(A)(iii)”, and by striking “(b)(15)(B)” both places it appears and inserting “(b)(16)(B)”; in Note 14 by striking “(b)(18)” each place it appears and inserting “(b)(19)”; and in Note 19(B) by striking “(b)(17)(A)(iii)” and inserting “(b)(18)(A)(iii)”.

The Commentary to §2B1.1 captioned “Background” is amended by striking “(b)(6)”, “(b)(8)”, “(b)(14)(B)”, “(b)(15)(A)”, “(b)(15)(B)(i)”, “(b)(16)”, “(b)(17)”, and “(b)(17)(B)” and inserting “(b)(5)”, “(b)(7)”, “(b)(15)(B)”, “(b)(16)(A)”, “(b)(16)(B)(i)”, “(b)(17)”, “(b)(18)”, and “(b)(18)(B)”, respectively; and by inserting before the paragraph that begins “Subsection (b)(15)(B)” (as so amended) the following:

“ Subsection (b)(13) implements the directive in section 3 of Public Law 112–269.”

REASON FOR AMENDMENT: This amendment responds to section 3 of the Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. 112–269 (enacted January 14, 2013), which contains a directive to the Commission regarding offenses involving stolen trade secrets or economic espionage.

Section 3(a) of the Act directs the Commission to “review and, if appropriate, amend” the guidelines “applicable to persons convicted of offenses relating to the transmission or attempted transmission of a stolen trade secret outside of the United States or economic espionage, in order to reflect the intent of Congress that penalties for such offenses under the Federal sentencing guidelines and policy statements appropriately reflect the seriousness of these offenses, account for the potential and actual harm caused by these offenses, and provide adequate deterrence against such offenses.” Section 3(b) of the Act states that, in carrying out the directive, the Commission shall consider, among other things, whether the guidelines adequately address the simple misappropriation of a trade secret; the transmission or attempted transmission of a stolen trade secret outside of the United States; and the transmission or attempted transmission of a stolen trade secret outside of the United States that is committed or attempted to be committed for the benefit of a foreign government, foreign instrumentality, or foreign agent.

The offenses described in the directive may be prosecuted under 18 U.S.C. § 1831 (Economic espionage), which requires that the defendant specifically intend or know that the offense “will benefit any foreign government, foreign instrumentality, or foreign agent,” and 18 U.S.C. § 1832 (Theft of trade secrets), which does not require such specific intent or knowledge. The statutory maximum terms of imprisonment are 15 years for a section 1831 offense and 10 years for a section 1832 offense. Both offenses are referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud).

In response to the directive, the amendment revises the existing specific offense characteristic at §2B1.1(b)(5), which provides an enhancement of two levels “[i]f the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent,” in two ways. First, it broadens the scope of the enhancement to provide a 2-level increase for trade secret offenses in which the defendant knew or intended that the trade secret would be transported or transmitted out of the United States. Second, it increases the severity of the enhancement to provide a 4-level enhancement and a minimum offense level of 14 for trade secret offenses in which the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent. The enhancement also is redesignated as subsection (b)(13).

In responding to the directive, the Commission consulted with individuals or groups representing law enforcement, owners of trade secrets, victims of economic espionage offenses, the United States Department of Justice, the United States Department of Homeland Security, the United States Department of State, the Office of the United States Trade Representative, the Federal Public and Community Defenders, and standing advisory groups, among others. The Commission also considered relevant data and literature.

The Commission received public comment and testimony that the transmission of stolen trade secrets outside of the United States creates significant obstacles to effective investigation and prosecution and causes both increased harm to victims and more general harms to the nation. With respect to the victim, civil remedies may not be readily available or effective, and the transmission of a stolen trade secret outside of the United States substantially increases the risk that the trade secret will be exploited by a foreign competitor. In contrast, the simple

Amendment 772

movement of a stolen trade secret within a domestic multinational company (e.g., from a United States office to an overseas office of the same company) may not pose the same risks or harms. More generally, the Commission heard that foreign actors increasingly target United States companies for trade secret theft and that such offenses pose a growing threat to the nation's global competitiveness, economic growth, and national security. Accordingly, the Commission determined that a 2-level enhancement is warranted for cases in which the defendant knew or intended that a stolen trade secret would be transported or transmitted outside of the United States.

The Commission also received public comment and testimony that cases involving economic espionage (i.e., trade secret offenses that benefit foreign governments or entities under the substantial control of foreign governments) are particularly serious. In such cases, the United States is unlikely to obtain a foreign government's cooperation when seeking relief for the victim, and offenders backed by a foreign government likely will have significant financial resources to combat civil remedies. In addition, a foreign government's involvement increases the threat to the nation's economic and national security. Accordingly, the Commission determined that the existing enhancement for economic espionage should be increased from 2 to 4 levels and that such offenses should be subject to a minimum offense level of 14. This heightened enhancement is consistent with the higher statutory maximum penalties and fines applicable to such offenses and the Commission's established treatment of economic espionage as a more serious form of trade secret theft.

Consistent with the directive, the Commission also considered whether the guidelines appropriately account for the simple misappropriation of a trade secret. The Commission determined that such offenses are adequately accounted for by existing provisions in the Guidelines Manual, such as the loss table in §2B1.1(b)(1), the sophisticated means enhancement at §2B1.1(b)(10), and the adjustment for abuse of position of trust or use of special skill at §3B1.3.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 772

AMENDMENT: Section 2B1.1 is amended by inserting before paragraph (9) the following new paragraph:

- “(8) (Apply the greater) If—
- (A) the offense involved conduct described in 18 U.S.C. § 670, increase by 2 levels; or
 - (B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by 4 levels.”;

The Commentary to §2B1.1 captioned “Application Notes” is amended in Note 1 by inserting after the paragraph that begins “‘Personal information’ means” the following:

“‘Pre-retail medical product’ has the meaning given that term in 18 U.S.C. § 670(e).”; and by inserting after the paragraph that begins “‘Publicly traded company’ means” the following:

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

Amendment 772

- (4) with intent to defraud, buy, or otherwise obtain, a pre-retail medical product that has expired or been stolen;
- (5) with intent to defraud, sell, or distribute, a pre-retail medical product that is expired or stolen; or
- (6) attempt or conspire to violate any of paragraphs (1) through (5).

The offense generally carries a statutory maximum term of imprisonment of three years. If the offense is an “aggravated offense,” however, higher statutory maximum terms of imprisonment are provided. The offense is an “aggravated offense” if—

- (1) the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product; or
- (2) the violation—
 - (A) involves the use of violence, force, or a threat of violence or force;
 - (B) involves the use of a deadly weapon;
 - (C) results in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved; or
 - (D) is subsequent to a prior conviction for an offense under section 670.

Specifically, the higher statutory maximum terms of imprisonment are:

- (1) Five years, if—
 - (A) the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product; or
 - (B) the violation (i) involves the use of violence, force, or a threat of violence or force, (ii) involves the use of a deadly weapon, or (iii) is subsequent to a prior conviction for an offense under section 670.
- (2) 15 years, if the value of the medical products involved in the offense is \$5,000 or greater.
- (3) 20 years, if both (1) and (2) apply.
- (4) 30 years, if the offense results in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved.

The amendment amends Appendix A (Statutory Index) to reference the new offense at 18 U.S.C. § 670 to §2B1.1 (Theft, Property Destruction, and Fraud). The Commission concluded that §2B1.1 is the appropriate guideline because the elements of the new offense include theft or fraud.

Response to Directive

Section 7 of the Act directs the Commission to “review and, if appropriate, amend” the federal sentencing guidelines and policy statements applicable to the new offense and the related offenses “to reflect the intent of Congress that penalties for such offenses be sufficient to deter and punish such offenses, and appropriately account for the actual harm to the public from these offenses.” The amendment amends §2B1.1 to address offenses involving pre-retail medical products in two ways.

First, the amendment adds a new specific offense characteristic at §2B1.1(b)(8) that provides a two-pronged enhancement with an instruction to apply the greater. Prong (A) provides a 2-level enhancement if the offense involved conduct described in 18 U.S.C. § 670. Prong (B) provides a 4-level enhancement if the offense involved conduct described in 18 U.S.C. § 670 and the defendant was employed by, or an agent of, an organization in the supply chain for the pre-retail product. Accompanying this new specific offense characteristic is new Commentary providing that, if prong (B) applies, “do not apply an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).”

Based on public comment, testimony and sentencing data, the Commission concluded that an enhancement differentiating fraud and theft offenses involving medical products from those involving other products is warranted by the additional risk such offenses pose to public health and safety. In addition, such offenses undermine the public’s confidence in the medical regulatory and distribution system. The Commission also concluded that the risks and harms it identified would be present in any theft or fraud offense involving a pre-retail medical product, regardless of the offense of conviction. Therefore application of the new specific offense characteristic is not limited to offenses charged under 18 U.S.C. § 670.

The amendment provides a 4-level enhancement for defendants who commit such offenses while employed in the supply chain for the pre-retail medical product. Such defendants are subject to an increased statutory maximum and the Commission determined that a heightened enhancement should apply to reflect the likelihood that the defendant’s position in the supply chain facilitated the commission or concealment of the offense. Defendants who receive the 4-level enhancement are not subject to the adjustment at §3B1.3 because the new enhancement adequately accounts for the concerns covered by §3B1.3. The Commission determined that existing specific offense characteristics generally account for other aggravating factors included in the Act, such as loss, use or threat of force, risk of death or serious bodily injury, and weapon involvement, and therefore additional new specific offense characteristics are not necessary. See, e.g., §§2B1.1(b)(1), (b)(3), and (b)(15) (as redesignated by the amendment).

Second, it amends the upward departure provisions in the Commentary to §2B1.1 at Application Note 19(A) to provide — as an example of a case in which an upward departure would be warranted — a case “involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.” Public comment and testimony indicated that §2B1.1 may not adequately account for the harm created by theft or fraud offenses involving pre-retail medical products when such serious bodily injury or death actually occurs as a result of the offense. For example, some pre-retail medical products are stolen as part of a scheme to re-sell them into the supply chain, but if the products have not been properly stored in the interim, their subsequent use can seriously injure the individual consumers who buy and use them. Thus, the amendment expands the scope of the existing upward departure provision to address such harms and to clarify that an upward departure is appropriate in such cases not only if serious bodily injury or death occurred during the theft or fraud, but also if such serious bodily injury or death resulted from the victim’s use of a pre-retail medical product that had previously been obtained by theft or fraud.

Amendment 773

Finally, the amendment amends the Commentary to §2B1.1 to provide relevant definitions and make other conforming changes.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 773

AMENDMENT: Section 2B5.3(b) is amended by renumbering paragraph (5) as (6); by inserting after paragraph (4) the following:

“(5) If the offense involved a counterfeit drug, increase by 2 levels.”; and

by inserting after paragraph (6) (as so renumbered) the following:

“(7) If the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause (A) the disclosure of classified information; (B) impairment of combat operations; or (C) other significant harm to (i) a combat operation, (ii) a member of the Armed Forces, or (iii) national security, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.”.

The Commentary to §2B5.3 captioned “Application Notes” is amended in Note 1 by inserting after the paragraph that begins “Commercial advantage” the following:

“‘Counterfeit drug’ has the meaning given that term in 18 U.S.C. § 2320(f)(6).

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

by renumbering Notes 3 and 4 as 4 and 5; by inserting after Note 2 the following:

“3. Application of Subsection (b)(7).—In subsection (b)(7), ‘other significant harm to a member of the Armed Forces’ means significant harm other than serious bodily injury or death. In a case in which the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, subsection (b)(6)(A) (conscious or reckless risk of serious bodily injury or death) would apply.”; and

in Note 5 (as so renumbered) by adding at the end the following:

“(D) The offense resulted in death or serious bodily injury.”.

The Commentary to §2B5.3 captioned “Background” is amended by inserting after the paragraph that begins “Subsection (b)(1)” the following:

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

Appendix A (Statutory Index) is amended by striking the line referenced to 21 U.S.C. § 333(b) as follows:

“21 U.S.C. § 333(b) 2N2.1”;

and inserting the following:

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

REASON FOR AMENDMENT: This amendment responds to two recent Acts that made changes to 18 U.S.C. § 2320 (Trafficking in counterfeit goods or services). One Act increased penalties for offenses involving counterfeit military goods and services; the other increased penalties for offenses involving counterfeit drugs and included a directive to the Commission. The amendment also responds to recent statutory changes to 21 U.S.C. § 333 (Penalties for violations of the Federal Food, Drug, and Cosmetics Act) that increase penalties for offenses involving intentionally adulterated drugs.

Section 2320 and Counterfeit Military Goods and Services

First, the amendment responds to changes to section 2320 made by the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112–81 (enacted December 31, 2011) (the “NDAA”). In general, section 2320 prohibits trafficking in goods or services using a counterfeit mark, and provides a statutory maximum term of imprisonment of 10 years, or 20 years for a second or subsequent offense. If the offender knowingly or recklessly causes or attempts to cause serious bodily injury or death, the statutory maximum is increased to 20 years or any term of years or life, respectively. Offenses under section 2320 are referenced in Appendix A (Statutory Index) to §2B5.3 (Criminal Infringement of Copyright or Trademark).

Section 818 of the NDAA amended section 2320 to add a new subsection (a)(3) that prohibits trafficking in counterfeit military goods and services, the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or national security. A “counterfeit military good or service” is defined as a good or service that uses a counterfeit mark and that (A) is falsely identified or labeled as meeting military specifications, or (B) is intended for use in a military or national security application. See 18 U.S.C. § 2320(f)(4). An individual who commits an offense under subsection (a)(3) is subject to a statutory maximum term of imprisonment of 20 years, or 30 years for a second or subsequent offense. See 18 U.S.C. § 2320(b)(3).

The legislative history of the NDAA indicates that Congress amended section 2320 because of concerns about national security and the protection of United States servicemen and women. After reviewing the legislative history, public comment, testimony, and data, the Commission determined that an offense involving counterfeit military goods and services that jeopardizes the safety of United States troops and compromises mission effectiveness warrants increased punishment.

Specifically, the amendment addresses offenses involving counterfeit military goods and services by amending §2B5.3 to create a new specific offense characteristic at subsection (b)(7). Subsection (b)(7) provides a 2-level enhancement and a minimum offense level of 14 if the offense involves a counterfeit military good or service the use, malfunction, or failure of which is likely to cause the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security. The Commission set the minimum offense level at 14 so that it would be proportionate to the minimum offense level in the enhancement for “conscious or reckless risk of death or serious bodily injury” at subsection (b)(5)(A). That enhancement is moved from (b)(5)(A) to (b)(6)(A) by the amendment.

Amendment 773

Although section 2320(a)(3) includes offenses that are likely to cause “serious bodily injury or death,” the new specific offense characteristic does not because the Commission determined that such risk of harm is adequately addressed by the existing enhancement for offenses involving the “conscious or reckless risk of death or serious bodily injury.” Consistent with that approach, the amendment includes commentary providing that the “other significant harm” specified in subsection (b)(7) does not include death or serious bodily injury and that §2B5.3(b)(6)(A) would apply if the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death.

Section 2320 and Counterfeit Drugs

Second, the amendment responds to changes made by section 717 of the Food and Drug Administration Safety and Innovation Act, Pub. L. 112–144 (enacted July 9, 2012) (the “FDASIA”), which amended section 2320 to add a new subsection (a)(4) that prohibits trafficking in a counterfeit drug. A “counterfeit drug” is a drug, as defined by section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 321), that uses a counterfeit mark. See 18 U.S.C. § 2320(f)(6). An individual who commits an offense under subsection (a)(4) is subject to the same statutory maximum term of imprisonment as for an offense involving a counterfeit military good or service — 20 years, or 30 years for a second or subsequent offense. See 18 U.S.C. § 2320(b)(3).

Section 717 of the FDASIA also contained a directive to the Commission to “review and amend, if appropriate” the guidelines and policy statements applicable to persons convicted of an offense described in section 2320(a)(4) — i.e., offenses involving counterfeit drugs — “in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by the guidelines and policy statements.” See Pub. L. 112–144, § 717(b)(1). In addition, section 717(b)(2) provides that, in responding to the directive, the Commission shall, among other things, ensure that the guidelines reflect the serious nature of section 2320(a)(4) offenses and consider the extent to which the guidelines account for the potential and actual harm to the public resulting from such offenses.

After reviewing the legislative history of the FDASIA, public comment, testimony, and data, the Commission determined that offenses involving counterfeit drugs involve a threat to public safety and undermine the public’s confidence in the drug supply chain. Furthermore, unlike many other goods covered by the infringement guideline, offenses involving counterfeit drugs circumvent a regulatory scheme established to protect the health and safety of the public. Accordingly, the amendment responds to the directive by adding a new specific offense characteristic at §2B5.3(b)(5) that provides a 2-level enhancement if the offense involves a counterfeit drug.

Offenses Resulting in Death or Serious Bodily Injury

Third, the amendment amends the Commentary to §2B5.3 to add a new upward departure consideration if the offense resulted in death or serious bodily injury. The addition of this departure consideration recognizes the distinction between an offense involving the risk of death or serious bodily injury and one in which death or serious bodily injury actually results. Departures for these reasons are already authorized in the guidelines, see §§5K2.1 (Death) (Policy Statement), 5K2.2 (Physical Injury) (Policy Statement), but the amendment is intended to heighten awareness of the availability of a departure in such cases.

Section 333 and Offenses Involving Intentionally Adulterated Drugs

Finally, the amendment provides a statutory reference for the new offense at 21 U.S.C. § 333(b)(7) created by section 716 of the FDASIA. Section 333(b)(7) applies to any person who knowingly and intentionally adulterates a drug such that the drug is adulterated under certain provisions of 21 U.S.C. § 351 and has a reasonable probability of causing serious adverse health consequences or death to humans or animals. It provides a statutory maximum term of imprisonment of 20 years.

The amendment amends Appendix A (Statutory Index) to reference offenses under section 333(b)(7) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury). The Commission concluded that offenses under section 333(b)(7) are similar to tampering offenses under 18 U.S.C. § 1365 (Tampering with consumer products), which are referenced to §2N1.1. In addition, the public health harms that Congress intended to target in adulteration cases are similar to those targeted by violations of section 1365(a) and are best addressed under §2N1.1.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 774

AMENDMENT: The Commentary to §2T1.1 captioned “Application Notes” is amended in Note 1 by inserting “Tax Loss.—” at the beginning;

in Note 2 by inserting “Total Tax Loss Attributable to the Offense.—” at the beginning, and by redesignating subdivisions (a) through (e) as (A) through (E);

by inserting after Note 2 the following:

- “3. Unclaimed Credits, Deductions, and Exemptions.—In determining the tax loss, the court should account for the standard deduction and personal and dependent exemptions to which the defendant was entitled. In addition, the court should account for any unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only to the extent that (A) the credit, deduction, or exemption was related to the tax offense and could have been claimed at the time the tax offense was committed; (B) the credit, deduction, or exemption is reasonably and practicably ascertainable; and (C) the defendant presents information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy (see §6A1.3 (Resolution of Disputed Factors) (Policy Statement)).

However, the court shall not account for payments to third parties made in a manner that encouraged or facilitated a separate violation of law (e.g., ‘under the table’ payments to employees or expenses incurred to obstruct justice).

The burden is on the defendant to establish any such credit, deduction, or exemption by a preponderance of the evidence. See §6A1.3, comment.”;

by striking “3. ‘Criminal activity’ means” and inserting the following:

- “4. Application of Subsection (b)(1) (Criminal Activity).—‘Criminal activity’ means”;

Amendment 774

by striking “4. Sophisticated Means Enhancement.—” and inserting the following:

“5. Application of Subsection (b)(2) (Sophisticated Means).—”;

by striking Notes 5 and 6 as follows:

“5. A ‘credit claimed against tax’ is an item that reduces the amount of tax directly. In contrast, a ‘deduction’ is an item that reduces the amount of taxable income.

6. ‘Gross income,’ for the purposes of this section, has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61.”;

and inserting the following:

“6. Other Definitions.—For purposes of this section:

A ‘credit claimed against tax’ is an item that reduces the amount of tax directly. In contrast, a ‘deduction’ is an item that reduces the amount of taxable income.

‘Gross income’ has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61.”;
and

in Note 7 by inserting “Aggregation of Individual and Corporate Tax Loss.—” at the beginning.

REASON FOR AMENDMENT: This amendment responds to a circuit conflict regarding whether a sentencing court, in calculating tax loss as defined in §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), may consider previously unclaimed credits, deductions, and exemptions that the defendant legitimately could have claimed if he or she had filed an accurate tax return.

The Tenth and Second Circuits have held that a sentencing court may give the defendant credit for a legitimate but unclaimed deduction. These circuit courts generally reason that, while a district court need not speculate about unclaimed deductions if the defendant offers weak support, nothing in the guidelines prohibits a sentencing court from considering evidence of unclaimed deductions where a defendant offers convincing proof. See United States v. Hoskins, 654 F.3d 1086, 1094 (10th Cir. 2011) (“[W]here defendant offers convincing proof — where the court’s exercise is neither nebulous nor complex — nothing in the Guidelines prohibits a sentencing court from considering evidence of unclaimed deductions in analyzing a defendant’s estimate of the tax loss suffered by the government.”); United States v. Martinez-Rios, 143 F.3d 662, 671 (2d Cir. 1998) (holding that “the sentencing court need not base its tax loss calculation on gross unreported income if it can make a ‘more accurate determination’ of the intended loss and that determination of the tax loss involves giving the defendant the benefit of legitimate but unclaimed deductions”); United States v. Gordon, 291 F.3d 181, 187 (2d Cir. 2002) (applying Martinez-Rios, the court held that the district court erred when it refused to consider potential unclaimed deductions in its sentencing analysis).

Six other circuit courts — the Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh — have reached the opposite conclusion, directly or indirectly holding that a court may not consider unclaimed deductions to reduce the tax loss. These circuit courts generally reason that the “object of the [defendant’s] offense” is established by the amount stated on the fraudulent return, and that courts should not be required to reconstruct the defendant’s return based on speculation regarding the many hypothetical ways the defendant could have completed the return. See United States v. Delfino, 510 F.3d 468, 473 (4th Cir. 2007) (“The law simply does not require the district court to engage in [speculation as to what deductions would have been

allowed], nor does it entitle the Delfinos to the benefit of deductions they might have claimed now that they stand convicted of tax evasion.”); United States v. Phelps, 478 F.3d 680, 682 (5th Cir. 2007) (holding that the defendant could not reduce tax loss by taking a social security tax deduction that he did not claim on the false return); United States v. Chavin, 316 F.3d 666, 677 (7th Cir. 2002) (“Here, the object of [the defendant]’s offense was the amount by which he underreported and fraudulently stated his tax liability on his return; reference to other unrelated mistakes on the return such as unclaimed deductions tells us nothing about the amount of loss to the government that his scheme intended to create.”); United States v. Psihos, 683 F.3d 777, 781–82 (7th Cir. 2012) (following Chavin in disallowing consideration of unclaimed deductions); United States v. Sherman, 372 F.App’x 668, 676–77 (8th Cir. 2010); United States v. Blevins, 542 F.3d 1200, 1203 (8th Cir. 2008) (declining to decide “whether an unclaimed tax benefit may ever offset tax loss,” but finding the district court properly declined to reduce tax loss based on taxpayers’ unclaimed deductions); United States v. Yip, 592 F.3d 1035, 1041 (9th Cir. 2010) (“We hold that § 2T1.1 does not entitle a defendant to reduce the tax loss charged to him by the amount of potentially legitimate, but unclaimed, deductions even if those deductions are related to the offense.”); United States v. Clarke, 562 F.3d 1158, 1165 (11th Cir. 2009) (holding that the defendant was not entitled to a tax loss calculation based on a filing status other than the one he actually used; “[t]he district court did not err in computing the tax loss based on the fraudulent return Clarke actually filed, and not on the tax return Clarke could have filed but did not.”).

The amendment resolves the conflict by amending the Commentary to §2T1.1 to establish a new application note regarding the consideration of unclaimed credits, deductions, or exemptions in calculating a defendant’s tax loss. This amendment reflects the Commission’s view that consideration of legitimate unclaimed credits, deductions, or exemptions, subject to certain limitations and exclusions, is most consistent with existing provisions regarding the calculation of tax loss in §2T1.1. *See, e.g.*, USSG §2T1.1, comment. (n.1) (“the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts”); USSG §2T1.1, comment. (backg’d.) (“a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics”); USSG §2T1.1, comment. (n.1) (allowing a sentencing court to go beyond the presumptions set forth in the guideline if “the government or defense provides sufficient information for a more accurate assessment of the tax loss,” and providing “the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed”).

The new application note first provides that courts should always account for the standard deduction and personal and dependent exemptions to which the defendant was entitled. The Commission received public comment and testimony that such deductions and exemptions are commonly considered and accepted by the government during the course of its investigation and during the course of plea negotiations. Consistent with this standard practice, the Commission determined that accounting for these generally undisputed and readily verifiable deductions and exemptions where they are not previously claimed (most commonly where the offense involves a failure to file a tax return) is appropriate.

The new application note further provides that courts should also account for any other previously unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only to the extent certain conditions are met. First, the credit, deduction, or exemption must be one that was related to the tax offense and could have been claimed at the time the tax offense was committed. This condition reflects the Commission’s determination that a defendant should not be permitted to invoke unforeseen or after-the-fact changes or characterizations — such as offsetting losses that occur before or after the relevant tax year or substituting a more advantageous depreciation method or filing status — to lower the tax

Amendment 775

loss. To permit a defendant to optimize his return in this manner would unjustly reward defendants, and could require unjustifiable speculation and complexity at the sentencing hearing.

Second, the otherwise unclaimed credit, deduction, or exemption must be reasonably and practicably ascertainable. Consistent with the instruction in Application Note 1, this condition reaffirms the Commission's position that sentencing courts need only make a reasonable estimate of tax loss. In this regard, the Commission recognized that consideration of some unclaimed credits, deductions, or exemptions could require sentencing courts to make unnecessarily complex tax determinations, and therefore concluded that limiting consideration of unclaimed credits, deductions, or exemptions to those that are reasonably and practicably ascertainable is appropriate.

Third, the defendant must present information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy. Consistent with the principles set forth in §6A1.3 (Resolution of Disputed Factors) (Policy Statement), this condition ensures that the parties have an adequate opportunity to present information relevant to the court's consideration of any unclaimed credits, deductions, or exemptions raised at sentencing.

In addition, the new application note provides that certain categories of credits, deductions, or exemptions shall not be considered by the court in any case. In particular, "the court shall not account for payments to third parties made in a manner that encouraged or facilitated a separate violation of law (e.g., 'under the table' payments to employees or expenses incurred to obstruct justice)." The Commission determined that payments made in this manner result in additional harm to the tax system and the legal system as a whole. Therefore, to use them to reduce the tax loss would unjustifiably benefit the defendant and would result in a tax loss figure that understates the seriousness of the offense and the culpability of the defendant.

Finally, the application note makes clear that the burden is on the defendant to establish any credit, deduction, or exemption permitted under this new application note by a preponderance of the evidence, which is also consistent with the commentary in §6A1.3.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 775

AMENDMENT: The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 6 by adding at the end of the paragraph that begins "Because the Government" the following as the last sentence: "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."; and

by adding after the paragraph that begins "Because the Government" the following new paragraph:

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

The Commentary to §3E1.1 captioned “Background” is amended in the paragraph that begins “Section 401(g)” by striking “the last paragraph” and inserting “the first sentence of the second paragraph”.

REASON FOR AMENDMENT: This amendment addresses two circuit conflicts involving the guideline for acceptance of responsibility, §3E1.1 (Acceptance of Responsibility). A defendant who clearly demonstrates acceptance of responsibility for his offense receives a 2-level reduction under subsection (a) of §3E1.1. The two circuit conflicts both involve the circumstances under which the defendant is eligible for a third level of reduction under subsection (b) of §3E1.1. Subsection (b) provides:

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

The first circuit conflict involves the government’s discretion under subsection (b) and, in particular, whether the government may withhold a motion based on an interest not identified in §3E1.1, such as the defendant’s refusal to waive his right to appeal. The second conflict involves the court’s discretion under subsection (b) and, in particular, whether the court may decline to apply the third level of reduction when the government has moved for it.

These circuit conflicts are unusual in that they involve guideline and commentary provisions that Congress directly amended. See section 401(g) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21 (the “PROTECT Act”); see also USSG App. C, Amendment 649 (effective April 30, 2003) (implementing amendments to the guidelines made directly by the PROTECT Act). They also implicate a congressional directive to the Commission not to “alter or repeal” the congressional amendments. See section 401(j)(4) of the PROTECT Act. Accordingly, in considering these conflicts, the Commission has not only reviewed public comment, sentencing data, case law, and the other types of information it ordinarily considers, but has also studied the operation of §3E1.1 before the PROTECT Act, the congressional action to amend §3E1.1, and the legislative history of that congressional action.

The Government’s Discretion to Withhold the Motion

The first circuit conflict involves the government’s discretion under subsection (b) and, in particular, whether the government may withhold a motion based on an interest not identified in §3E1.1, such as the defendant’s refusal to waive his right to appeal.

Several circuits have held that a defendant’s refusal to sign an appellate waiver is a legitimate reason for the government to withhold a §3E1.1(b) motion. See, e.g., United States v. Johnson, 581 F.3d 994, 1002 (9th Cir. 2009) (holding that “allocation and expenditure of prosecutorial resources for the purposes of defending an appeal is a rational basis” for such refusal); United States v. Deberry, 576 F.3d 708, 711 (7th Cir. 2009) (holding that requiring the defendant to sign an appeal waiver would avoid “expense and uncertainty” on appeal); United States v. Newson, 515 F.3d 374, 378 (5th Cir. 2008) (holding that the government’s interests under §3E1.1 encompass not only the government’s time and effort at prejudgment stage but also at post-judgment proceedings).

Amendment 775

In contrast, the Fourth Circuit has held that a defendant’s refusal to sign an appellate waiver is not a legitimate reason for the government to withhold a §3E1.1(b) motion. See United States v. Divens, 650 F.3d 343, 348 (4th Cir. 2011) (stating that “the text of §3E1.1(b) reveals a concern for the efficient allocation of trial resources, not appellate resources” [emphasis in original]); see also United States v. Davis, 714 F.3d 474, 476 (7th Cir. 2013) (Rovner, J., concurring) (“insisting that [the defendant] waive his right to appeal before he may receive the maximum credit under the Guidelines for accepting responsibility serves none of the interests identified in section 3E1.1”). The majority in Davis called for the conflict to be resolved, stating: “Resolution of this conflict is the province of the Supreme Court or the Sentencing Commission.” Davis, 714 F.3d at 475 (per curiam). The Second Circuit, stating that the Fourth Circuit’s reasoning in Divens applies “with equal force” to the defendant’s request for an evidentiary hearing on sentencing issues, held that the government may not withhold a §3E1.1 motion based upon such a request. See United States v. Lee, 653 F.3d 170, 175 (2d Cir. 2011).

The PROTECT Act added Commentary to §3E1.1 stating that “[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing.” See §3E1.1, comment. (n.6). The PROTECT Act also amended §3E1.1(b) to provide that the government motion state, among other things, that the defendant’s notification of his intention to enter a plea of guilty permitted “the government to avoid preparing for trial and . . . the government and the court to allocate their resources efficiently”

In its study of the PROTECT Act, the Commission could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1. Furthermore, consistent with Divens and the concurrence in Davis, the Commission determined that the defendant’s waiver of his or her right to appeal is an example of an interest not identified in §3E1.1. Accordingly, this amendment adds an additional sentence to the Commentary stating that “[t]he government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.”

The Court’s Discretion to Deny the Motion

The second conflict involves the court’s discretion under subsection (b) and, in particular, whether the court may decline to apply the third level of reduction when the government has moved for it.

The Seventh Circuit has held that if the government makes the motion (and the other two requirements of subsection (b) are met, i.e., the defendant qualifies for the 2-level decrease and the offense level is level 16 or greater), the third level of reduction must be awarded. See United States v. Mount, 675 F.3d 1052 (7th Cir. 2012).

In contrast, the Fifth Circuit has held that the district court retains discretion to deny the motion. See United States v. Williamson, 598 F.3d 227, 230 (5th Cir. 2010). In Williamson, the defendant was convicted after jury trial but successfully appealed. After remand, he pled guilty to a lesser offense. The government moved for the third level of reduction, but the court declined to grant it because “regardless of however much additional trial preparation the government avoided through Williamson’s guilty plea following remand, the preparation for the initial trial and the use of the court’s resources for that trial meant that the § 3E1.1(b) benefits to the government and the court were not obtained.” Id. at 231. The Fifth Circuit affirmed, holding that the decision whether to grant the third level of reduction “is the district court’s — not the government’s — even though the court may only do so on the government’s motion.” Id. at 230.

This amendment amends the Commentary to §3E1.1 by adding the following statement: “If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.”

In its study of the PROTECT Act, the Commission could discern no congressional intent to take away from the court its responsibility under §3E1.1 to make its own determination of whether the conditions were met. In particular, both the language added to the Commentary by the PROTECT Act and the legislative history of the PROTECT Act speak in terms of allowing the court discretion to “grant” the third level of reduction. See USSG §3E1.1, comment. (n.6) (stating that the third level of reduction “may only be granted upon a formal motion by the Government”); H.R. Rep. No. 108–66, at 59 (2003) (Conf. Rep.) (stating that the PROTECT Act amendment would “only allow courts to grant an additional third point reduction for ‘acceptance of responsibility’ upon motion of the government.”). In addition, the Commission observes that one of the considerations in §3E1.1(b) is whether the defendant’s actions permitted the court to allocate its resources efficiently, and the court is in the best position to make that determination. Accordingly, consistent with congressional intent, this amendment recognizes that the court continues to have discretion to decide whether to grant the third level of reduction.

Finally, and as mentioned above, the Commission in its study of the PROTECT Act could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1. For that reason, this amendment indicates that, if the government has filed the motion and the court also determines that the circumstances identified in §3E1.1 are present, the court should grant the motion.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 776

AMENDMENT: The Commentary to §5G1.3 captioned “Background” is amended by striking the following: “In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S.C. § 3584(a). Exercise of that authority,”;

and inserting the following: “Federal courts generally ‘have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings.’ See Setser v. United States, 132 S. Ct. 1463, 1468 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. See Setser, 132 S. Ct. at 1468. Exercise of that discretion.”.

REASON FOR AMENDMENT: This amendment responds to a recent Supreme Court decision that federal courts have discretion to order that the sentence run consecutively to (or concurrently with) an anticipated, but not yet imposed, state sentence. See Setser v. United States, 132 S. Ct. 1463, 1468 (2012).

Amendment 777

The discretion recognized in Setser for anticipated state sentences is similar to the discretion that federal courts have under 18 U.S.C. § 3584 for previously imposed sentences. Under section 3584, a federal court imposing a sentence generally has discretion to order that the sentence run consecutively to (or, in the alternative, concurrently with) a term of imprisonment previously imposed but not yet discharged. See 18 U.S.C. § 3584(a). Section 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) provides guidance to the court in determining whether, and how, to use the discretion under section 3584, i.e., whether the sentence should run consecutively to (or, in the alternative, concurrently with) the prior undischarged term of imprisonment.

The amendment amends the background commentary to §5G1.3 to include a statement that, in addition to the discretion provided by section 3584, federal courts also generally have discretion under Setser to order that the sentences they impose will run consecutively to or concurrently with other state sentences that are anticipated but not yet imposed. Determining whether, and how, to use this discretion will depend on the adequacy of the information available. See Setser, 132 S. Ct. at 1471 n.6 (“Of course, a district court should exercise the power to impose anticipatory consecutive (or concurrent) sentences intelligently. In some situations, a district court may have inadequate information and may forbear, but in other situations, that will not be the case.”). Adding this statement to the guideline that applies to the court’s discretion under section 3584 is intended to provide heightened awareness of the court’s similar discretion under Setser.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 777

AMENDMENT: The Commentary to §2B1.1 captioned “Application Notes” is amended in Note 15 (as renumbered by Amendment 772) by striking “1a(5)” both places it appears and inserting “1a(11)”; by striking “1a(6)” both places it appears and inserting “1a(12)”; by striking “1a(20)” both places it appears and inserting “1a(28)”; and by striking “1a(23)” both places it appears and inserting “1a(31)”.

Section 2B2.3(b) is amended by striking paragraph (1) as follows:

“(1) If the trespass occurred (A) at a secure government facility; (B) at a nuclear energy facility; (C) on a vessel or aircraft of the United States; (D) in a secure area of an airport or a seaport; (E) at a residence; (F) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration; or (G) on a computer system used (i) to maintain or operate a critical infrastructure; or (ii) by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels.”;

and inserting the following:

“(1) (Apply the greater) If—

(A) the trespass occurred (i) at a secure government facility; (ii) at a nuclear energy facility; (iii) on a vessel or aircraft of the United States; (iv) in a secure area of an airport or a seaport; (v) at a residence; (vi) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration; (vii) at any restricted building or grounds; or (viii) on a computer system used (I) to maintain or operate a critical infrastructure; or (II) by or for a government

entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels; or

- (B) the trespass occurred at the White House or its grounds, or the Vice President’s official residence or its grounds, increase by 4 levels.”.

The Commentary to §2B2.3 captioned “Application Notes” is amended in Note 1 by inserting after the paragraph that begins “‘Protected computer’ means” the following:

“‘Restricted building or grounds’ has the meaning given that term in 18 U.S.C. § 1752.”; and in Note 2 by inserting “Application of Subsection (b)(3).—” at the beginning.

The Notes to the Drug Quantity Table in §2D1.1(c) are amended in each of Notes (H) and (I) by striking “1308.11(d)(30)” and inserting “1308.11(d)(31)”.

The Commentary to §2J1.2 captioned “Application Notes” is amended in Note 2(A) by striking “Chapter Three, Part C” in the heading and inserting “§3C1.1”; and by striking “Chapter Three, Part C (Obstruction and Related Adjustments)” and inserting “§3C1.1 (Obstructing or Impeding the Administration of Justice)”.

The Commentary to §2J1.3 captioned “Application Notes” is amended in Note 2 by striking “Chapter Three, Part C (Obstruction and Related Adjustments)” and inserting “§3C1.1 (Obstructing or Impeding the Administration of Justice)”; and in Note 3 by striking “Chapter Three, Part C (Obstruction and Related Adjustments)” and inserting “§3C1.1”.

The Commentary to §2J1.6 captioned “Application Notes” is amended in Note 2 by striking “Chapter Three, Part C (Obstruction and Related Adjustments)” and inserting “§3C1.1 (Obstructing or Impeding the Administration of Justice)”.

The Commentary to §2J1.9 captioned “Application Notes” is amended in Note 1 by striking “Chapter Three, Part C (Obstruction and Related Adjustments)” and inserting “§3C1.1 (Obstructing or Impeding the Administration of Justice)”; and in Note 2 by striking “Chapter Three, Part C (Obstruction and Related Adjustments)” and inserting “§3C1.1”.

The Commentary to §4A1.1 captioned “Application Notes” is amended in each of Notes 2 and 3 by striking “court martial” and inserting “court-martial”.

Section 4A1.2(g) is amended by striking “court martial” both places it appears and inserting “court-martial”.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 38 the following:

“18 U.S.C. § 39A 2A5.2”;

in the line referenced to 18 U.S.C. § 554 by inserting “2M5.1,” after “2B1.5,”;

by inserting after the line referenced to 18 U.S.C. § 1513 the following:

“18 U.S.C. § 1514(c) 2J1.2”;

Amendment 777

by inserting after the line referenced to 18 U.S.C. § 1751(e) the following:

“18 U.S.C. § 1752 2A2.4, 2B2.3”; and

by inserting after the line referenced to 19 U.S.C. § 1586(e) the following:

“19 U.S.C. § 1590(d)(1) 2T3.1

19 U.S.C. § 1590(d)(2) 2D1.1”.

REASON FOR AMENDMENT: This amendment responds to recently enacted legislation and miscellaneous and technical guideline issues.

Aiming a Laser Pointer at an Aircraft

First, the amendment responds to Section 311 of the FAA Modernization and Reform Act of 2012, Pub. L. 112–95 (enacted February 14, 2012), which established a new criminal offense at 18 U.S.C. § 39A (Aiming a laser pointer at an aircraft). The offense applies to whoever knowingly aims the beam of a laser pointer at an aircraft in the special aircraft jurisdiction of the United States or at the flight path of such an aircraft. The statutory maximum term of imprisonment is five years.

The amendment amends Appendix A (Statutory Index) to reference section 39A offenses to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle). Section 2A5.2 is the most analogous guideline because the offense involves interference with an aircraft in flight.

Restraining the Harassment of a Victim or Witness

Second, the amendment responds to section 3(a) of the Child Protection Act of 2012, Pub. L. 112–206 (enacted December 7, 2012), which established a new offense at 18 U.S.C. § 1514(c) that makes it a criminal offense to knowingly and intentionally violate or attempt to violate an order issued under section 1514 (Civil action to restrain harassment of a victim or witness). The new offense has a statutory maximum term of imprisonment of five years.

The amendment amends Appendix A (Statutory Index) to reference section 1514(c) offenses to §2J1.2 (Obstruction of Justice). Section 2J1.2 is the most analogous guideline because the offense involves interference with judicial proceedings.

Restricted Buildings and Grounds

Third, the amendment responds to the Federal Restricted Buildings and Grounds Improvement Act of 2011, Pub. L. 112–98 (enacted March 8, 2012), which amended the criminal offense at 18 U.S.C. § 1752 (Restricted building or grounds). As so amended, the statute defines “restricted buildings or grounds” to mean any restricted area (A) of the White House or its grounds, or the Vice President’s official residence or its grounds; (B) of a building or grounds where the President or other person protected by the United States Secret Service is or will be temporarily visiting; or (C) of a building or grounds restricted in conjunction with an event designated as a special event of national significance. The statute makes it a crime to enter or remain; to impede or disrupt the orderly conduct of business or official functions; to obstruct or impede ingress or egress; or to engage in any physical violence against any person or property. The Act did not change the statutory maximum term of imprisonment, which is ten years

if the person used or carried a deadly or dangerous weapon or firearm or if the offense results in significant bodily injury, and one year in any other case.

The amendment amends Appendix A (Statutory Index) to reference section 1752 offenses to §2A2.4 (Obstructing or Impeding Officers) and §2B2.3 (Trespass). These guidelines are most analogous because the elements of offenses under section 1752 involve either trespass at certain locations (*i.e.*, locations permanently or temporarily protected by the Secret Service) or interference with official business at such locations, or both.

The amendment also amends §2B2.3(b)(1) to ensure that a trespass under section 1752 provides a 4-level enhancement if the trespass occurred at the White House or the Vice President's official residence, or a 2-level enhancement if the trespass occurred at any other location permanently or temporarily protected by the Secret Service. Section 2B2.3(b)(1) provides a 2-level enhancement if the trespass occurred at locations that involve a significant federal interest, such as nuclear facilities, airports, and seaports. A trespass at a location protected by the Secret Service is no less serious than a trespass at other locations that involve a significant federal interest and warrants an equivalent enhancement of 2 levels. Section 2B2.3(b)(1) also provides a 2-level enhancement if the trespass occurred at a residence. A trespass at the residence of the President or the Vice President is more serious and poses a greater risk of harm than a trespass at an ordinary residence and warrants an enhancement of 4 levels.

Aviation Smuggling

Fourth, the amendment responds to the Ultralight Aircraft Smuggling Prevention Act of 2012, Pub. L. 112–93 (enacted February 10, 2012), which amended the criminal offense at 19 U.S.C. § 1590 (Aviation smuggling) to clarify that the term “aircraft” includes ultralight aircraft and to cover attempts and conspiracies. Section 1590 makes it unlawful for the pilot of an aircraft to transport merchandise, or for any individual on board any aircraft to possess merchandise, knowing that the merchandise will be introduced into the United States contrary to law. It is also unlawful for a person to transfer merchandise between an aircraft and a vessel on the high seas or in the customs waters of the United States unlawfully. The Act did not change the statutory maximum terms of imprisonment, which are 20 years if any of the merchandise involved was a controlled substance, *see* § 1590(d)(2), and five years otherwise, *see* § 1590(d)(1).

The amendment amends Appendix A (Statutory Index) to reference offenses under section 1590(d)(1) to §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property). In such cases, §2T3.1 is the most analogous guideline because the offense involves smuggling. The amendment also amends Appendix A (Statutory Index) to reference offenses under section 1590(d)(2) to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). In such cases, §2D1.1 is the most analogous guideline because controlled substances are involved in these offenses.

Interaction Between Offense Guidelines in Chapter Two, Part J, and Certain Adjustments in Chapter Three, Part C

Fifth, the amendment responds to an application issue that may arise in cases in which the defendant is sentenced under an offense guideline in Chapter Two, Part J (Offenses Involving the Administration of Justice) and the defendant may also be subject to an adjustment under Chapter Three, Part C (Obstruction and Related Adjustments). Specifically, there are application notes in four Chapter Two, Part J guidelines that, it has been argued, preclude the court from applying adjustments in Chapter Three, Part C. *See, e.g., United States v. Duong*, 665 F.3d 364 (1st Cir. 2012) (observing that, “according to the literal terms” of the application

Amendment 777

notes, an adjustment under Chapter Three, Part C ““does not apply,”” but “reject[ing] that premise”).

The amendment amends the relevant application notes in Chapter Two, Part J (see §§2J1.2, comment. (n.2(A)); 2J1.3, comment. (n.2); 2J1.6, comment. (n.2); 2J1.9, comment. (n.1)) to clarify the Commission’s intent that they restrict the court from applying §3C1.1 (Obstructing or Impeding the Administration of Justice) but do not restrict the court from applying §§3C1.2, 3C1.3, and 3C1.4. These changes resolve the application issue consistent with Duong and promote clarity and consistency in the application of these adjustments.

Export Offenses Under 18 U.S.C. § 554

Sixth, the amendment broadens the range of guidelines to which export offenses under 18 U.S.C. § 554 (Smuggling goods from the United States) are referenced. Section 554 makes it unlawful to export or send from the United States (or attempt to do so) any merchandise, article, or object contrary to any law or regulation of the United States. It also makes it unlawful to receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise, article, or object, prior to exportation, knowing the same to be intended for exportation contrary to any law or regulation of the United States. Offenses under section 554 have a statutory maximum term of imprisonment of ten years, and they are referenced in Appendix A (Statutory Index) to three guidelines: §§2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), and 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).

The amendment amends Appendix A (Statutory Index) to add §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism) to the list of guidelines to which offenses under section 554 are referenced. Not all offenses under section 554 involve munitions, cultural resources, or wildlife, so a reference to an additional guideline is warranted. For example, a section 554 offense may be based on the export of ordinary commercial goods in violation of economic sanctions or on the export of “dual-use” goods (*i.e.*, goods that have both commercial and military applications). For such cases, the additional reference to §2M5.1 promotes clarity and consistency in guideline application, and the penalty structure of §2M5.1 provides appropriate distinctions between offenses that violate national security controls and offenses that do not.

Technical and Stylistic Changes

Finally, the amendment makes certain technical and stylistic changes to the Guidelines Manual. First, it amends the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud) to provide updated references to the definitions contained in 7 U.S.C. § 1a, which were renumbered by Public Law 111–203 (enacted July 21, 2010). Second, it amends the Notes to the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide updated references to the definition of tetrahydrocannabinols contained in 21 C.F.R. § 1308.11(d), which were renumbered by 75 Fed. Reg. 79296 (December 20, 2010). Third, it makes several stylistic revisions in the Guidelines Manual to change “court martial” to “court-martial.” The changes are not substantive.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 778

AMENDMENT: The Commentary to §1B1.8 captioned “Application Notes” is amended in Note 3 by striking “(Inadmissibility of Pleas” and inserting “Pleas”.

The Commentary to §2M3.1 captioned “Application Notes” is amended in Note 1 by striking “12958” and inserting “13526”.

The Commentary to §8B2.1 captioned “Background” is amended by striking “805(a)(2)(5)” and inserting “805(a)(5)”.

The Commentary to §8D1.2 captioned “Application Note” is amended in Note 1 by striking “3561(b)” and inserting “3561(c)”.

REASON FOR AMENDMENT: This amendment makes certain technical changes to Commentary in the Guidelines Manual. The changes amend—

- (1) Application Note 3 to §1B1.8 (Use of Certain Information) to reflect a change to the heading of Rule 410 of the Federal Rules of Evidence;
- (2) Application Note 1 to §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government) to ensure that the Executive Order to which it refers is the most recent Executive Order; and
- (3) the Background Commentary to §8B2.1 (Effective Compliance and Ethics Program) and Application Note 1 to §8D1.2 (Term of Probation — Organizations) to correct typographical errors in citations to certain statutes.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 779

AMENDMENT: The Commentary to §1B1.11 captioned “Background” is amended in the first paragraph by striking the following:

“Although aware of possible ex post facto clause challenges to application of the guidelines in effect at the time of sentencing, Congress did not believe that the ex post facto clause would apply to amended sentencing guidelines. S. Rep. No. 225, 98th Cong., 1st Sess. 77–78 (1983). While the Commission concurs in the policy expressed by Congress, courts to date have generally held that the ex post facto clause does apply to sentencing guideline amendments that subject the defendant to increased punishment.”;

and inserting the following:

“However, the Supreme Court has held that the ex post facto clause applies to sentencing guideline amendments that subject the defendant to increased punishment. See Peugh v. United States, 133 S. Ct. 2072, 2078 (2013) (holding that ‘there is an ex post facto violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense’).”; and

Amendment 780

in the paragraph that begins “Subsection (b)(3)” by striking “, cert. denied, 493 U.S. 1062 (1990)”.

REASON FOR AMENDMENT: The Commission’s policy statement at §1B1.11 (Use of Guidelines in Effect on Date of Sentencing) provides that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the ex post facto clause, in which case the court shall apply the Guidelines Manual in effect on the date the offense of conviction was committed. See §1B1.11(a), (b)(1).

This amendment updates the Background Commentary to 1B1.11 to reflect the Supreme Court’s decision in Peugh v. United States, 133 S. Ct. 2072 (2013), which held that “there is an ex post facto violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense.” Id. at 2078. The amendment inserts new language to refer to the Supreme Court’s decision in Peugh and deletes obsolete language.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 780

AMENDMENT: Section 1B1.10 is amended in each of subsections (a)(1), (a)(2)(A), (a)(2)(B), and (b)(1) by striking “subsection (c)” each place such term appears and inserting “subsection (d)”; by redesignating subsection (c) as subsection (d); and by inserting after subsection (b) the following new subsection (c):

“(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).”.

The Commentary to §1B1.10 captioned “Application Notes” is amended in Notes 1(A), 2, and 4 by striking “subsection (c)” each place such term appears and inserting “subsection (d)”; by redesignating Notes 4 through 6 as Notes 5 through 7, respectively; and by inserting after Note 3 the following new Note 4:

“4. Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant’s substantial assistance to authorities. The court determines

that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

- (B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. See §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. See §5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (i.e., unrestricted by operation of §5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.”.

The Commentary to §1B1.10 captioned “Background” is amended by striking “subsection (c)” both places such term appears and inserting “subsection (d)”.

REASON FOR AMENDMENT: This amendment clarifies an application issue that has arisen with respect to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement). Circuits have conflicting interpretations of when, if at all, §1B1.10 provides that a statutory minimum continues to limit the amount by which a defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2) when the defendant's original sentence was below the statutory minimum due to substantial assistance.

This issue arises in two situations. First, there are cases in which the defendant's original guideline range was above the mandatory minimum but the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. For example, consider a case in which the mandatory minimum was 240 months, the original guideline range was 262 to 327 months, and the defendant's original sentence was 160 months, representing a 39 percent reduction for substantial assistance below the bottom of the guideline range. In a sentence reduction proceeding pursuant to Amendment 750, the amended

Amendment 780

guideline range as determined on the Sentencing Table is 168 to 210 months, but after application of the “trumping” mechanism in §5G1.1 (Sentencing on a Single Count of Conviction), the mandatory minimum sentence of 240 months is the guideline sentence. See §5G1.1(b). Section 1B1.10(b)(2)(B) provides that such a defendant may receive a comparable 39 percent reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

The Eighth Circuit has taken the view that the bottom of the amended guideline range in such a case would be 240 months, *i.e.*, the guideline sentence that results after application of the “trumping” mechanism in §5G1.1. See United States v. Golden, 709 F.3d 1229, 1231–33 (8th Cir. 2013). In contrast, the Seventh Circuit has taken the view that the bottom of the amended guideline range in such a case would be 168 months, *i.e.*, the bottom of the amended range as determined by the Sentencing Table, without application of the “trumping” mechanism in §5G1.1. See United States v. Wren, 706 F.3d 861, 863 (7th Cir. 2013). Each circuit found support for its view in an Eleventh Circuit decision, United States v. Liberse, 688 F.3d 1198 (11th Cir. 2012), which also discussed this issue.

Second, there are cases in which the defendant’s original guideline range as determined by the Sentencing Table was, at least in part, below the mandatory minimum, and the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. In these cases, the “trumping” mechanism in §5G1.1 operated at the original sentence to restrict the guideline range to be no less than the mandatory minimum. For example, consider a case in which the original Sentencing Table guideline range was 140 to 175 months but the mandatory minimum was 240 months, resulting (after operation of §5G1.1) in a guideline sentence of 240 months. The defendant’s original sentence was 96 months, representing a 60 percent reduction for substantial assistance below the statutory and guideline minimum. In a sentence reduction proceeding, the amended Sentencing Table guideline range is 110 to 137 months, resulting (after operation of §5G1.1) in a guideline sentence of 240 months. Section 1B1.10(b)(2)(B) provides that such a defendant may receive a reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

The Eleventh Circuit, the Sixth Circuit, and the Second Circuit have taken the view that the bottom of the amended range in such a case would remain 240 months, *i.e.*, the guideline sentence that results after application of the “trumping” mechanism in §5G1.1. See United States v. Glover, 686 F.3d 1203, 1208 (11th Cir. 2012); United States v. Joiner, 727 F.3d 601 (6th Cir. 2013); United States v. Johnson, 732 F.3d 109 (2d Cir. 2013). Under these decisions, the defendant in the example would have an original range of 240 months and an amended range of 240 months, and would not be eligible for any reduction because the range has not been lowered. In contrast, the Third Circuit and the District of Columbia Circuit have taken the view that the bottom of the amended range in such a case would be 110 months, *i.e.*, the bottom of the Sentencing Table guideline range. See United States v. Savani, 733 F.3d 56, 66–7 (3d Cir. 2013); In re Sealed Case, 722 F.3d 361, 369–70 (D.C. Cir. 2013).

The amendment generally adopts the approach of the Third Circuit in Savani and the District of Columbia Circuit in In re Sealed Case. It amends §1B1.10 to specify that, if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, then for purposes of §1B1.10 the amended guideline range shall be determined without regard to the operation of §5G1.1 and §5G1.2. The amendment also adds a new application note with examples.

This clarification ensures that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full

benefit of a reduction that accounts for that assistance. See USSG App. C. Amendment 759 (Reason for Amendment). As the Commission noted in the reason for that amendment: “The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.” Id.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 781

AMENDMENT: Section 2A2.2(b) is amended by redesignating paragraphs (4) through (6) as paragraphs (5) through (7), respectively; and by inserting after paragraph (3) the following new paragraph (4):

“(4) If the offense involved strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner, increase by 3 levels.

However, the cumulative adjustments from application of subdivisions (2), (3), and (4) shall not exceed 12 levels.”.

The Commentary to §2A2.2 captioned “Statutory Provisions” is amended by inserting after “113(a)(2), (3), (6),” the following: “(8),”.

The Commentary to §2A2.2 captioned “Application Notes” is amended in Note 1 by striking “or (C)” and inserting “(C) strangling, suffocating, or attempting to strangle or suffocate; or (D)”; and by adding at the end the following new paragraphs:

“‘Strangling’ and ‘suffocating’ have the meaning given those terms in 18 U.S.C. § 113.

‘Spouse,’ ‘intimate partner,’ and ‘dating partner’ have the meaning given those terms in 18 U.S.C. § 2266.”;

and in Note 4 by striking “(b)(6)” and inserting “(b)(7)”.

The Commentary to §2A2.2 captioned “Background” is amended in the first paragraph by striking “minor assaults” and inserting “other assaults”; by striking the comma after “serious bodily injury” and inserting a semicolon; and by striking the comma after “cause bodily injury” and inserting “; strangling, suffocating, or attempting to strangle or suffocate;”;

and in the paragraph that begins “Subsection” by striking “(b)(6)” both places it appears and inserting “(b)(7)”.

Section 2A2.3 is amended in the heading by striking “Minor Assault” and inserting “Assault”.

Section 2A2.3(b)(1) is amended by inserting after “substantial bodily injury to” the following: “a spouse, intimate partner, or dating partner, or”.

Amendment 781

The Commentary to §2A2.3 captioned “Statutory Provisions” is amended by inserting after “112,” the following: “113(a)(4), (5), (7).”

The Commentary to §2A2.3 captioned “Application Notes” is amended in Note 1 by striking “‘Minor assault’ means a misdemeanor assault, or a felonious assault not covered by §2A2.2 (Aggravated Assault).” and inserting the following new paragraph:

“‘Spouse,’ ‘intimate partner,’ and ‘dating partner’ have the meaning given those terms in 18 U.S.C. § 2266.”

The Commentary to §2A2.3 captioned “Background” is amended by striking “Minor assault and battery are covered by this section.” and inserting the following: “This section applies to misdemeanor assault and battery and to any felonious assault not covered by §2A2.2 (Aggravated Assault).”

Section 2A6.2(b)(1) is amended by striking “(C)” and inserting “(C) strangling, suffocating, or attempting to strangle or suffocate; (D)”; by striking “(D) a pattern” and inserting “(E) a pattern”; and by striking “these aggravating factors” and inserting “subdivisions (A), (B), (C), (D), or (E)”.

The Commentary to §2A6.2 captioned “Application Notes” is amended in Note 1 by striking the paragraph referenced to “Stalking” as follows:

“‘Stalking’ means (A) traveling with the intent to kill, injure, harass, or intimidate another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to that person or an immediate family member of that person; or (B) using the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, that person or an immediate family member of that person. See 18 U.S.C. § 2261A. ‘Immediate family member’ (A) has the meaning given that term in 18 U.S.C. § 115(c)(2); and (B) includes a spouse or intimate partner. ‘Course of conduct’ and ‘spouse or intimate partner’ have the meaning given those terms in 18 U.S.C. § 2266(2) and (7), respectively.”

and inserting the following new paragraph:

“‘Stalking’ means conduct described in 18 U.S.C. § 2261A.”;

and by adding at the end of Note 1 the following new paragraph:

“‘Strangling’ and ‘suffocating’ have the meaning given those terms in 18 U.S.C. § 113.”;

and in Notes 3 and 4 by striking “(b)(1)(D)” each place such term appears and inserting “(b)(1)(E)”.

The Commentary to §2B1.5 captioned “Statutory Provisions” is amended by striking “1152–1153.”

The Commentary to §2B2.1 captioned “Statutory Provisions” is amended by striking “1153.”

The Commentary to §2H3.1 captioned “Statutory Provisions” is amended by striking “1375a(d)(3)(C), (d)(5)(B);” and inserting “1375a(d)(5)(B)(i), (ii);”.

The Commentary to §2K1.4 captioned “Statutory Provisions” is amended by striking “1153.”

The Commentary to §5D1.1 captioned “Application Notes” is amended in Note 3 by adding at the end the following:

“(D) Domestic Violence.—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. § 3561(b), a term of supervised release is required by statute. See 18 U.S.C. § 3583(a). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. See 18 U.S.C. § 3583(d); §5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.”.

Appendix A (Statutory Index) is amended by striking the line referenced to 8 U.S.C. § 1375a(d)(3)(C), (d)(5)(B) and inserting the following new line references:

“8 U.S.C. § 1375a(d)(5)(B)(i) 2H3.1
 8 U.S.C. § 1375a(d)(5)(B)(ii) 2H3.1
 8 U.S.C. § 1375a(d)(5)(B)(iii) 2B1.1”;

in the line referenced to 18 U.S.C. § 113(a)(1) by adding “, 2A3.1” at the end;

in the line referenced to 18 U.S.C. § 113(a)(2) by adding “, 2A3.2, 2A3.3, 2A3.4” at the end;

after the line referenced to 18 U.S.C. § 113(a)(3) by inserting the following new line reference:

“18 U.S.C. § 113(a)(4) 2A2.3”;

after the line referenced to 18 U.S.C. § 113(a)(7) by inserting the following new line reference:

“18 U.S.C. § 113(a)(8) 2A2.2”;

by striking the lines referenced to 18 U.S.C. §§ 1152 and 1153;

by inserting after the line referenced to 18 U.S.C. § 1593A the following new line reference:

“18 U.S.C. § 1597 2X5.2”; and

by striking the lines referenced to 18 U.S.C. § 2423(a) and (b) and inserting the following new line reference:

“18 U.S.C. § 2423(a)–(d) 2G1.3”.

REASON FOR AMENDMENT: This amendment responds to recent statutory changes made by the Violence Against Women Reauthorization Act of 2013 (the “Act”), Pub. L. No. 113–4 (March 7, 2013), which provided new and expanded criminal offenses and increased penalties for certain crimes pertaining to assault, sexual abuse, stalking, domestic violence, and human trafficking.

The Act established new assault offenses and enhanced existing assault offenses at 18 U.S.C. § 113 (Assaults within maritime and territorial jurisdiction). In general, section 113 sets forth a range of penalties for assaults within the special maritime and territorial jurisdiction of the United States. The legislative history of the Act indicates that Congress intended many of these changes to allow federal prosecutors to address domestic violence against Native American women more effectively. Such violence often occurs in a series of incidents of escalating seriousness.

Amendment 781

First, the amendment responds to changes in sections 113(a)(1) and (a)(2). Section 113(a)(1) prohibits assault with intent to commit murder, and the Act amended it to also prohibit assault with intent to commit a violation of 18 U.S.C. §§ 2241 (Aggravated sexual abuse) or 2242 (Sexual abuse), with a statutory maximum term of imprisonment of 20 years. Section 113(a)(2) prohibits assault with intent to commit any felony except murder, and prior to the Act had also excluded assault with intent to commit a violation of Chapter 109A, including sections 2241, 2242, 2243 (Sexual abuse of a minor or ward) and 2244 (Abusive sexual contact), with a statutory maximum term of imprisonment of 10 years. The Act amended section 113(a)(2) to prohibit assault with intent to commit any felony except murder or a violation of section 2241 or 2242. The effect of the statutory change is that an assault with intent to commit a violation of section 2243 or 2244 may now be prosecuted under section 113(a)(2). Offenses under section 2241 and 2242 are referenced to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), and offenses under section 2243 and 2244 are referenced to §§2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts); 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts); and 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact).

The amendment amends Appendix A (Statutory Index) to reference the expanded offense conduct prohibited by 18 U.S.C. § 113(a)(1) to §2A3.1 and to reference the expanded offense conduct prohibited by 18 U.S.C. § 113(a)(2) to §§2A3.2, 2A3.3, and 2A3.4. The Commission concluded that an assault offense committed with the intent to commit a sexual abuse offense is analogous to, and in some cases more serious than, an attempted sexual abuse offense under Chapter 109A, and the criminal sexual abuse guidelines which apply to attempted sexual abuse offenses were therefore appropriate for this conduct.

Second, the Act increased the statutory maximum penalty for violations of 18 U.S.C. § 113(a)(4) from six months to one year of imprisonment. Section 113(a)(4) prohibits an assault by striking, beating, or wounding. Because the crime had been categorized as a Class B misdemeanor, Appendix A did not previously include a reference for section 113(a)(4). The amendment adds such a reference to §2A2.3 (Assault). The Commission determined that §2A2.3 will provide appropriate punishment that is consistent with the statutory maximum term of imprisonment, while sufficiently addressing the possible levels of bodily harm that may result to victims in individual cases of assault by striking, beating, or wounding.

Third, the Act expanded 18 U.S.C. § 113(a)(7), which prohibits assaults resulting in substantial bodily injury to an individual who has not attained the age of sixteen years, to also apply to assaults resulting in substantial bodily injury to a spouse, intimate partner, or dating partner, and provides a statutory maximum term of imprisonment of five years. Offenses under section 113(a)(7) are referenced in Appendix A to §2A2.3 (Assault). The amendment broadened the scope of §2A2.3(b)(1)(B), which provides a 4-level enhancement if the offense resulted in substantial bodily injury to an individual under the age of sixteen years, to also provide a 4-level enhancement if the offense resulted in substantial bodily injury to a spouse, intimate partner, or dating partner. The Commission determined that because the expanded assaultive conduct of a victim of domestic violence has the same statutory maximum term of imprisonment, the same enhancement was warranted as for assaults of individuals under the age of sixteen resulting in substantial bodily injury.

Fourth, the Act created a new section 113(a)(8) in title 18, which prohibits the assault of a spouse, intimate partner, or dating partner by strangulation, suffocation, or attempting to strangle or suffocate, with a statutory maximum term of imprisonment of ten years. After reviewing legislative history, public comment, testimony at a public hearing on February 13, 2014, and data, the Commission determined that strangulation and suffocation of a spouse,

intimate partner, or dating partner represents a significant harm not addressed by existing guidelines and specific offense characteristics.

Comment and testimony that the Commission received indicated that strangulation and suffocation in the domestic violence context is serious conduct that warrants enhanced punishment regardless of whether it results in a provable injury that would lead to a bodily injury enhancement; this conduct harms victims physically and psychologically and can be a predictor of future serious or lethal violence. Testimony and data also indicated that cases of strangulation and suffocation often involve other bodily injury to a victim separate from the strangulation and suffocation. Congress specifically addressed strangulation and suffocation in the domestic violence context, and testimony and data indicated that almost all cases involving this conduct occur in that context and that strangulation and suffocation is most harmful in such cases.

Accordingly, the amendment amends Appendix A to reference section 113(a)(8) to §2A2.2 (Aggravated Assault) and amends the Commentary to §2A2.2 to provide that the term “aggravated assault” includes an assault involving strangulation, suffocation, or an attempt to strangle or suffocate. The amendment amends §2A2.2 to provide a 3-level enhancement at §2A2.2(b)(4) for strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner. The amendment also provides that the cumulative impact of the enhancement for use of a weapon at §2A2.2(b)(2), bodily injury at §2A2.2(b)(3), and strangulation or suffocation at §2A2.2(b)(4) is capped at 12 levels. The Commission determined that the cap would assure that these three specific offense characteristics, which data suggests co-occur frequently, will enhance the ultimate sentence without leading to an excessively severe result.

Although the amendment refers section 113(a)(8) offenses to §2A2.2, it also amends §2A6.2 (Stalking or Domestic Violence) to address cases involving strangulation, suffocation, or attempting to strangle or suffocate, as a conforming change. The amendment adds strangulation and suffocation as a new aggravating factor at §2A6.2(b)(1), which results in a 2-level enhancement, or in a 4-level enhancement if it applies in conjunction with another aggravating factor such as bodily injury or the use of a weapon.

Fifth, the amendment removes the term “minor assault” from the Guidelines Manual. Misdemeanor assaults and other felonious assaults are referenced to §2A2.3, which prior to this amendment was titled “Minor Assault.” Informed by public comment, the Commission determined that use of the term “minor” is inconsistent with the severity of the underlying crimes and does a disservice to the victims and communities affected. Therefore, the amendment changes the title of §2A2.3 to “Assault,” and it removes other references to “minor assault” from the Background and Commentary sections of §§2A2.2 and 2A2.3. This is a stylistic change that does not affect the application of §2A2.3.

Sixth, the amendment amended the Commentary to §5D1.1 (Imposition of a Term of Supervised Release) to provide additional guidance on the imposition of supervised release for domestic violence and stalking offenders. The amendment describes the statutory requirements pursuant to 18 U.S.C. § 3583(a) if a defendant is convicted for the first time of a domestic violence offense as defined in 18 U.S.C. § 3561(b). Under section 3583, a term of supervised release is required, and the defendant is also required to attend an approved rehabilitation program if one is available within a 50-mile radius from the defendant’s residence.

The Commission received public comment and testimony that supervised release should be recommended in every case of domestic violence and stalking, and the Commission’s sentencing data showed that in more than ninety percent of the cases sentenced under §2A6.2, supervised release was imposed. Based on this comment, testimony, and data, the amendment

Amendment 781

amends the Commentary to §5D1.1 to provide that in any other case involving either a domestic violence or a stalking offense, it is “highly recommended” that a term of supervised release be imposed.

Seventh, the amendment responds to changes made by the Act amending the federal statutes related to stalking and domestic violence. For the crimes of interstate domestic violence (18 U.S.C. § 2261), stalking (18 U.S.C. § 2261A), and interstate violation of a protective order (18 U.S.C. § 2262), the Act expanded the scope of each offense to provide that a defendant’s mere presence in a special maritime or territorial jurisdiction is sufficient for purposes of satisfying the jurisdictional element of the crimes. The Act also revised the prohibited conduct set forth in section 2261A to now include stalking with intent to “intimidate” the victim, and it added the use of an “electronic communication service” or “electronic communication system” as prohibited means of committing the crime.

The amendment updates the definition of “stalking” in §2A6.2 to reflect these changes by tying the definition to the conduct described in 18 U.S.C. § 2261A. The Commission determined that such a change would simplify the application of §2A6.2, while also ensuring that the definition of stalking remains consistent with any future statutory changes.

Eighth, the Act amended 8 U.S.C. § 1375a (Regulation of international marriage brokers) by reorganizing existing offenses and increasing the statutory maximum term of imprisonment for knowing violations of the regulations concerning marriage brokers from one year to five years. The Act also added a new criminal provision for “knowingly and with intent to defraud another person outside of the United States in order to recruit, solicit, entice, or induce that person into entering a dating or matrimonial relationship,” making false or fraudulent representations regarding the background information required to be provided to an international marriage brokers. The new offense has a statutory maximum term of imprisonment of one year. The amendment referenced this new offense in Appendix A to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States). The Commission concluded that §2B1.1 is the appropriate guideline because the elements of the new offense include fraud and deceit. The amendment also amended Appendix A by revising the other criminal subsections, which continue to be referred to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information), to accord with the reorganization of the statute.

Ninth, the Trafficking Victims Protection Reauthorization Act, passed as part of the Act, included a provision expanding subsection (c) of 18 U.S.C. § 2423 (Transportation of minors), which had previously prohibited U.S. citizens or permanent residents who traveled abroad from engaging in illicit sexual conduct. After the Act, the same prohibition now also applies to those individuals who reside temporarily or permanently in a foreign country and engage in such conduct. Section 2423 contains four offenses, set forth in subsections (a) through (d), each of which prohibits sexual conduct with minors. Prior to the amendment, Appendix A referenced sections 2423(a) and 2423(b) to §2G1.3 (Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors; Travel to Engage in Commercial Sex or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children), but provided no reference for sections 2423(c) or 2423(d), which prohibits arranging, inducing, procuring, or facilitating the travel of a person for illicit sexual conduct, for the purpose of commercial advantage or financial gain. Both subsections (c) and (d) provide a 30 year statutory maximum term of imprisonment.

The amendment adds references in Appendix A for 18 U.S.C. §§ 2423(c) and (d). Based on the seriousness of the prohibited conduct, the severity of the penalties, and the vulnerability of the

victims involved, the Commission concluded that 18 U.S.C. §§ 2423(c) and (d) should also be referenced in Appendix A to §2G1.3.

Tenth, the Act created a new Class A misdemeanor offense at 18 U.S.C. § 1597 prohibiting the knowing destruction, concealment, confiscation or possession of an actual or purported passport or other immigration documents of another individual if done in the course of violating or with the intent to violate 18 U.S.C. § 1351, relating to fraud in foreign labor contracting, or 8 U.S.C. § 1324, relating to bringing in or harboring certain aliens. The new offense also prohibits this conduct if it is done in order to, without lawful authority, maintain, prevent, or restrict the labor or services of the individual, and the knowing obstruction, attempt to obstruct, or interference with or prevention of the enforcement of section 1597. Section 1597 has a statutory maximum term of imprisonment of one year.

The amendment references this misdemeanor offense to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). This reference comports with the Commission’s intent when it promulgated §2X5.2, as stated in Amendment 685 (effective November 1, 2006), that the Commission will reference new Class A misdemeanor offenses either to §2X5.2 or to another, more specific Chapter Two guideline, if appropriate. The Commission determined that with a base offense level of 6, §2X5.2 covers the range of sentencing possibilities that are available for defendants convicted of this offense, regardless of their criminal history. The Commission may consider referencing section 1597 to another substantive guideline in the future after more information becomes available regarding the type of conduct that constitutes the typical violation and the aggravating or mitigating factors that may apply.

Finally, the amendment removes from Appendix A the guideline references for two jurisdictional statutes in title 18 related to crimes committed within Indian country. Section 1152, also known as the General Crimes Act, grants federal jurisdiction for federal offenses committed by non-Indians within Indian country. Section 1153, also known as the Major Crimes Act, grants federal jurisdiction over Indians who commit certain enumerated offenses within Indian country. The Act expanded section 1153 to include any felony assault under section 113. Because sections 1152 and 1153 are simply jurisdictional statutes that do not provide substantive offenses, the Commission determined there is no need for Appendix A to provide a guidelines reference for those statutes.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 782

AMENDMENT: Section 2D1.1(c) is amended by striking paragraph (17); by redesignating paragraphs (1) through (16) as paragraphs (2) through (17), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

- “(1) Level 38
- 90 KG or more of Heroin;
 - 450 KG or more of Cocaine;
 - 25.2 KG or more of Cocaine Base;
 - 90 KG or more of PCP, or 9 KG or more of PCP (actual);
 - 45 KG or more of Methamphetamine, or
 4.5 KG or more of Methamphetamine (actual), or
 4.5 KG or more of ‘Ice’;
 - 45 KG or more of Amphetamine, or
 4.5 KG or more of Amphetamine (actual);
 - 900 G or more of LSD;

Amendment 782

- 36 KG or more of Fentanyl;
- 9 KG or more of a Fentanyl Analogue;
- 90,000 KG or more of Marihuana;
- 18,000 KG or more of Hashish;
- 1,800 KG or more of Hashish Oil;
- 90,000,000 units or more of Ketamine;
- 90,000,000 units or more of Schedule I or II Depressants;
- 5,625,000 units or more of Flunitrazepam.”.

Section 2D1.1(c)(2) (as so redesignated) is amended to read as follows:

- “(2) Level 36
- At least 30 KG but less than 90 KG of Heroin;
 - At least 150 KG but less than 450 KG of Cocaine;
 - At least 8.4 KG but less than 25.2 KG of Cocaine Base;
 - At least 30 KG but less than 90 KG of PCP, or
at least 3 KG but less than 9 KG of PCP (actual);
 - At least 15 KG but less than 45 KG of Methamphetamine, or
at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or
at least 1.5 KG but less than 4.5 KG of ‘Ice’;
 - At least 15 KG but less than 45 KG of Amphetamine, or
at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);
 - At least 300 G but less than 900 G of LSD;
 - At least 12 KG but less than 36 KG of Fentanyl;
 - At least 3 KG but less than 9 KG of a Fentanyl Analogue;
 - At least 30,000 KG but less than 90,000 KG of Marihuana;
 - At least 6,000 KG but less than 18,000 KG of Hashish;
 - At least 600 KG but less than 1,800 KG of Hashish Oil;
 - At least 30,000,000 units but less than 90,000,000 units of Ketamine;
 - At least 30,000,000 units but less than 90,000,000 units of
Schedule I or II Depressants;
 - At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam.”.

Section 2D1.1(c)(3) (as so redesignated) is amended by striking “Level 36” and inserting “Level 34”.

Section 2D1.1(c)(4) (as so redesignated) is amended by striking “Level 34” and inserting “Level 32”.

Section 2D1.1(c)(5) (as so redesignated) is amended by striking “Level 32” and inserting “Level 30”; and by inserting before the line referenced to Flunitrazepam the following:

- “
- 1,000,000 units or more of Schedule III Hydrocodone;”.

Section 2D1.1(c)(6) (as so redesignated) is amended by striking “Level 30” and inserting “Level 28”; and in the line referenced to Schedule III Hydrocode by striking “700,000 or more” and inserting “At least 700,000 but less than 1,000,000”.

Section 2D1.1(c)(7) (as so redesignated) is amended by striking “Level 28” and inserting “Level 26”.

Section 2D1.1(c)(8) (as so redesignated) is amended by striking “Level 26” and inserting “Level 24”.

Section 2D1.1(c)(9) (as so redesignated) is amended by striking “Level 24” and inserting “Level 22”.

Section 2D1.1(c)(10) (as so redesignated) is amended by striking “Level 22” and inserting “Level 20”; and by inserting before the line referenced to Flunitrazepam the following:

“ ● 60,000 units or more of Schedule III substances (except Ketamine or Hydrocodone);”.

Section 2D1.1(c)(11) (as so redesignated) is amended by striking “Level 20” and inserting “Level 18”; and in the line referenced to Schedule III substances (except Ketamine or Hydrocodone) by striking “40,000 or more” and inserting “At least 40,000 but less than 60,000”.

Section 2D1.1(c)(12) (as so redesignated) is amended by striking “Level 18” and inserting “Level 16”.

Section 2D1.1(c)(13) (as so redesignated) is amended by striking “Level 16” and inserting “Level 14”.

Section 2D1.1(c)(14) (as so redesignated) is amended by striking “Level 14” and inserting “Level 12”; by striking the line referenced to Heroin and all that follows through the line referenced to Fentanyl Analogue and inserting the following:

“(14) ● Less than 10 G of Heroin; Level 12
● Less than 50 G of Cocaine;
● Less than 2.8 G of Cocaine Base;
● Less than 10 G of PCP, or
 less than 1 G of PCP (actual);
● Less than 5 G of Methamphetamine, or
 less than 500 MG of Methamphetamine (actual),
 or less than 500 MG of ‘Ice’;
● Less than 5 G of Amphetamine, or
 less than 500 MG of Amphetamine (actual);
● Less than 100 MG of LSD;
● Less than 4 G of Fentanyl;
● Less than 1 G of a Fentanyl Analogue;”;

by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● 80,000 units or more of Schedule IV substances (except Flunitrazepam).”.

Section 2D1.1(c)(15) (as so redesignated) is amended by striking “Level 12” and inserting “Level 10”; by striking the line referenced to Heroin and all that follows through the line referenced to Fentanyl Analogue; and in the line referenced to Schedule IV substances (except Flunitrazepam) by striking “40,000 or more” and inserting “At least 40,000 but less than 80,000”.

Section 2D1.1(c)(16) (as so redesignated) is amended by striking “Level 10” and inserting “Level 8”; in the line referenced to Flunitrazepam by striking “At least 62 but less” and inserting “Less”; by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon; and by adding at the end the following:

“ ● 160,000 units or more of Schedule V substances.”.

Amendment 782

Section 2D1.1(c)(17) (as so redesignated) is amended to read as follows:

- “(17) ● Less than 1 KG of Marihuana; Level 6
● Less than 200 G of Hashish;
● Less than 20 G of Hashish Oil;
● Less than 1,000 units of Ketamine;
● Less than 1,000 units of Schedule I or II Depressants;
● Less than 1,000 units of Schedule III Hydrocodone;
● Less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);
● Less than 16,000 units of Schedule IV substances (except Flunitrazepam);
● Less than 160,000 units of Schedule V substances.”.

The annotation to §2D1.1(c) captioned “Notes to Drug Quantity Table” is amended in Note (E) by striking “100 G” and inserting “100 grams”; in Note (F) by striking “0.5 ml” and “25 mg” and inserting “0.5 milliliters” and “25 milligrams”, respectively; and in Note (G) by striking “0.4 mg” and inserting “0.4 milligrams”.

The Commentary to §2D1.1 captioned “Application Notes” is amended in Note 8(A) by striking “1 gm”, “5 kg”, “100 gm”, and “500 kg” and inserting “1 gram”, “5 kilograms”, “100 grams”, and “500 kilograms”, respectively, and by striking “28” and inserting “26”;

in Note 8(B) by striking “999 grams” and inserting “2.49 kilograms”;

in Note 8(C)(i) by striking “22” and inserting “20”, by striking “18” and inserting “16”, and by striking “24” and inserting “22”;

in Note 8(C)(ii) by striking “8” both places such term appears and inserting “6”, by striking “five kilograms” and inserting “10,000 units”, and by striking “10” and inserting “8”;

in Note 8(C)(iii) by striking “16” and inserting “14”, by striking “14” and inserting “12”, and by striking “18” and inserting “16”;

in Note 8(C)(iv) by striking “56,000” and inserting “76,000”, by striking “100,000” and inserting “200,000”, by striking “200,000” and inserting “600,000”, by striking “56” and inserting “76”, by striking “59.99” and inserting “79.99”, by striking “4.99” and inserting “9.99”, by striking “6.25” and inserting “12.5”, by striking “999 grams” and inserting “2.49 kilograms”, by striking “1.25” and inserting “3.75”, by striking “59.99” and inserting “79.99”, and by striking “61.99 (56 + 4.99 + .999)” and inserting “88.48 (76 + 9.99 + 2.49)”;

in Note 8(D), under the heading relating to Schedule III Substances (except ketamine and hydrocodone), by striking “59.99” and inserting “79.99”; under the heading relating to Schedule III Hydrocodone, by striking “999.99” and inserting “2,999.99”; under the heading relating to Schedule IV Substances (except flunitrazepam) by striking “4.99” and inserting “9.99”; and under the heading relating to Schedule V Substances by striking “999 grams” and inserting “2.49 kilograms”;

and in Note 9 by striking “500 mg” and “50 gms” and inserting “500 milligrams” and “50 grams”, respectively.

The Commentary to §2D1.1 captioned “Background” is amended in the paragraph that begins “The base offense levels in §2D1.1” by striking “32 and 26” and inserting “30 and 24”; and by striking the paragraph that begins “The base offense levels at levels 26 and 32” as follows:

“ The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.”,

and inserting the following new paragraph:

“ The base offense levels at levels 24 and 30 establish guideline ranges such that the statutory minimum falls within the range; e.g., level 30 ranges from 97 to 121 months, where the statutory minimum term is ten years or 120 months.”.

The Commentary to §2D1.2 captioned “Application Note” is amended in Note 1 by striking “16” and inserting “14”; and by striking “17” and inserting “15”.

Section 2D1.11(d) is amended by striking paragraph (14); by redesignating paragraphs (1) through (13) as paragraphs (2) through (14), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

“(1) 9 KG or more of Ephedrine; Level 38
9 KG or more of Phenylpropanolamine;
9 KG or more of Pseudoephedrine.”.

Section 2D1.11(d)(2) (as so redesignated) is amended by striking “Level 38” and inserting “Level 36”; and by striking “3 KG or more” each place such term appears and inserting “At least 3 KG but less than 9 KG”.

Section 2D1.11(d)(3) (as so redesignated) is amended by striking “Level 36” and inserting “Level 34”.

Section 2D1.11(d)(4) (as so redesignated) is amended by striking “Level 34” and inserting “Level 32”.

Section 2D1.11(d)(5) (as so redesignated) is amended by striking “Level 32” and inserting “Level 30”.

Section 2D1.11(d)(6) (as so redesignated) is amended by striking “Level 30” and inserting “Level 28”.

Section 2D1.11(d)(7) (as so redesignated) is amended by striking “Level 28” and inserting “Level 26”.

Section 2D1.11(d)(8) (as so redesignated) is amended by striking “Level 26” and inserting “Level 24”.

Section 2D1.11(d)(9) (as so redesignated) is amended by striking “Level 24” and inserting “Level 22”.

Section 2D1.11(d)(10) (as so redesignated) is amended by striking “Level 22” and inserting “Level 20”.

Section 2D1.11(d)(11) (as so redesignated) is amended by striking “Level 20” and inserting “Level 18”.

Section 2D1.11(d)(12) (as so redesignated) is amended by striking “Level 18” and inserting “Level 16”.

Amendment 782

Section 2D1.11(d)(13) (as so redesignated) is amended by striking “Level 16” and inserting “Level 14”.

Section 2D1.11(d)(14) (as so redesignated) is amended by striking “Level 14” and inserting “Level 12”; and by striking “At least 500 MG but less” each place such term appears and inserting “Less”.

Section 2D1.11(e) is amended by striking paragraph (10); by redesignating paragraphs (1) through (9) as paragraphs (2) through (10), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

- “(1) List I Chemicals Level 30
2.7 KG or more of Benzaldehyde;
60 KG or more of Benzyl Cyanide;
600 G or more of Ergonovine;
1.2 KG or more of Ergotamine;
60 KG or more of Ethylamine;
6.6 KG or more of Hydriodic Acid;
3.9 KG or more of Iodine;
960 KG or more of Isosafrole;
600 G or more of Methylamine;
1500 KG or more of N-Methylephedrine;
1500 KG or more of N-Methylpseudoephedrine;
1.9 KG or more of Nitroethane;
30 KG or more of Norpseudoephedrine;
60 KG or more of Phenylacetic Acid;
30 KG or more of Piperidine;
960 KG or more of Piperonal;
4.8 KG or more of Propionic Anhydride;
960 KG or more of Safrole;
1200 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;
3406.5 L or more of Gamma-butyrolactone;
2.1 KG or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.”.

Section 2D1.11(e)(2) (as so redesignated) is amended to read as follows:

- “(2) List I Chemicals Level 28
At least 890 G but less than 2.7 KG of Benzaldehyde;
At least 20 KG but less than 60 KG of Benzyl Cyanide;
At least 200 G but less than 600 G of Ergonovine;
At least 400 G but less than 1.2 KG of Ergotamine;
At least 20 KG but less than 60 KG of Ethylamine;
At least 2.2 KG but less than 6.6 KG of Hydriodic Acid;
At least 1.3 KG but less than 3.9 KG of Iodine;
At least 320 KG but less than 960 KG of Isosafrole;
At least 200 G but less than 600 G of Methylamine;
At least 500 KG but less than 1500 KG of N-Methylephedrine;
At least 500 KG but less than 1500 KG of N-Methylpseudoephedrine;
At least 625 G but less than 1.9 KG of Nitroethane;
At least 10 KG but less than 30 KG of Norpseudoephedrine;
At least 20 KG but less than 60 KG of Phenylacetic Acid;
At least 10 KG but less than 30 KG of Piperidine;

At least 320 KG but less than 960 KG of Piperonal;
At least 1.6 KG but less than 4.8 KG of Propionic Anhydride;
At least 320 KG but less than 960 KG of Safrole;
At least 400 KG but less than 1200 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 1135.5 L but less than 3406.5 L of Gamma-butyrolactone;
At least 714 G but less than 2.1 KG of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.

List II Chemicals

33 KG or more of Acetic Anhydride;
3525 KG or more of Acetone;
60 KG or more of Benzyl Chloride;
3225 KG or more of Ethyl Ether;
3600 KG or more of Methyl Ethyl Ketone;
30 KG or more of Potassium Permanganate;
3900 KG or more of Toluene.”.

Section 2D1.11(e)(3) (as so redesignated) is amended by striking “Level 28” and inserting “Level 26”; and, under the heading relating to List II Chemicals, by striking the line referenced to Acetic Anhydride and all that follows through the line referenced to Toluene and inserting the following:

“ At least 11 KG but less than 33 KG of Acetic Anhydride;
At least 1175 KG but less than 3525 KG of Acetone;
At least 20 KG but less than 60 KG of Benzyl Chloride;
At least 1075 KG but less than 3225 KG of Ethyl Ether;
At least 1200 KG but less than 3600 KG of Methyl Ethyl Ketone;
At least 10 KG but less than 30 KG of Potassium Permanganate;
At least 1300 KG but less than 3900 KG of Toluene.”.

Section 2D1.11(e)(4) (as so redesignated) is amended by striking “Level 26” and inserting “Level 24”.

Section 2D1.11(e)(5) (as so redesignated) is amended by striking “Level 24” and inserting “Level 22”.

Section 2D1.11(e)(6) (as so redesignated) is amended by striking “Level 22” and inserting “Level 20”.

Section 2D1.11(e)(7) (as so redesignated) is amended by striking “Level 20” and inserting “Level 18”.

Section 2D1.11(e)(8) (as so redesignated) is amended by striking “Level 18” and inserting “Level 16”.

Section 2D1.11(e)(9) (as so redesignated) is amended by striking “Level 16” and inserting “Level 14”.

Section 2D1.11(e)(10) (as so redesignated) is amended by striking “Level 14” and inserting “Level 12”; and in each line by striking “At least” and all that follows through “but less” and inserting “Less”.

Amendment 782

The Commentary to §2D1.11 captioned “Application Notes” is amended in Note 1(A) by striking “38” both places such term appears and inserting “36”, and by striking “26” and inserting “24”; and in Note 1(B) by striking “32” and inserting “30”.

The Commentary to §3B1.2 captioned “Application Notes” is amended in Note 3(B) by striking “14” and inserting “12”.

The Commentary following §3D1.5 captioned “Illustrations of the Operation of the Multiple-Count Rules” is amended in Example 2 by striking “26” and inserting “24”; and by striking “28” each place such term appears and inserting “26”.

The Commentary to §5G1.3 captioned “Application Notes” is amended in Note 2(D) by striking “40” and inserting “90”; by striking “15” and inserting “25”; and by striking “55” and inserting “115”.

REASON FOR AMENDMENT: This amendment revises the guidelines applicable to drug trafficking offenses by changing how the base offense levels in the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) incorporate the statutory mandatory minimum penalties for such offenses.

When Congress passed the Anti-Drug Abuse Act of 1986, Pub. L. 99–570, the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The quantity thresholds in the Drug Quantity Table were set so as to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses that trigger a ten-year statutory minimum were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month). The base offense levels for drug quantities above and below the mandatory minimum threshold quantities were extrapolated upward and downward to set guideline sentencing ranges for all drug quantities, see §2D1.1, comment. (backg’d.), with a minimum base offense level of 6 and a maximum base offense level of 38 for most drug types.

This amendment changes how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties. See 28 U.S.C. § 994(b)(1) (providing that each sentencing range must be “consistent with all pertinent provisions of title 18, United States Code”); see also 28 U.S.C. § 994(a) (providing that the Commission shall promulgate guidelines and policy statements “consistent with all pertinent provisions of any Federal statute”).

Specifically, the amendment reduces by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and offenses involving drug quantities that trigger a ten-year statutory minimum are assigned a base offense level of 30 (97 to 121 months at Criminal

History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Offense levels for quantities above and below the mandatory minimum threshold quantities similarly are adjusted downward by two levels, except that the minimum base offense level of 6 and the maximum base offense level of 38 for most drug types is retained, as are previously existing minimum and maximum base offense levels for particular drug types.

The amendment also makes parallel changes to the quantity tables in §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), which apply to offenses involving chemical precursors of controlled substances. Section 2D1.11 is generally structured to provide offense levels that are tied to, but less severe than, the base offense levels in §2D1.1 for offenses involving the final product.

In considering this amendment, the Commission held a hearing on March 13, 2014, and heard expert testimony from the Executive Branch, including the Attorney General and the Director of the Federal Bureau of Prisons, defense practitioners, state and local law enforcement, and interested community representatives. The Commission also received substantial written public comment, including from the Federal judiciary, members of Congress, academicians, community organizations, law enforcement groups, and individual members of the public.

The Commission determined that setting the base offense levels slightly above the mandatory minimum penalties is no longer necessary to achieve its stated purpose. Previously, the Commission has stated that “[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels [levels 26 and 32] to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities.” However, changes in the law and recent experience with similar reductions in base offense levels for crack cocaine offenses indicate that setting the base offense levels above the mandatory minimum penalties is no longer necessary to provide adequate incentives to plead guilty or otherwise cooperate with authorities.

In 1994, after the initial selection of levels 26 and 32, Congress enacted the “safety valve” provision, which applies to certain non-violent drug defendants and allows the court, without a government motion, to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that the defendant “has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.” See 18 U.S.C. § 3553(f). The guidelines incorporate the “safety valve” at §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and, furthermore, provide a 2-level reduction if the defendant meets the “safety valve” criteria. See §2D1.1(b)(16).

These statutory and guideline provisions, which are unrelated to the guideline range’s relationship to the mandatory minimum, provide adequate incentive to plead guilty. Commission data indicate that defendants charged with a mandatory minimum penalty in fact are more likely to plead guilty if they qualify for the “safety valve” than if they do not. In fiscal year 2012, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.6 percent if they qualified for the “safety valve” and a plea rate of 93.9 percent if they did not.

Recent experience with similar reductions in the base offense levels for crack cocaine offenses indicates that the amendment should not negatively affect the rates at which offenders plead guilty or otherwise cooperate with authorities. Similar to this amendment, the Commission in 2007 amended the Drug Quantity Table for cocaine base (“crack” cocaine) so that the quantities that trigger mandatory minimum penalties were assigned base offense levels 24 and 30, rather than 26 and 32. See USSG App. C, Amendment 706 (effective November 1, 2007). In 2010, in implementing the emergency directive in section 8 of the Fair Sentencing Act of 2010,

Amendment 782

Pub. L. 111–220, the Commission moved crack cocaine offenses back to a guideline penalty structure based on levels 26 and 32.

During the period when crack cocaine offenses had a guideline penalty structure based on levels 24 and 30, the overall rates at which crack cocaine defendants pled guilty remained stable. Specifically, in the fiscal year before the 2007 amendment took effect, the plea rate for crack cocaine defendants was 93.1 percent. In the two fiscal years after the 2007 amendment took effect, the plea rates for such defendants were 95.2 percent and 94.0 percent, respectively. For those same fiscal years, the overall rates at which crack cocaine defendants received substantial assistance departures under §5K1.1 (Substantial Assistance to Authorities) were 27.8 percent in the fiscal year before the 2007 amendment took effect and 25.3 percent and 25.6 percent in the two fiscal years after the 2007 amendment took effect. This recent experience indicates that this amendment, which is similar in nature to the 2007 crack cocaine amendment, should not negatively affect the willingness of defendants to plead guilty or otherwise cooperate with authorities. See 28 U.S.C. § 991(b) (specifying that sentencing policies are to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process”).

The amendment also reflects the fact that the guidelines now more adequately differentiate among drug trafficking offenders than when the Drug Quantity Table was initially established. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times — often in response to congressional directives — to provide a greater emphasis on the defendant’s conduct and role in the offense rather than on drug quantity. The version of §2D1.1 in the original 1987 Guidelines Manual contained a single specific offense characteristic: a 2-level enhancement if a firearm or other dangerous weapon was possessed. Section 2D1.1 in effect at the time of this amendment contains fourteen enhancements and three downward adjustments (including the “mitigating role cap” provided in subsection (a)(5)). These numerous adjustments, both increasing and decreasing offense levels based on specific conduct, reduce the need to rely on drug quantity in setting the guideline penalties for drug trafficking offenders as a proxy for culpability, and the amendment permits these adjustments to differentiate among offenders more effectively.

The amendment was also motivated by the significant overcapacity and costs of the Federal Bureau of Prisons. The Sentencing Reform Act directs the Commission to ensure that the sentencing guidelines are “formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.” See 28 U.S.C. § 994(g). Reducing the federal prison population and the costs of incarceration has become an urgent consideration. The Commission observed that the federal prisons are now 32 percent overcapacity, and drug trafficking offenders account for approximately 50 percent of the federal prison population (100,114 of 199,810 inmates as of October 26, 2013, for whom the Commission could determine the offense of conviction). Spending on federal prisons exceeds \$6 billion a year, or more than 25 percent of the entire budget for the Department of Justice. The Commission received testimony from the Department of Justice and others that spending on federal prisons is now crowding out resources available for federal prosecutors and law enforcement, aid to state and local law enforcement, crime victim services, and crime prevention programs, all of which promote public safety.

In response to these concerns, the Commission considered the amendment an appropriate step toward alleviating the overcapacity of the federal prisons. Based on an analysis of the 24,968 offenders sentenced under §2D1.1 in fiscal year 2012, the Commission estimates the amendment will affect the sentences of 17,457 — or 69.9 percent — of drug trafficking offenders sentenced under §2D1.1, and their average sentence will be reduced by 11 months — or

17.7 percent — from 62 months to 51 months. The Commission estimates these sentence reductions will correspond to a reduction in the federal prison population of approximately 6,500 inmates within five years after its effective date.

The Commission carefully weighed public safety concerns and, based on past experience, existing statutory and guideline enhancements, and expert testimony, concluded that the amendment should not jeopardize public safety. In particular, the Commission was informed by its studies that compared the recidivism rates for offenders who were released early as a result of retroactive application of the Commission’s 2007 crack cocaine amendment with a control group of offenders who served their full terms of imprisonment. *See* USSG App. C, Amendment 713 (effective March 3, 2008). The Commission detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. This study suggests that modest reductions in drug penalties such as those provided by the amendment will not increase the risk of recidivism.

Furthermore, existing statutory enhancements, such as those available under 18 U.S.C. § 924(c), and guideline enhancements for offenders who possess firearms, use violence, have an aggravating role in the offense, or are repeat or career offenders, ensure that the most dangerous or serious offenders will continue to receive appropriately severe sentences. In addition, the Drug Quantity Table as amended still provides a base offense level of 38 for offenders who traffic the greatest quantities of most drug types and, therefore, sentences for these offenders will not be reduced. Similarly, the Drug Quantity Table as amended maintains minimum base offense levels that preclude sentences of straight probation for drug trafficking offenders with small quantities of most drug types.

Finally, the Commission relied on testimony from the Department of Justice that the amendment would not undermine public safety or law enforcement initiatives. To the contrary, the Commission received testimony from several stakeholders that the amendment would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 783

AMENDMENT: Section 2D1.1(b) is amended by redesignating paragraphs (14) through (16) as paragraphs (15) through (17), respectively; and by inserting after paragraph (13) the following new paragraph (14):

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

The Commentary to §2D1.1 captioned “Application Notes” is amended in Note 16 by striking “(b)(14)(D)” and inserting “(b)(15)(D)”; by redesignating Notes 19 through 26 as Notes 20 through 27, respectively; and by inserting after Note 18 the following new Note 19:

“19. Application of Subsection (b)(14).—Subsection (b)(14) applies to offenses that involve the cultivation of marihuana on state or federal land or while trespassing on tribal or private land. Such offenses interfere with the ability of others to safely access and use

Amendment 783

the area and also pose or risk a range of other harms, such as harms to the environment.

The enhancements in subsection (b)(13)(A) and (b)(14) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. See §1B1.1 (Application Instructions), Application Note 4(A).”;

in the heading of Note 20 (as so redesignated) by striking “(b)(14)” and inserting “(b)(15)”;

in Note 20(A) (as so redesignated) by striking “(b)(14)(B)” both places such term appears and inserting “(b)(15)(B)”;

in Note 20(B) (as so redesignated) by striking “(b)(14)(C)” each place such term appears and inserting “(b)(15)(C)”;

in Note 20(C) (as so redesignated) by striking “(b)(14)(E)” both places such term appears and inserting “(b)(15)(E)”;

in Note 21 (as so redesignated) by striking “(b)(16)” each place such term appears and inserting “(b)(17)”.

The Commentary to §2D1.1 captioned “Background” is amended by striking “(b)(14)” and inserting “(b)(15)”;

Section 2D1.14(a)(1) is amended by striking “(b)(16)” and inserting “(b)(17)”.

The Commentary to §3B1.4 captioned “Application Notes” is amended in Note 2 by striking “(b)(14)(B)” and inserting “(b)(15)(B)”.

The Commentary to §3C1.1 captioned “Application Notes” is amended in Note 7 by striking “(b)(14)(D)” and inserting “(b)(15)(D)”.

REASON FOR AMENDMENT: This amendment provides increased punishment for certain defendants involved in marihuana cultivation operations on state or federal land or while trespassing on tribal or private land. The amendment adds a new specific offense characteristic at subsection (b)(14) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The new specific offense characteristic provides an increase of two levels if the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land.

The amendment responds to concerns raised by federal and local elected officials, law enforcement groups, trade groups, environmental advocacy groups and others, especially in areas of the country where unlawful outdoor marihuana cultivation is occurring with increasing frequency. The concerns included the fact that such operations typically involve acts such as clearing existing vegetation, diverting natural water sources for irrigation, using potentially harmful chemicals, killing wild animals, and leaving trash and debris at the site. The concerns also included the risk to public safety of marihuana cultivation operations on federal or state land or while trespassing on tribal or private land. Additionally, when an operation is located on public land or on private land without the owner’s permission, the operation deprives the public or the owner of lawful access to and use of the land.

Accordingly, this amendment provides an increase of two levels when a marihuana cultivation operation is located on state or federal land or while trespassing on tribal or private land, but

only applies to defendants who received an adjustment under §3B1.1 (Aggravating Role). These defendants are more culpable and have greater decision-making authority in the operation. The amendment also adds commentary in §2D1.1 at Application Note 19 clarifying that, consistent with ordinary guideline operation, the new increase may be applied cumulatively with the existing enhancement at subsection (b)(13)(A) of §2D1.1, which applies if an offense involved certain conduct relating to hazardous or toxic substances or waste.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 784

AMENDMENT: Section 2K2.1(c)(1) is amended by inserting after “firearm or ammunition” both places it appears the following: “cited in the offense of conviction”.

The Commentary to §2K2.1 captioned “Application Notes” is amended in Note 14 by striking “‘In Connection With’.” and inserting “Application of Subsections (b)(6)(B) and (c)(1).”;

in Note 14(A) by adding at the end the following: “However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.”;

in Note 14(B) by striking “application of subsections (b)(6)(B) and (c)(1)” and inserting “application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1)”;

and by adding at the end of Note 14 the following:

“(E) Relationship Between the Instant Offense and the Other Offense.—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See §1B1.3(a)(1)–(4) and accompanying commentary.

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

For example:

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

Ordinarily, the unlawful possession of the shotgun on February 10 will be ‘part of the same course of conduct or common scheme or plan’ as the unlawful possession of the same shotgun on October 15. See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 9 to §1B1.3). The use of the shotgun ‘in connection with’ the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). See §1B1.3(a)(4) (‘any other information specified in the applicable guideline’).

Amendment 784

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

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were ‘part of the same course of conduct or common scheme or plan’. See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 9 to §1B1.3).

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

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

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

REASON FOR AMENDMENT: This amendment addresses cases in which the defendant is convicted of a firearms offense (in particular, being a felon in possession of a firearm) and also possessed a firearm in connection with another offense, such as robbery or attempted murder.

In such a case, the defendant is sentenced under the firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). If the defendant possessed any firearm in connection with another felony offense, subsection (b)(6)(B) provides a 4-level enhancement and a minimum offense level of 18. If the defendant possessed any firearm in connection with another offense, subsection (c)(1) provides a cross reference to the offense guideline applicable to the other offense, if it results in a higher offense level. (For example, if the defendant possessed any firearm in connection with a robbery, a cross reference to the robbery guideline may apply.)

This amendment is a result of the Commission’s review of the operation of subsections (b)(6)(B) and (c)(1). The review was prompted in part because circuits have been following a range of approaches in determining whether these provisions apply. Several circuits have taken the view that subsections (b)(6)(B) and (c)(1) apply only if the other offense is a “groupable” offense under §3D1.2(d). See, e.g., United States v. Horton, 693 F.3d 463, 478–79 (4th Cir. 2012) (felon in possession used a firearm in connection with a murder, but the cross reference does not apply because murder is not “groupable”); United States v. Settle, 414 F.3d 629, 632–33 (6th Cir. 2005) (attempted murder); United States v. Jones, 313 F.3d 1019, 1023 n.3 (7th Cir. 2002) (murder); United States v. Williams, 431 F.3d 767, 772–73 & n.9 (11th Cir. 2005) (aggravated assault). But see United States v. Kulick, 629 F.3d 165, 170 (3d Cir. 2010) (felon in possession used a firearm in connection with extortion; the cross reference may apply even though extortion is not “groupable”); United States v. Gonzales, 996 F.2d 88, 92 n.6 (5th Cir. 1993) (relevant conduct principles do not restrict the application of subsection (b)(6)(B));

United States v. Outley, 348 F.3d 476 (5th Cir. 2003) (relevant conduct principles do not restrict the application of subsection (c)(1)).

The amendment clarifies how relevant conduct principles operate in determining whether subsections (b)(6)(B) and (c)(1) apply. Subsections (b)(6)(B) and (c)(1) are not intended to apply only when the other felony offense is a “groupable” offense. Such an approach would result in unwarranted disparities, with defendants who possess a firearm in connection with a “groupable” offense (such as a drug offense) being subject to higher penalties than defendants who possess a firearm in connection with a “non-groupable” offense (such as murder or robbery). Instead, the central question for the court in these cases is whether the defendant’s two firearms offenses — the firearms offense of conviction, and his unlawful possession of a firearm in connection with the other felony offense — were “part of the same course of conduct or common scheme or plan.” See §1B1.3(a)(2). The amendment adds examples to the commentary to clarify how relevant conduct principles are intended to operate in this context.

The amendment also responds to concerns regarding the impact of subsection (c)(1), particularly in cases in which the defendant was convicted of unlawfully possessing a firearm on one occasion but was found to have possessed a different firearm on another occasion in connection with another, more serious, offense. Because unlawfully possessing a firearm is an offense based on a status (i.e., being a felon) that can continue for many years, the cross reference at subsection (c)(1) may, in effect, expose such a defendant to the highest offense level of any crime he may have committed at any time, regardless of its connection to the instant offense.

While relevant conduct principles provide a limitation on the scope of subsection (c)(1) (and, as discussed above, this amendment clarifies how those principles operate in this context), the Commission determined that a further limitation on the scope of subsection (c)(1) is appropriate. Specifically, the instant offense and the other offense must be related to each other by, at a minimum, having an identifiable firearm in common. Accordingly, the amendment revises the cross reference so that it applies only to the particular firearm or firearms cited in the offense of conviction.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 785

AMENDMENT: The Commentary to §2L1.1 captioned “Application Notes” is amended in Note 5 after “vehicle” by striking the comma and inserting a semicolon; after “vessel” by striking “, or” and inserting a semicolon; and after “inhumane condition” by inserting the following: “; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements”.

REASON FOR AMENDMENT: This amendment accounts for the risks of death, injury, starvation, dehydration, or exposure that aliens potentially face when transported through dangerous and remote geographical areas, e.g., along the southern border of the United States.

Section 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) currently has an enhancement at subsection (b)(6), which provides for a 2-level increase and a minimum offense level of 18, for intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person. The Commentary for subsection (b)(6), Application Note 5, explains that §2L1.1(b)(6) may apply to a “wide variety of conduct” and provides as examples “transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially

Amendment 786

more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition.”

One case that illustrates the concerns addressed in this amendment is United States v. Mateo Garza, 541 F.3d 290 (5th Cir. 2008), in which the Fifth Circuit held that the reckless endangerment enhancement at §2L1.1(b)(6) does not *per se* apply to transporting aliens through the South Texas brush country, and must instead be applied based on the specific facts presented to the court. The Fifth Circuit emphasized that it is not enough to say, as the district court had, that traversing an entire geographical region is inherently dangerous, but that it must be dangerous on the facts presented to and used by the district court. The Fifth Circuit identified such pertinent facts from its prior case law as the length of the journey, the temperature, whether the aliens were provided food and water and allowed rest periods, and whether the aliens suffered injuries and death. *See, e.g., United States v. Garcia-Guerrero*, 313 F.3d 892 (5th Cir. 2002). Additional facts that have supported the enhancement include: whether the aliens were abandoned en route, the time of year during which the journey took place, the distance traveled, and whether the aliens were adequately clothed for the journey. *See, e.g., United States v. Chapa*, 362 Fed. App'x 411 (5th Cir. 2010); United States v. De Jesus-Ojeda, 515 F.3d 434 (5th Cir. 2008); United States v. Hernandez-Pena, 267 Fed. App'x 367 (5th Cir. 2008); United States v. Rodriguez-Cruz, 255 F.3d 1054 (9th Cir. 2001).

The amendment adds to Application Note 5 the following new example of the conduct to which §2L1.1(b)(6) could apply: “or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements.” The Commission determined that this new example will clarify application of subsection (b)(6), highlight the potential risks in these types of cases, provide guidance for the courts to determine whether to apply the enhancement, and promote uniformity in sentencing by providing factors to consider when determining whether to apply §2L1.1(b)(6).

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 786

AMENDMENT: The Commentary to §5D1.2 captioned “Application Notes” is amended in Note 1, in the paragraph that begins “‘Sex offense’ means”, in subparagraph (A), by striking “(ii) chapter 109B of such title;”, and by redesignating clauses (iii) through (vi) as clauses (ii) through (v), respectively; in subparagraph (B) by striking “(vi)” and inserting “(v)”; and by adding at the end as the last sentence the following: “Such term does not include an offense under 18 U.S.C. § 2250 (Failure to register).”.

The Commentary to §5D1.2 captioned “Application Notes” is amended by adding at the end the following new Note 6:

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

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

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

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

REASON FOR AMENDMENT: This amendment resolves a circuit conflict and a related guideline application issue about the calculation of terms of supervised release. The circuit conflict involves defendants sentenced under statutes providing for mandatory minimum terms of supervised release, while the application issue relates specifically to defendants convicted of failure to register as a sex offender, in violation of 18 U.S.C. § 2250.

The guideline term of supervised release is determined by §5D1.2 (Term of Supervised Release). Section 5D1.2(a) sets forth general rules for determining the guideline term of supervised release, based on the statutory classification of the offense. See §5D1.2(a)(1)–(3); 18 U.S.C. § 3559 (sentencing classification of offenses). For certain terrorism-related and sex offenses, §5D1.2(b) operates to replace the top end of the guideline term calculated under subsection (a) with a life term of supervised release. In the case of a “sex offense,” as defined by Application Note 1 to §5D1.2, a policy statement recommends that a life term of supervised release be imposed. See §5D1.2(b), p.s. Finally, §5D1.2(c) states that “the term of supervised release imposed shall be not less than any statutorily required term of supervised release.”

When a Statutory Minimum Term of Supervised Release Applies

First, there appear to be differences among the circuits in how to calculate the guideline term of supervised release when there is a statutory minimum term of supervised release. These cases involve the meaning of subsection (c) and its interaction with subsection (a).

The Seventh Circuit has held that when there is a statutory minimum term of supervised release, the statutory minimum term becomes the bottom of the guideline range (replacing the bottom of the term provided by (a)) and, if the statutory minimum equals or exceeds the top of the guideline term provided by subsection (a), the guideline “range” becomes a single point at the statutory minimum. United States v. Gibbs, 578 F.3d 694, 695 (7th Cir. 2009). Thus, if subsection (a) provides a range of three to five years, but the statute provides a range of five years to life, the “range” is precisely five years. Gibbs involved a drug offense for which 21 U.S.C. § 841(b) required a supervised release term of five years to life. See also United States v. Goodwin, 717 F.3d 511, 519–20 (7th Cir. 2013) (applying Gibbs to a case involving a failure to register for which 18 U.S.C. § 3583(k) required a supervised release term of five years to life).

These cases are in tension with the approach of the Eighth Circuit in United States v. Deans, 590 F.3d 907, 911 (8th Cir. 2010). In Deans, the range calculated under subsection (a) was two to three years of supervised release. However, the relevant statute, 21 U.S.C. § 841(b)(1)(C), provided a range of three years to life. Under the Seventh Circuit’s approach in Gibbs, the

Amendment 786

guideline “range” would be precisely three years. Without reference to Gibbs, the Eighth Circuit in Deans indicated that the statutory requirement “trumps” subsection (a), and the guideline range becomes the statutory range — three years to life. 590 F.3d at 911. Thus, the district court’s imposition of five years of supervised release “was neither an upward departure nor procedural error.” Id.

The amendment adopts the approach of the Seventh Circuit in Gibbs and Goodwin. The amendment provides a new Application Note and examples explaining that, under subsection (c), a statutorily required minimum term of supervised release operates to restrict the low end of the guideline term of supervised release.

The Commission determined that this resolution was most consistent with its statutory obligation to determine the “appropriate length” of supervised release terms, and with how a statutory minimum term of imprisonment operates to restrict the range of imprisonment provided by the guidelines. See 28 U.S.C. § 994(a)(1)(c); USSG §5G1.1(a). This outcome is also consistent with the Commission’s 2010 report on supervised release, which found that most supervised release violations occur in the first year after release from incarceration. See U.S. Sentencing Comm’n, Federal Offenders Sentenced to Supervised Release, at 63 & n. 265 (July 2010). If an offender shows non-compliance during the initial term of supervised release, the court may extend the term of supervision up to the statutory maximum, pursuant to 18 U.S.C. § 3583(e)(2).

When the Defendant is Convicted of Failure to Register as a Sex Offender

Second, there are differences among the circuits over how to calculate the guideline range of supervised release when a defendant is convicted, under 18 U.S.C. § 2250, of failing to register as a sex offender. That offense carries a statutory minimum term of supervised release of at least five years, with a term up to life permitted. See 18 U.S.C. § 3583(k).

There is an application issue about when, if at all, such an offense is a “sex offense” for purposes of subsection (b) of §5D1.2. If a failure to register is a sex offense, then subsection (b) specifically provides for a term of supervised release of anywhere from the minimum provided by subsection (a) to the maximum provided by statute (i.e., life), and a policy statement contained within subsection (b) recommends that the maximum be imposed. See §5D1.2(b), p.s. Another effect of the determination is that, if failure to register is a “sex offense,” the guidelines recommend that special conditions of supervised release also be imposed, such as participating in a sex offender monitoring program and submitting to warrantless searches. See §5D1.3(d)(7).

Application Note 1 defines “sex offense” to mean, among other things, “an offense, perpetrated against a minor, under” chapter 109B of title 18 (the only section of which is Section 2250). Circuits have reached different conclusions about the effect of this definition.

The Seventh Circuit has held that a failure to register can never be a “sex offense” within the meaning of Note 1. United States v. Goodwin, 717 F.3d 511, 518–20 (7th Cir. 2013); see also United States v. Segura, 747 F.3d 323, 329 (5th Cir. 2014) (agreeing with Goodwin). The court in Goodwin reasoned that there is no specific victim of a failure to register, and therefore a failure to register is never “perpetrated against a minor” and can never be a “sex offense” — rendering the definition’s inclusion of offenses under chapter 109B “surplusage.” 717 F.3d at 518. In an unpublished opinion, the Second Circuit has determined that a failure to register was not a “sex offense.” See United States v. Herbert, 428 Fed. App’x 37 (2d Cir. 2011). In both cases, the government argued for these outcomes, confessing error below.

There are unpublished decisions in other circuits that have reached different results, without discussion. In those cases, the defendant had a prior sex offense against a minor, and the circuit court determined that the failure to register was a “sex offense.” See United States v. Zeiders, 440 Fed. App’x 699, 701 (11th Cir. 2011); United States v. Nelson, 400 Fed. App’x 781 (4th Cir. 2010).

The Commission agrees with the Seventh Circuit that failure to register is not an offense that is “perpetrated against a minor.” In addition, expert testimony and research reviewed by the Commission indicated that commission of a failure-to-register offense is not correlated with sex offense recidivism. The amendment resolves the application issue by amending the commentary to §5D1.2 to clarify that offenses under Section 2250 are not “sex offenses.”

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 787

AMENDMENT: The Commentary to §2L1.2 captioned “Application Notes” is amended by redesignating Note 8 as Note 9 and by inserting after Note 7 the following new Note 8:

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

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

The Commentary to §2X5.1 captioned “Application Notes” is amended in Note 1 by inserting after “§5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment)” the following: “or Anticipated State Term of Imprisonment”.

Section 5G1.3 is amended in the heading by inserting after “Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment” the following: “or Anticipated State Term of Imprisonment”.

Section 5G1.3 is amended in subsection (b) by striking “and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter

Amendment 787

Three (Adjustments)”; by redesignating subsection (c) as (d); and by inserting after subsection (b) the following new subsection (c):

“(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.”.

The Commentary to §5G1.3 captioned “Application Notes” is amended in Note 2(A) by striking “(i)” and by striking “; and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense”;

in Note 2(B) by striking “increased the Chapter Two or Three offense level for the instant offense but”;

by redesignating Notes 3 and 4 as Notes 4 and 5, respectively, and inserting after Note 2 the following new Note 3:

“3. Application of Subsection (c).—Subsection (c) applies to cases in which the federal court anticipates that, after the federal sentence is imposed, the defendant will be sentenced in state court and serve a state sentence before being transferred to federal custody for federal imprisonment. In such a case, where the other offense is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.”;

and in Note 4 (as so redesignated), in the heading, by striking “(c)” and inserting “(d)”; in each of subparagraphs (A), (B), (C), and (D) by striking “(c)” each place such term appears and inserting “(d)”; and in subparagraph (E) by striking “subsection (c)” both places such term appears and inserting “subsection (d)”, and by striking “§5G1.3 (c)” and inserting “§5G1.3(d)”.

Section 5K2.23 is amended by inserting after “Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment” the following: “or Anticipated Term of Imprisonment”.

REASON FOR AMENDMENT: This multi-part amendment addresses certain cases in which the defendant is subject to another term of imprisonment, such as an undischarged term of imprisonment or an anticipated term of imprisonment. The guideline generally applicable to undischarged terms of imprisonment is §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment).

Section 5G1.3 identifies three categories of cases in which a federal defendant is also subject to an undischarged term of imprisonment. First, there are cases in which the federal offense was committed while the defendant was serving the undischarged term of imprisonment (including work release, furlough, or escape status). In these cases, the federal sentence is to be imposed consecutively to the remainder of the undischarged term of imprisonment. See §5G1.3(a). Second, assuming subsection (a) does not apply, there are cases in which the conduct involved in the undischarged term of imprisonment is related to the conduct involved in the federal offense — specifically, the offense for which the defendant is serving an undischarged term of imprisonment is relevant conduct under subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) — and was the basis for an increase in the offense level under Chapter Two or Chapter Three. In these cases, the court is directed to adjust the federal sentence to account for the time already served on the undischarged term of imprisonment (if the

Bureau of Prisons will not itself provide credit for that time already served) and is further directed to run the federal sentence concurrently with the remainder of the sentence for the undischarged term of imprisonment. See §5G1.3(b). Finally, in all other cases involving an undischarged state term of imprisonment, the court may impose the federal sentence concurrently, partially concurrently, or consecutively, to achieve a reasonable punishment for the federal offense. See §5G1.3(c), p.s.

Within the category of cases covered by subsection (b), where the conduct involved in the undischarged term of imprisonment is related to the federal offense conduct, the Commission considered whether the benefit of subsection (b) should continue to be limited to cases in which the offense conduct related to the undischarged term of imprisonment resulted in a Chapter Two or Three increase. The Commission determined that this limitation added complexity to the guidelines and may lead to unwarranted disparities. For example, a federal drug trafficking defendant who is serving an undischarged state term of imprisonment for a small amount of a controlled substance that is relevant conduct to the federal offense may not receive the benefit of subsection (b) because the amount of the controlled substance may not be sufficient to increase the offense level under Chapter Two. In contrast, a federal drug trafficking defendant who is serving an undischarged state term of imprisonment for a large amount of a controlled substance that is relevant conduct to the federal offense may be more likely to receive the benefit of subsection (b) because the amount of the controlled substance may be more likely to increase the offense level under Chapter Two. The amendment amends §5G1.3(b) to require a court to adjust the sentence and impose concurrent sentences in any case in which the prior offense is relevant conduct under the provisions of §1B1.3(a)(1), (a)(2), or (a)(3), regardless of whether the conduct from the prior offense formed the basis for a Chapter Two or Chapter Three increase. The Commission determined that this amendment will simplify the operation of §5G1.3(b) and will also address concerns that the requirement that the relevant conduct increase the offense level under Chapters Two or Three is somewhat arbitrary.

Second, the amendment addresses cases in which there is an anticipated, but not yet imposed, state term of imprisonment that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct). This amendment creates a new subsection (c) at §5G1.3 that directs the court to impose the sentence for the instant federal offense to run concurrently with the anticipated but not yet imposed period of imprisonment if §5G1.3(a) does not apply.

This amendment is a further response to the Supreme Court's decision in Setser v. United States, 132 S. Ct. 1463 (2012). Last year, the Commission amended the Background Commentary to §5G1.3 to provide heightened awareness of the court's authority under Setser. See USSG App. C, Amend. 776 (effective November 1, 2013). In Setser, the Supreme Court held that a federal sentencing court has the authority to order that a federal term of imprisonment run concurrent with, or consecutive to, an anticipated but not yet imposed state sentence. This amendment reflects the Commission's determination that the concurrent sentence benefits of subsection (b) of §5G1.3 should be available not only in cases in which the state sentence has already been imposed at the time of federal sentencing (as subsection (b) provides), but also in cases in which the state sentence is anticipated but has not yet been imposed, as long as the other criteria in subsection (b) are satisfied (i.e., the state offense is relevant conduct under subsections (a)(1), (a)(2), or (a)(3) of §1B1.3, and subsection (a) of §5G1.3 does not apply). By requiring courts to impose a concurrent sentence in these cases, the amendment reduces disparities between defendants whose state sentences have already been imposed and those whose state sentences have not yet been imposed. The amendment also promotes certainty and consistency.

Third, the amendment addresses certain cases in which the defendant is an alien and is subject to an undischarged term of imprisonment. The amendment provides a new departure provision

Amendment 788

in §2L1.2 (Unlawfully Entering or Remaining in the United States) for cases in which the defendant is located by immigration authorities while the defendant is in state custody, whether pre- or post- conviction, for a state offense unrelated to the federal illegal reentry offense. In such a case, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). The new departure provision states that, in such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody for the unrelated offense, from the time federal immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. The new departure provision also sets forth factors for the court to consider in determining whether to provide such a departure, and states that a departure should be considered only if the departure will not increase the risk to the public from further crimes of the defendant.

This amendment addresses concerns that the amount of time a defendant serves in state custody after being located by immigration authorities may be somewhat arbitrary. Several courts have recognized a downward departure to account for the delay between when the defendant is “found” by immigration authorities and when the defendant is brought into federal custody. See, e.g., United States v. Sanchez-Rodriguez, 161 F.3d 556, 563–64 (9th Cir. 1998) (affirming downward departure on the basis that, because of the delay in proceeding with the illegal reentry case, the defendant lost the opportunity to serve a greater portion of his state sentence concurrently with his illegal reentry sentence); United States v. Barrera-Saucedo, 385 F.3d 533, 537 (5th Cir. 2004) (holding that “it is permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody”); see also United States v. Los Santos, 283 F.3d 422, 428–29 (2d Cir. 2002) (departure appropriate if the delay was either in bad faith or unreasonable). The amendment provides guidance to the courts in the determination of an appropriate sentence in such a case.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 788

AMENDMENT: Section 1B1.10, as amended by Amendment 780, is further amended in subsection (d) by striking “and” and by inserting “; and 782 (subject to subsection (e)(1))” before the period at the end;

and by adding at the end the following new subsection (e):

“(e) Special Instruction.—

- (1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court’s order is November 1, 2015, or later.”.

The Commentary to 1B1.10 captioned “Application Notes”, as amended by Amendment 780, is further amended by redesignating Notes 6 and 7 as Notes 7 and 8, respectively;

and by inserting after Note 5 the following new Note 6:

“6. Application to Amendment 782.—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables

across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.”.

REASON FOR AMENDMENT: This amendment expands the listing in §1B1.10(d) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application. The Commission has determined that Amendment 782, subject to the limitation in new §1B1.10(e) delaying the effective date of sentence reduction orders until November 1, 2015, should be applied retroactively.

Amendment 782 reduced by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties in §2D1.1, and made parallel changes to §2D1.11. Under the applicable standards set forth in the background commentary to §1B1.10, the Commission considers the following factors, among others: (1) the purpose of the amendment, (2) the magnitude of the change in the guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively. See §1B1.10, comment. (backg'd.). Applying those standards to Amendment 782, the Commission determined that, among other factors:

- (1) The purposes of the amendment are to reflect the Commission's determination that setting the base offense levels above mandatory minimum penalties is no longer necessary and that a reduction would be an appropriate step toward alleviating the overcapacity of the federal prisons. See 28 U.S.C. § 994(g) (requiring the Commission to formulate guidelines to “minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons”).
- (2) The number of cases potentially involved is large, and the magnitude of the change in the guideline range is significant. The Commission determined that an estimated 46,000 offenders may benefit from retroactive application of Amendment 782 subject to the limitation in §1B1.10(e), and the average sentence reduction would be approximately 18 percent.
- (3) The administrative burdens of applying Amendment 782 retroactively are significant but manageable given the one-year delay in the effective date, which allows courts and agencies more time to prepare. This determination was informed by testimony at the Commission's June 10, 2014 public hearing on retroactivity and by other public comment received by the Commission.

The Commission determined that public safety, among other factors, requires a limitation on retroactive application of Amendment 782. In light of the large number of cases potentially involved, the Commission determined that the agencies of the federal criminal justice system responsible for the offenders' reentry into society need time to prepare, and to help the offenders prepare, for that reentry. For example, the Bureau of Prisons has the responsibility under 18 U.S.C. § 3624(c) to ensure, to the extent practicable, that the defendant will spend a portion

Amendment 789

of his or her term of imprisonment under conditions that will afford the defendant a reasonable opportunity to adjust to and prepare for his or her reentry into the community. The Commission received testimony indicating that some offenders released pursuant to earlier retroactive guideline amendments had been released without having had this opportunity. In addition, for many of the defendants potentially involved, their sentence includes a term of supervised release after imprisonment. The judiciary and its probation officers will have the responsibility under 18 U.S.C. § 3624(e) to supervise those defendants when they are released by the Bureau of Prisons. The Commission received testimony from the Criminal Law Committee of the Judicial Conference of the United States that a delay would permit courts and probation offices to prepare to effectively supervise this increased number of defendants.

The Commission concluded that a one-year delay in the effective date of any orders granting sentence reductions under Amendment 782 is needed (1) to give courts adequate time to obtain and review the information necessary to make an individualized determination in each case of whether a sentence reduction is appropriate, (2) to ensure that, to the extent practicable, all offenders who are to be released have the opportunity to participate in reentry programs and transitional services, such as placement in halfway houses, while still in the custody of the Bureau of Prisons, which increases their likelihood of successful reentry to society and thereby promotes public safety, and (3) to permit those agencies that will be responsible for offenders after their release to prepare for the increased responsibility. Therefore, the Commission added a Special Instruction at subsection (e) providing that a reduced term of imprisonment based on retroactive application of Amendment 782 shall not be ordered unless the effective date of the court's order is November 1, 2015, or later. An application note clarifies that this special instruction does not preclude the court from conducting sentence reduction proceedings before November 1, 2015, as long as any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later. As a result, offenders cannot be released from custody pursuant to retroactive application of Amendment 782 before November 1, 2015.

In addition, public safety will be considered in every case because §1B1.10 requires the court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction. See §1B1.10, comment. (n.1(B)(ii)).

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 789

Amendment: Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines) is amended by striking “127 S. Ct. 2456” and inserting “551 U.S. 338”; by striking “2463” and inserting “347–48”; by striking “wholesale, *id.*,” and inserting “wholesale[,] *id.* at 348”; by striking “*Id.* at 2464” the first time it appears and inserting “*Id.* at 350”; by striking “127 S. Ct. at 2465” both places such term appears and inserting “551 U.S. at 351”; by striking “128 S. Ct. 586, 596” and inserting “552 U.S. 38, 49”; by striking “128 S. Ct. at 597” and inserting “552 U.S. at 51”; by striking “*Id.* at 2464” the second time it appears and inserting “*Rita*, 551 U.S. at 350”; by striking “128 S. Ct. at 594” and inserting “552 U.S. at 46”; by striking “128 S. Ct. 558” and inserting “552 U.S. 85”; and by striking “571” and inserting “103”.

The Commentary to §1B1.1 captioned “Background” is amended by striking “128 S. Ct. 2198, 2200–03” and inserting “553 U.S. 708, 709–16”.

The Commentary to §1B1.10 captioned “Background”, as amended by Amendment 780, is further amended by striking “130 S. Ct. 2683” and inserting “560 U.S. 817”.

The Commentary to §2M3.1 captioned “Application Notes” is amended in Note 1 by striking “50 U.S.C. § 435 note” and inserting “50 U.S.C. § 3161 note”.

The Commentary to §5G1.3 captioned “Application Notes”, as amended by Amendment 787, is further amended in Note 2(A) by striking “subsection (c)” and inserting “subsection (d)”.

REASON FOR AMENDMENT: This amendment makes certain technical changes to the Introduction and the Commentary in the Guidelines Manual.

First, the amendment makes clerical changes to provide United States Reports citations for certain Supreme Court cases. The changes are made to—

- (1) Subpart 2 of Part A of Chapter One (Introduction, Authority, and General Application Principles);
- (2) the Background Commentary to §1B1.1 (Application Instructions); and
- (3) the Background Commentary to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)).

Second, the amendment makes a clerical change to Application Note 1 to §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government) to reflect the editorial reclassification of a section in the United States Code.

Finally, the amendment makes a technical and conforming change to Application Note 2(A) to §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) to reflect that subsection (c) was redesignated as subsection (d) by Amendment 787.

Effective Date: The effective date of this amendment is November 1, 2014.

AMENDMENT 790

AMENDMENT: Section 1B1.3(a)(1)(B) is amended by striking “all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,” and inserting the following:

- “ all acts and omissions of others that were—
- (i) within the scope of the jointly undertaken criminal activity,
 - (ii) in furtherance of that criminal activity, and
 - (iii) reasonably foreseeable in connection with that criminal activity;”.

The Commentary to §1B1.3 captioned “Application Notes” is amended by striking Note 2 as follows:

- “2. A ‘jointly undertaken criminal activity’ is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

Amendment 790

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

- (A) in furtherance of the jointly undertaken criminal activity; and
- (B) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the ‘jointly undertaken criminal activity’) is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant’s accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant’s agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant’s agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

A defendant’s relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in

determining the defendant’s offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant’s culpability; in such a case, an upward departure may be warranted.

Illustrations of Conduct for Which the Defendant is Accountable

(a) Acts and omissions aided or abetted by the defendant

- (1) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity (the scope of which was the importation of the shipment of marihuana). A finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant’s accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.

(b) Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable

- (1) Defendant C is the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was

Amendment 790

the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

- (c) Requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable; scope of the criminal activity
- (1) Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant D (i.e., the forgery of the \$800 check).
 - (2) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.
 - (3) Defendants H and I engaged in an ongoing marijuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marijuana. Defendant J is accountable for the entire single shipment of marijuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (see the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marijuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marijuana).
 - (4) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of

Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

- (5) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (*i.e.*, the one delivery).
- (6) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.
- (7) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.
- (8) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marijuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments

Amendment 790

from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.”;

by redesignating Notes 3 through 10 as Notes 5 through 12, respectively, and inserting the following new Notes 2, 3, and 4:

“2. Accountability Under More Than One Provision.—In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.

3. Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).—

(A) In General.—A ‘jointly undertaken criminal activity’ is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:

- (i) within the scope of the jointly undertaken criminal activity;
- (ii) in furtherance of that criminal activity; and
- (iii) reasonably foreseeable in connection with that criminal activity.

The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (i.e., ‘within the scope,’ ‘in furtherance,’ and ‘reasonably foreseeable’) is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.

(B) Scope.—Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the ‘jointly undertaken

criminal activity' is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). In doing so, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

- (C) In Furtherance.—The court must determine if the conduct (acts and omissions) of others was in furtherance of the jointly undertaken criminal activity.
- (D) Reasonably Foreseeable.—The court must then determine if the conduct (acts and omissions) of others that was within the scope of, and in furtherance of, the jointly undertaken criminal activity was reasonably foreseeable in connection with that criminal activity.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the jointly undertaken criminal activity (the robbery), was in furtherance of that criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

Amendment 790

With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity.

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

4. Illustrations of Conduct for Which the Defendant is Accountable under Subsections (a)(1)(A) and (B).—

(A) Acts and omissions aided or abetted by the defendant.—

- (i) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity and all three criteria of subsection (a)(1)(B) are met. First, the conduct was within the scope of the criminal activity (the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity, as described above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case

(the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant’s accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. See Application Note 2.

(B) Acts and omissions aided or abetted by the defendant; acts and omissions in a jointly undertaken criminal activity.—

- (i) Defendant C is the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

(C) Requirements that the conduct of others be within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable.—

- (i) Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not within the scope of the jointly undertaken criminal activity (i.e., the forgery of the \$800 check).
- (ii) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the jointly undertaken criminal activity (the scheme to sell fraudulent stocks), was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity.

Amendment 790

- (iii) Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions of others related to the importation of that shipment on the basis of subsection (a)(1)(B) (see the discussion in example (A)(i) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not within the scope of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).
- (iv) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity (to distribute child pornography with Defendant K), in furtherance of that criminal activity, and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because he is not engaged in a jointly undertaken criminal activity with the other defendants. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.
- (v) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not within the scope of her jointly undertaken criminal activity (i.e., the one delivery).
- (vi) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug

dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.

- (vii) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (i.e., the 500 grams).
- (viii) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, the scope of the jointly undertaken criminal activity may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. See Application Note 3(B)."

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 14(E) by striking "Application Note 9" both places such term appears and inserting "Application Note 11".

The Commentary to §2X3.1 captioned "Application Notes" is amended in Note 1 by striking "Application Note 10" and inserting "Application Note 12".

The Commentary to §2X4.1 captioned "Application Notes" is amended in Note 1 by striking "Application Note 10" and inserting "Application Note 12".

REASON FOR AMENDMENT: This amendment is a result of the Commission's effort to clarify the use of relevant conduct in offenses involving multiple participants.

Amendment 791

The amendment makes clarifying revisions to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)). It restructures the guideline and its commentary to set out more clearly the three-step analysis the court applies in determining whether a defendant is accountable for the conduct of others in a jointly undertaken criminal activity under §1B1.3(a)(1)(B). The three-step analysis requires that the court (1) identify the scope of the jointly undertaken criminal activity; (2) determine whether the conduct of others in the jointly undertaken criminal activity was in furtherance of that criminal activity; and (3) determine whether the conduct of others was reasonably foreseeable in connection with that criminal activity.

Prior to this amendment, the “scope” element of the three-step analysis was identified in the commentary to §1B1.3 but was not included in the text of the guideline itself. This amendment makes clear that, under the “jointly undertaken criminal activity” provision, a defendant is accountable for the conduct of others in a jointly undertaken criminal activity if the conduct meets all three criteria of the three-step analysis. This amendment is not intended as a substantive change in policy.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 791

AMENDMENT: Section 2B1.1(b) is amended by striking paragraph (1) as follows:

“(1) If the loss exceeded \$5,000, increase the offense level as follows:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$5,000 or less	no increase
(B)	More than \$5,000	add 2
(C)	More than \$10,000	add 4
(D)	More than \$30,000	add 6
(E)	More than \$70,000	add 8
(F)	More than \$120,000	add 10
(G)	More than \$200,000	add 12
(H)	More than \$400,000	add 14
(I)	More than \$1,000,000	add 16
(J)	More than \$2,500,000	add 18
(K)	More than \$7,000,000	add 20
(L)	More than \$20,000,000	add 22
(M)	More than \$50,000,000	add 24
(N)	More than \$100,000,000	add 26
(O)	More than \$200,000,000	add 28
(P)	More than \$400,000,000	add 30.”;

and inserting the following:

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

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$6,500 or less	no increase
(B)	More than \$6,500	add 2

(C)	More than \$15,000	add 4
(D)	More than \$40,000	add 6
(E)	More than \$95,000	add 8
(F)	More than \$150,000	add 10
(G)	More than \$250,000	add 12
(H)	More than \$550,000	add 14
(I)	More than \$1,500,000	add 16
(J)	More than \$3,500,000	add 18
(K)	More than \$9,500,000	add 20
(L)	More than \$25,000,000	add 22
(M)	More than \$65,000,000	add 24
(N)	More than \$150,000,000	add 26
(O)	More than \$250,000,000	add 28
(P)	More than \$550,000,000	add 30.”.

Section 2B1.4(b)(1) is amended by striking “\$5,000” and inserting “\$6,500”.

Section 2B1.5(b)(1) is amended by striking “\$2,000” and inserting “\$2,500”; and by striking “\$5,000” both places such term appears and inserting “\$6,500”.

Section 2B2.1(b) is amended by striking paragraph (2) as follows:

“(2) If the loss exceeded \$2,500, increase the offense level as follows:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$2,500 or less	no increase
(B)	More than \$2,500	add 1
(C)	More than \$10,000	add 2
(D)	More than \$50,000	add 3
(E)	More than \$250,000	add 4
(F)	More than \$800,000	add 5
(G)	More than \$1,500,000	add 6
(H)	More than \$2,500,000	add 7
(I)	More than \$5,000,000	add 8.”;

and inserting the following:

“(2) If the loss exceeded \$5,000, increase the offense level as follows:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$5,000 or less	no increase
(B)	More than \$5,000	add 1
(C)	More than \$20,000	add 2
(D)	More than \$95,000	add 3
(E)	More than \$500,000	add 4
(F)	More than \$1,500,000	add 5
(G)	More than \$3,000,000	add 6
(H)	More than \$5,000,000	add 7
(I)	More than \$9,500,000	add 8.”.

Section 2B2.3(b)(3) is amended by striking “\$2,000” and inserting “\$2,500”; and by striking “\$5,000” both places such term appears and inserting “\$6,500”.

Amendment 791

Section 2B3.1(b) is amended by striking paragraph (7) as follows:

“(7) If the loss exceeded \$10,000, increase the offense level as follows:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$10,000 or less	no increase
(B)	More than \$10,000	add 1
(C)	More than \$50,000	add 2
(D)	More than \$250,000	add 3
(E)	More than \$800,000	add 4
(F)	More than \$1,500,000	add 5
(G)	More than \$2,500,000	add 6
(H)	More than \$5,000,000	add 7.”;

and inserting the following:

“(7) If the loss exceeded \$20,000, increase the offense level as follows:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$20,000 or less	no increase
(B)	More than \$20,000	add 1
(C)	More than \$95,000	add 2
(D)	More than \$500,000	add 3
(E)	More than \$1,500,000	add 4
(F)	More than \$3,000,000	add 5
(G)	More than \$5,000,000	add 6
(H)	More than \$9,500,000	add 7.”.

Section 2B3.2(b)(2) is amended by striking “\$10,000” and inserting “\$20,000”.

Sections 2B3.3(b)(1), 2B4.1(b)(1), 2B5.1(b)(1), 2B5.3(b)(1), and 2B6.1(b)(1) are each amended by striking “\$2,000” and inserting “\$2,500”; and by striking “\$5,000” both places such term appears and inserting “\$6,500”.

Sections 2C1.1(b)(2), 2C1.2(b)(2), and 2C1.8(b)(1) are each amended by striking “\$5,000” and inserting “\$6,500”.

Sections 2E5.1(b)(2) and 2Q2.1(b)(3) are each amended by striking “\$2,000” and inserting “\$2,500”; and by striking “\$5,000” both places such term appears and inserting “\$6,500”.

Section 2R1.1(b) is amended by striking paragraph (2) as follows:

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

	<u>Volume of Commerce (Apply the Greatest)</u>	<u>Adjustment to Offense Level</u>
(A)	More than \$1,000,000	add 2
(B)	More than \$10,000,000	add 4
(C)	More than \$40,000,000	add 6

(D)	More than \$100,000,000	add 8
(E)	More than \$250,000,000	add 10
(F)	More than \$500,000,000	add 12
(G)	More than \$1,000,000,000	add 14
(H)	More than \$1,500,000,000	add 16.”;

and inserting the following:

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

	<u>Volume of Commerce</u> (Apply the Greatest)	<u>Adjustment to Offense Level</u>
(A)	More than \$1,000,000	add 2
(B)	More than \$10,000,000	add 4
(C)	More than \$50,000,000	add 6
(D)	More than \$100,000,000	add 8
(E)	More than \$300,000,000	add 10
(F)	More than \$600,000,000	add 12
(G)	More than \$1,200,000,000	add 14
(H)	More than \$1,850,000,000	add 16.”.

Section 2T3.1(a) is amended by striking “\$1,000” both places such term appears and inserting “\$1,500”; and by striking “\$100” both places such term appears and inserting “\$200”.

Section 2T4.1 is amended by striking the following:

“	<u>Tax Loss</u> (Apply the Greatest)	<u>Offense Level</u>
	(A) \$2,000 or less	6
	(B) More than \$2,000	8
	(C) More than \$5,000	10
	(D) More than \$12,500	12
	(E) More than \$30,000	14
	(F) More than \$80,000	16
	(G) More than \$200,000	18
	(H) More than \$400,000	20
	(I) More than \$1,000,000	22
	(J) More than \$2,500,000	24
	(K) More than \$7,000,000	26
	(L) More than \$20,000,000	28
	(M) More than \$50,000,000	30
	(N) More than \$100,000,000	32
	(O) More than \$200,000,000	34
	(P) More than \$400,000,000	36.”;

and inserting the following:

“	<u>Tax Loss</u> (Apply the Greatest)	<u>Offense Level</u>
	(A) \$2,500 or less	6
	(B) More than \$2,500	8
	(C) More than \$6,500	10

Amendment 791

(D)	More than \$15,000	12
(E)	More than \$40,000	14
(F)	More than \$100,000	16
(G)	More than \$250,000	18
(H)	More than \$550,000	20
(I)	More than \$1,500,000	22
(J)	More than \$3,500,000	24
(K)	More than \$9,500,000	26
(L)	More than \$25,000,000	28
(M)	More than \$65,000,000	30
(N)	More than \$150,000,000	32
(O)	More than \$250,000,000	34
(P)	More than \$550,000,000	36.”;

Section 5E1.2 is amended in subsection (c)(3) by striking the following:

“

	<u>Fine Table</u>	
<u>Offense Level</u>	<u>A Minimum</u>	<u>B Maximum</u>
3 and below	\$100	\$5,000
4–5	\$250	\$5,000
6–7	\$500	\$5,000
8–9	\$1,000	\$10,000
10–11	\$2,000	\$20,000
12–13	\$3,000	\$30,000
14–15	\$4,000	\$40,000
16–17	\$5,000	\$50,000
18–19	\$6,000	\$60,000
20–22	\$7,500	\$75,000
23–25	\$10,000	\$100,000
26–28	\$12,500	\$125,000
29–31	\$15,000	\$150,000
32–34	\$17,500	\$175,000
35–37	\$20,000	\$200,000
38 and above	\$25,000	\$250,000.”,

and inserting the following:

“

	<u>Fine Table</u>	
<u>Offense Level</u>	<u>A Minimum</u>	<u>B Maximum</u>
3 and below	\$200	\$9,500
4–5	\$500	\$9,500
6–7	\$1,000	\$9,500
8–9	\$2,000	\$20,000
10–11	\$4,000	\$40,000
12–13	\$5,500	\$55,000
14–15	\$7,500	\$75,000
16–17	\$10,000	\$95,000
18–19	\$10,000	\$100,000

20–22	\$15,000	\$150,000
23–25	\$20,000	\$200,000
26–28	\$25,000	\$250,000
29–31	\$30,000	\$300,000
32–34	\$35,000	\$350,000
35–37	\$40,000	\$400,000
38 and above	\$50,000	\$500,000.”;

in subsection (c)(4) by striking “\$250,000” and inserting “\$500,000”;

and by inserting after subsection (g) the following new subsection (h):

“(h) Special Instruction

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

Section 8C2.4 is amended in subsection (d) by striking the following:

“ Offense Level Fine Table

<u>Offense Level</u>	<u>Amount</u>
6 or less	\$5,000
7	\$7,500
8	\$10,000
9	\$15,000
10	\$20,000
11	\$30,000
12	\$40,000
13	\$60,000
14	\$85,000
15	\$125,000
16	\$175,000
17	\$250,000
18	\$350,000
19	\$500,000
20	\$650,000
21	\$910,000
22	\$1,200,000
23	\$1,600,000
24	\$2,100,000
25	\$2,800,000
26	\$3,700,000
27	\$4,800,000
28	\$6,300,000
29	\$8,100,000
30	\$10,500,000
31	\$13,500,000
32	\$17,500,000
33	\$22,000,000
34	\$28,500,000

Amendment 791

35	\$36,000,000
36	\$45,500,000
37	\$57,500,000
38 or more	\$72,500,000.”

and inserting the following:

“

<u>Offense Level Fine Table</u>	
<u>Offense Level</u>	<u>Amount</u>
6 or less	\$8,500
7	\$15,000
8	\$15,000
9	\$25,000
10	\$35,000
11	\$50,000
12	\$70,000
13	\$100,000
14	\$150,000
15	\$200,000
16	\$300,000
17	\$450,000
18	\$600,000
19	\$850,000
20	\$1,000,000
21	\$1,500,000
22	\$2,000,000
23	\$3,000,000
24	\$3,500,000
25	\$5,000,000
26	\$6,500,000
27	\$8,500,000
28	\$10,000,000
29	\$15,000,000
30	\$20,000,000
31	\$25,000,000
32	\$30,000,000
33	\$40,000,000
34	\$50,000,000
35	\$65,000,000
36	\$80,000,000
37	\$100,000,000
38 or more	\$150,000,000.”;

and by inserting after subsection (d) the following new subsection (e):

“(e) Special Instruction

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

REASON FOR AMENDMENT: This amendment makes adjustments to the monetary tables in §§2B1.1 (Theft, Property, Destruction, and Fraud), 2B2.1 (Burglary), 2B3.1 (Robbery), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 2T4.1 (Tax Table), 5E1.2 (Fines for Individual Defendants), and 8C2.4 (Base Fine) to account for inflation. The amendment adjusts the amounts in each of the seven monetary tables using a specific multiplier derived from the Consumer Price Index (CPI), and then rounds—

- amounts greater than \$100,000,000 to the nearest multiple of \$50,000,000;
- amounts greater than \$10,000,000 to the nearest multiple of \$5,000,000;
- amounts greater than \$1,000,000 to the nearest multiple of \$500,000;
- amounts greater than \$100,000 to the nearest multiple of \$50,000;
- amounts greater than \$10,000 to the nearest multiple of \$5,000;
- amounts greater than \$1,000 to the nearest multiple of \$500; and
- amounts of \$1,000 or less to the nearest multiple of \$50.

In addition, the amendment includes conforming changes to other Chapter Two guidelines that refer to the monetary tables.

Congress has generally mandated that agencies in the executive branch adjust the civil monetary penalties they impose to account for inflation using the CPI. See 28 U.S.C. § 2461 note (Federal Civil Penalties Inflationary Adjustment Act of 1990). Although the Commission’s work does not involve civil monetary penalties, it does establish appropriate criminal sentences for categories of offenses and offenders, including appropriate amounts for criminal fines. While some of the monetary values in the Chapter Two guidelines have been revised since they were originally established in 1987, none of the tables has been specifically revised to account for inflation.

Due to inflationary changes, there has been a gradual decrease in the value of the dollar over time. As a result, monetary losses in current offenses reflect, to some degree, a lower degree of harm and culpability than did equivalent amounts when the monetary tables were established or last substantively amended. Similarly, the fine levels recommended by the guidelines are lower in value than when they were last adjusted, and therefore, do not have the same sentencing impact as a similar fine in the past. Based on its analysis and widespread support for inflationary adjustments expressed in public comment, the Commission concluded that aligning the above monetary tables with modern dollar values is an appropriate step at this time.

The amendment adjusts each table based on inflationary changes since the year each monetary table was last substantially amended:

- Loss table in §2B1.1 and tax table in §2T4.1: adjusting for inflation from 2001 (\$1.00 in 2001 = \$1.34 in 2014);
- Loss tables in §§2B2.1 and 2B3.1 and fine table for individual defendants at §5E1.2(c)(3): adjusting for inflation from 1989 (\$1.00 in 1989 = \$1.91 in 2014);
- Volume of Commerce table in §2R1.1: adjusting for inflation from 2005 (\$1.00 in 2005 = \$1.22 in 2014); and
- Fine table for organizational defendants at §8C2.4(d): adjusting for inflation from 1991 (\$1.00 in 1991 = \$1.74 in 2014).

Adjusting from the last substantive amendment year appropriately accounts for the Commission’s previous work in revising these tables at various times. Although not specifically focused

Amendment 792

on inflationary issues, previous Commissions engaged in careful examination (and at times, a wholesale rewriting) of the monetary tables and ultimately included monetary and enhancement levels that it considered appropriate at that time. The Commission estimates that this amendment would result in the Bureau of Prisons having approximately 224 additional prison beds available at the end of the first year after implementation, and approximately 956 additional prison beds available at the end of its fifth year of implementation.

Finally, the amendment adds a special instruction to both §§5E1.2 and 8C2.4 providing that, for offenses committed prior to November 1, 2015, the court shall use the fine provisions that were in effect on November 1, 2014, rather than the fine provisions as amended for inflation. This addition responds to concerns expressed in public comment that changes to the fine tables might create ex post facto problems. It ensures that an offender whose offense level is calculated under the current Guidelines Manual is not subject to the inflated fine provisions if his or her offense was committed prior to November 1, 2015. Such guidance is similar to that provided in the commentary to §5E1.3 (Special Assessment) relating to the amount of the special assessment to be imposed in a given case.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 792

AMENDMENT: Section 2B1.1 is amended in subsection (b)(2) by striking the following:

- “ (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by 2 levels;
 - (B) involved 50 or more victims, increase by 4 levels; or
 - (C) involved 250 or more victims, increase by 6 levels.”,

and inserting the following:

- “ (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;
 - (B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or
 - (C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.”;

in subsection (b)(10)(C) by inserting after “the offense otherwise involved sophisticated means” the following: “and the defendant intentionally engaged in or caused the conduct constituting sophisticated means”;

and in subsection (b)(16)(B) by inserting “or” at the end of subdivision (i), and by striking “; or (iii) substantially endangered the solvency or financial security of 100 or more victims”.

The Commentary to §2B1.1 captioned “Application Notes” is amended in Note 3(A)(ii) by striking “(I) means the pecuniary harm that was intended to result from the offense; and” and inserting “(I) means the pecuniary harm that the defendant purposely sought to inflict; and”;

in Note 3(F)(ix) by striking “there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—” and inserting “the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by—”;

in Note 4 by striking “50 victims” and inserting “10 victims” at subdivision (C)(ii); and by inserting at the end the following new subdivision (F):

“(F) Substantial Financial Hardship.—In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—

- (i) becoming insolvent;
- (ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);
- (iii) suffering substantial loss of a retirement, education, or other savings or investment fund;
- (iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;
- (v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and
- (vi) suffering substantial harm to his or her ability to obtain credit.”;

in Note 9 by striking “Sophisticated Means Enhancement under” in the heading and inserting “Application of”; and by inserting at the end of the heading of subdivision (B) the following: “under Subsection (b)(10)(C)”;

and in Note 20(A)(vi) by striking both “or credit record” and “or a damaged credit record”.

REASON FOR AMENDMENT: This amendment makes several changes to the guideline applicable to economic crimes, §2B1.1 (Theft, Property Destruction, and Fraud), to better account for harm to victims, individual culpability, and the offender’s intent. This amendment is a result of the Commission’s multi-year study of §2B1.1 and related guidelines, and follows extensive data collection and analysis relating to economic offenses and offenders. Using this Commission data, combined with legal analysis and public comment, the Commission identified a number of specific areas where changes were appropriate.

Victims Table

First, the amendment revises the victims table in §2B1.1(b)(2) to specifically incorporate substantial financial hardship to victims as a factor in sentencing economic crime offenders. As amended, the first tier of the victims table provides for a 2-level enhancement where the offense involved 10 or more victims or mass-marketing, or if the offense resulted in substantial

Amendment 792

financial hardship to one or more victims. The 4-level enhancement applies if the offense resulted in substantial financial hardship to five or more victims, and the 6-level enhancement applies if the offense resulted in substantial financial hardship to 25 or more victims. As a conforming change, the special rule in Application Note 4(C)(ii)(I), pertaining to theft of undelivered mail, is also revised to refer to 10 rather than 50 victims.

In addition, the amendment adds a non-exhaustive list of factors for courts to consider in determining whether the offense caused substantial financial hardship. These factors include: becoming insolvent; filing for bankruptcy; suffering substantial loss of a retirement, education, or other savings or investment fund; making substantial changes to employment; making substantial changes to living arrangements; or suffering substantial harm to the victim's ability to obtain credit. Two conforming changes are also included. First, one factor — substantial harm to ability to obtain credit — was previously included in Application Note 20(A)(vi) as a potential departure consideration. The amendment removes this language from the Application Note. Second, the amendment deletes subsection (b)(16)(B)(iii), which provided for an enhancement where an offense substantially endangered the solvency or financial security of 100 or more victims.

The Commission continues to believe that the number of victims is a meaningful measure of the harm and scope of an offense and can be indicative of its seriousness. It is for this reason that the amended victims table maintains the 2-level enhancement for offenses that involve 10 or more victims or mass marketing. However, the revisions to the victims table also reflect the Commission's conclusion that the guideline should place greater emphasis on the extent of harm that particular victims suffer as a result of the offense. Consistent with the Commission's overall goal of focusing more on victim harm, the revised victims table ensures that an offense that results in even one victim suffering substantial financial harm receives increased punishment, while also lessening the cumulative impact of loss and the number of victims, particularly in high-loss cases.

Intended Loss

Second, the amendment revises the commentary at §2B1.1, Application Note 3(A)(ii), which has defined intended loss as “pecuniary harm that was intended to result from the offense.” In interpreting this provision, courts have expressed some disagreement as to whether a subjective or an objective inquiry is required. Compare United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011) (holding that a subjective inquiry is required), United States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013) (“To make this determination, we look to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims.”), United States v. Confredo, 528 F.3d 143, 152 (2d Cir. 2008) (remanding for consideration of whether defendant had “proven a subjective intent to cause a loss of less than the aggregate amount” of fraudulent loans), and United States v. Sanders, 343 F.3d 511, 527 (5th Cir. 2003) (“our case law requires the government prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level”), with United States v. Innarelli, 524 F.3d 286, 291 (1st Cir. 2008) (“we focus our loss inquiry for purposes of determining a defendant's offense level on the objectively reasonable expectation of a person in his position at the time he perpetrated the fraud, not on his subjective intentions or hopes”) and United States v. Lane, 323 F.3d 568, 590 (7th Cir. 2003) (“The determination of intended loss under the Sentencing Guidelines therefore focuses on the conduct of the defendant and the objective financial risk to victims caused by that conduct”).

The amendment adopts the approach taken by the Tenth Circuit by revising the commentary in Application Note 3(A)(ii) to provide that intended loss means the pecuniary harm that “the defendant purposely sought to inflict.” The amendment reflects the Commission's continued belief that intended loss is an important factor in economic crime offenses, but also recognizes

that sentencing enhancements predicated on intended loss, rather than losses that have actually accrued, should focus more specifically on the defendant’s culpability.

Sophisticated Means

Third, the amendment narrows the focus of the specific offense characteristic at §2B1.1(b)(10)(C) to cases in which the defendant intentionally engaged in or caused conduct constituting sophisticated means. Prior to the amendment, the enhancement applied if “the offense otherwise involved sophisticated means.” Based on this language, courts had applied this enhancement on the basis of the sophistication of the overall scheme without a determination of whether the defendant’s own conduct was “sophisticated.” See, e.g., United States v. Green, 648 F.3d 569, 576 (7th Cir. 2011); United States v. Bishop-Oyedepo, 480 Fed. App’x 431, 433–34 (7th Cir. 2012); United States v. Jenkins-Watt, 574 F.3d 950, 965 (8th Cir. 2009). The Commission concluded that basing the enhancement on the defendant’s own intentional conduct better reflects the defendant’s culpability and will appropriately minimize application of this enhancement to less culpable offenders.

Fraud on the Market

Finally, the amendment revises the special rule at Application Note 3(F)(ix) relating to the calculation of loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. When this special rule was added to the guidelines, it established a rebuttable presumption that the specified loss calculation methodology provides a reasonable estimate of the actual loss in such cases. As amended, the method provided in the special rule is no longer the presumed starting point for calculating loss in these cases. Instead, the revised special rule states that the provided method is one method that courts may consider, but that courts, in determining loss, are free to use any method that is appropriate and practicable under the circumstances. This amendment reflects the Commission’s view that the most appropriate method to determine a reasonable estimate of loss will often vary in these highly complex and fact-intensive cases.

This amendment, in combination with related revisions to the mitigating role guideline at §3B1.2 (Mitigating Role), reflects the Commission’s overall goal of focusing the economic crime guideline more on qualitative harm to victims and individual offender culpability.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 793

AMENDMENT: Section 2D1.1(c) is amended in each of subdivisions (5), (6), (7), (8), and (9) by striking the lines referenced to Schedule III Hydrocodone;

and in each of subdivisions (10), (11), (12), (13), (14), (15), (16), and (17) by striking the lines referenced to Schedule III Hydrocodone, and in the lines referenced to Schedule III substances (except Ketamine or Hydrocodone) by striking “or Hydrocodone”.

The annotation to §2D1.1(c) captioned “Notes to Drug Quantity Table” is amended in Note (B) in the last paragraph by striking “The term ‘Oxycodone (actual)’ refers” and inserting “The terms ‘Hydrocodone (actual)’ and ‘Oxycodone (actual)’ refer”.

Amendment 793

The Commentary to §2D1.1 captioned “Application Notes” is amended in Note 8(D), under the heading relating to Schedule I or II Opiates, by striking the line referenced to Hydrocodone/Dihydrocodeinone and inserting the following:

“ 1 gm of Hydrocodone (actual) = 6700 gm of marihuana”;

in the heading relating to Schedule III Substances (except ketamine and hydrocodone) by striking “and hydrocodone” both places such term appears;

and in the heading relating to Schedule III Hydrocodone by striking the heading and subsequent paragraphs as follows:

“ Schedule III Hydrocodone****

1 unit of Schedule III hydrocodone = 1 gm of marihuana

****Provided, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 2,999.99 kilograms of marihuana.”;

and in Note 27(C) by inserting after “methamphetamine,” the following: “hydrocodone,”.

REASON FOR AMENDMENT: This amendment changes the way the primary drug trafficking guideline calculates a defendant’s drug quantity in cases involving hydrocodone in response to recent administrative actions by the Food and Drug Administration and the Drug Enforcement Administration. The amendment adopts a marihuana equivalency for hydrocodone (1 gram equals 6700 grams of marihuana) based on the weight of the hydrocodone alone.

In 2013 and 2014, the Food and Drug Administration approved several new pharmaceuticals containing hydrocodone which can contain up to twelve times as much hydrocodone in a single pill than was previously available. Separately, in October 2014, the Drug Enforcement Administration moved certain commonly-prescribed pharmaceuticals containing hydrocodone from the less-restricted Schedule III to the more-restricted Schedule II. Among other things, the scheduling doubled the statutory maximum term of imprisonment available for trafficking in the pharmaceuticals that were previously controlled under Schedule III from 10 years to 20 years. The change also rendered obsolete the entries in the Drug Quantity Table and Drug Equivalency Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) that set a marihuana equivalency for the pharmaceuticals that were previously controlled under Schedule III.

As a result of these administrative actions, all pharmaceuticals that include hydrocodone are now subject to the same statutory penalties. There is wide variation in the amount of hydrocodone available in these pharmaceuticals and in the amount of other ingredients (such as binders, coloring, acetaminophen, etc.) they contain. This variation raises significant proportionality issues within §2D1.1, where drug quantity for hydrocodone offenses has previously been calculated based on the weight of the entire substance that contains hydrocodone or on the number of pills. Neither of these calculations directly took into account the amount of actual hydrocodone in the pills.

The amendment addresses these changed circumstances by setting a new marihuana equivalency for hydrocodone based on the weight of the hydrocodone alone. Without this change, defendants with less actual hydrocodone could have received a higher guideline range than

those with more hydrocodone because pills with less hydrocodone can sometimes contain more non-hydrocodone ingredients, leading the lower-dose pills to weigh more.

In setting the marijuana equivalency, the Commission considered: potency of the drug, medical use of the drug, and patterns of abuse and trafficking, such as prevalence of abuse, consequences of misuse including death or serious bodily injury from use, and incidence of violence associated with its trafficking. The Commission noted that the Drug Enforcement Administration's rescheduling decision relied in part on the close relationship between hydrocodone and oxycodone, a similar and commonly-prescribed drug that was already controlled under Schedule II. Scientific literature, public comment, and testimony supported the conclusion that the potency, medical use, and patterns of abuse and trafficking of hydrocodone are very similar to oxycodone. In particular, the Commission heard testimony from abuse liability specialists and reviewed scientific literature indicating that, in studies conducted under standards established by the Food and Drug Administration for determining the abuse liability of a particular drug, the potencies of hydrocodone and oxycodone when abused are virtually identical, even though some physicians who prescribe the two drugs in a clinical setting might not prescribe them in equal doses. Public comment indicated that both hydrocodone and oxycodone are among the top ten drugs most frequently encountered by law enforcement and that their methods of diversion and rates of diversion per kilogram of available drug are similar. Public comment and review of the scientific literature also indicated that the users of the two drugs share similar characteristics, and that some users may use them interchangeably, a situation which may become more common as the more powerful pharmaceuticals recently approved by the Food and Drug Administration become available.

Based on proportionality considerations and the Commission's assessment that, for purposes of the drug guideline, hydrocodone and oxycodone should be treated equivalently, the amendment adopts a marijuana equivalency for hydrocodone (actual) that is the same as the existing equivalency for oxycodone (actual): 1 gram equals 6,700 grams of marijuana.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 794

AMENDMENT: The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 3(A) by inserting after "that makes him substantially less culpable than the average participant" the following: "in the criminal activity", by striking "concerted" and inserting "the", by striking "is not precluded from consideration for" each place such term appears and inserting "may receive", by striking "role" both places such term appears and inserting "participation", and by striking "personal gain from a fraud offense and who had limited knowledge" and inserting "personal gain from a fraud offense or who had limited knowledge";

in Note 3(C) by inserting at the end the following new paragraphs:

- “
- In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:
- (i) the degree to which the defendant understood the scope and structure of the criminal activity;
 - (ii) the degree to which the defendant participated in planning or organizing the criminal activity;

Amendment 794

- (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
- (iv) the nature and extent of the defendant’s participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
- (v) the degree to which the defendant stood to benefit from the criminal activity.

For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.

The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.”;

in Note 4 by striking “concerted” and inserting “the criminal”;

and in Note 5 by inserting after “than most other participants” the following: “in the criminal activity”.

REASON FOR AMENDMENT: This amendment is a result of the Commission’s study of §3B1.2 (Mitigating Role). The Commission conducted a review of cases involving low-level offenders, analyzed case law, and considered public comment and testimony. Overall, the study found that mitigating role is applied inconsistently and more sparingly than the Commission intended. In drug cases, the Commission’s study confirmed that mitigating role is applied inconsistently to drug defendants who performed similar low-level functions (and that rates of application vary widely from district to district). For example, application of mitigating role varies along the southwest border, with a low of 14.3 percent of couriers and mules receiving the mitigating role adjustment in one district compared to a high of 97.2 percent in another. Moreover, among drug defendants who do receive mitigating role, there are differences from district to district in application rates of the 2-, 3-, and 4-level adjustments. In economic crime cases, the study found that the adjustment was often applied in a limited fashion. For example, the study found that courts often deny mitigating role to otherwise eligible defendants if the defendant was considered “integral” to the successful commission of the offense.

This amendment provides additional guidance to sentencing courts in determining whether a mitigating role adjustment applies. Specifically, it addresses a circuit conflict and other case law that may be discouraging courts from applying the adjustment in otherwise appropriate circumstances. It also provides a non-exhaustive list of factors for the court to consider in determining whether an adjustment applies and, if so, the amount of the adjustment.

Section 3B1.2 provides an adjustment of 2, 3, or 4 levels for a defendant who plays a part in committing the offense that makes him or her “substantially less culpable than the average participant.” However, there are differences among the circuits about what determining the “average participant” requires. The Seventh and Ninth Circuits have concluded that the “average participant” means only those persons who actually participated in the criminal activity at issue in the defendant’s case, so that the defendant’s relative culpability is determined only by reference to his or her co-participants in the case at hand. *See, e.g., United States v. Benitez*, 34 F.3d 1489, 1498 (9th Cir. 1994); *United States v. Cantrell*, 433 F.3d 1269, 1283 (9th Cir. 2006); *United States v. DePriest*, 6 F.3d 1201, 1214 (7th Cir. 1993). The First and Second Circuits have concluded that the “average participant” also includes “the universe of persons

participating in similar crimes.” See United States v. Santos, 357 F.3d 136, 142 (1st Cir. 2004); see also United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999). Under this latter approach, courts will ordinarily consider the defendant’s culpability relative both to his co-participants and to the typical offender.

The amendment generally adopts the approach of the Seventh and Ninth Circuits, revising the commentary to specify that, when determining mitigating role, the defendant is to be compared with the other participants “in the criminal activity.” Focusing the court’s attention on the individual defendant and the other participants is more consistent with the other provisions of Chapter Three, Part B. See, e.g., §3B1.2 (the adjustment is based on “the defendant’s role in the offense”); §3B1.2, comment. (n.3(C)) (a determination about mitigating role “is heavily dependent upon the facts of the particular case”); Ch. 3, Pt. B, intro. comment. (the determination about mitigating role “is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct)”).

Next, the amendment addresses cases in which the defendant was “integral” or “indispensable” to the commission of the offense. Public comment suggested, and a review of case law confirmed, that in some cases a defendant may be denied a mitigating role adjustment solely because he or she was “integral” or “indispensable” to the commission of the offense. See, e.g., United States v. Skinner, 690 F.3d 772, 783–84 (6th Cir. 2012) (a “defendant who plays a lesser role in a criminal scheme may nonetheless fail to qualify as a minor participant if his role was indispensable or critical to the success of the scheme”); United States v. Panaigua-Verdugo, 537 F.3d 722, 725 (7th Cir. 2008) (defendant “played an integral part in the transactions and therefore did not deserve a minor participant reduction”); United States v. Deans, 590 F.3d 907, 910 (8th Cir. 2010) (“Numerous decisions have upheld the denial of minor role adjustments to defendants who . . . play a critical role”); United States v. Carter, 971 F.2d 597, 600 (10th Cir. 1992) (because defendant was “indispensable to the completion of the criminal activity . . . to debate which one is less culpable than the others . . . is akin to the old argument over which leg of a three-legged stool is the most important leg.”). However, a finding that the defendant was essential to the offense does not alter the requirement, expressed in Note 3(A), that the court must assess the defendant’s culpability relative to the average participant in the offense. Accordingly, the amendment revises the commentary to emphasize that “the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative” and that such a defendant may receive a mitigating role adjustment, if he or she is otherwise eligible.

The amendment also revises two paragraphs in Note 3(A) that illustrate how mitigating role interacts with relevant conduct principles in §1B1.3. Specifically, the illustrations provide that certain types of defendants are “not precluded from consideration for” a mitigating role adjustment. The amendment revises these paragraphs to state that these types of defendants “may receive” a mitigating role adjustment. The Commission determined that the double-negative tone (“not precluded”) may have had the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances.

Finally, the amendment provides a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment. The factors direct the court to consider the degree to which the defendant understood the scope and structure of the criminal activity, participated in planning or organizing the criminal activity, and exercised decision-making authority, as well as the acts the defendant performed and the degree to which he or she stood to benefit from the criminal activity. The Commission was persuaded by public comment and a detailed review of cases involving low-level offenders, particularly in fraud cases, that providing a list of factors will give the courts a common framework for determining whether to apply a mitigating role adjustment (and, if so, the amount of the adjustment) and will help promote consistency.

Amendment 795

The amendment further provides, as an example, that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for a mitigating role adjustment.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 795

AMENDMENT: The Commentary to §2L1.2 captioned “Application Notes” is amended in Note 4(B) by striking “not counted as a single sentence” and inserting “not treated as a single sentence”.

Section 4A1.1(e) is amended by striking “such sentence was counted as a single sentence” and inserting “such sentence was treated as a single sentence”.

The Commentary to §4A1.1 captioned “Application Notes” is amended in Note 5 by striking “are counted as a single sentence” and inserting “are treated as a single sentence”; and by striking “are counted as a single prior sentence” and inserting “are treated as a single prior sentence”.

Section 4A1.2(a)(2) is amended by striking “those sentences are counted separately or as a single sentence” and inserting “those sentences are counted separately or treated as a single sentence”; by striking “Count any prior sentence” and inserting “Treat any prior sentence”; and by striking “if prior sentences are counted as a single sentence” and inserting “if prior sentences are treated as a single sentence”.

The Commentary to §4A1.2 captioned “Application Notes” is amended in Note 3 by redesignating Note 3 as Note 3(B), and by inserting at the beginning the following:

“ Application of ‘Single Sentence’ Rule (Subsection (a)(2)).—

- (A) Predicate Offenses.—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (see §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted “separately” from each other (see §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant’s criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently

would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant’s commencement of the instant offense. See §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.”;

and in Note 3(B) (as so redesignated) by striking “Counting multiple prior sentences as a single sentence” and inserting “Treating multiple prior sentences as a single sentence”; and by striking “and the resulting sentences were counted as a single sentence” and inserting “and the resulting sentences were treated as a single sentence”.

The Commentary to §4B1.2 captioned “Application Notes” is amended in Note 1 by striking “the sentences for the two prior convictions will be counted as a single sentence” and inserting “the sentences for the two prior convictions will be treated as a single sentence”.

REASON FOR AMENDMENT: This amendment responds to a circuit conflict regarding the meaning of the “single sentence” rule, set forth in subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History), and its implications for the career offender guideline and other guidelines that provide sentencing enhancements for predicate offenses.

When the defendant’s criminal history includes two or more prior sentences that meet certain criteria specified in §4A1.2(a)(2), those prior sentences are counted as a “single sentence” rather than separately. Generally, this operates to reduce the cumulative impact of prior sentences in determining a defendant’s criminal history score. Courts, however, are divided over whether this “single sentence” rule also causes certain prior convictions that ordinarily would qualify as predicate offenses under the career offender guideline to be disqualified from serving as predicate offenses. See §4B1.2 (Definitions of Terms Used in Section 4B1.1), comment. (n.3).

In 2010, in King v. United States, the Eighth Circuit held that when two or more prior sentences are treated as a single sentence under the guidelines, all the criminal history points attributable to the single sentence are assigned to only one of the prior sentences — specifically, the one that was the longest. King, 595 F.3d 844, 852 (8th Cir. 2010). Accordingly, only that prior sentence may be considered a predicate offense for purposes of the career offender guideline. Id. at 849, 852.

In 2014, in United States v. Williams, a panel of the Sixth Circuit considered and rejected King, because it permitted the defendant to “evade career offender status because he committed more crimes.” Williams, 753 F.3d 626, 639 (6th Cir. 2014) (emphasis in original). See also United States v. Cornog, 945 F.2d 1504, 1506 n.3 (11th Cir. 1991) (“It would be illogical . . . to ignore a conviction for a violent felony just because it happened to be coupled with a nonviolent felony conviction having a longer sentence.”).

After the Williams decision, a different panel of the Eighth Circuit agreed with the Sixth Circuit’s analysis but was not in a position to overrule the earlier panel’s decision in King. See Donnell v. United States, 765 F.3d 817, 820 (8th Cir. 2014). The Eighth Circuit has applied the analysis from King to a case involving the firearms guideline and to a case in which the prior sentences were consecutive rather than concurrent. See, e.g., Pierce v. United States, 686 F.3d 529, 533 n.3 (8th Cir. 2012) (firearms); United States v. Parker, 762 F.3d 801, 808 (8th Cir. 2014) (consecutive sentences). This issue has also been addressed by other courts, some which have followed the Sixth Circuit’s approach in Williams. See, e.g., United States v. Carr, No. 1:06-cr-275-TCB (N.D. Ga. Sept. 11, 2013); United States v. Agurs, No. 12-100

Amendment 796

(W.D. Pa., July 28, 2014). Other decisions have been consistent with the Eighth Circuit’s approach in King. See, e.g., United States v. Santiago, 387 F. App’x 223 (3d Cir. 2010); United States v. McQueen, No. 2:14-CR-031-JLQ (E.D. Wash., July 28, 2014).

The amendment generally follows the Sixth Circuit’s approach in Williams. It amends the commentary to §4A1.2 to provide that, for purposes of determining predicate offenses, a prior sentence included in a single sentence should be treated as if it received criminal history points if it independently would have received criminal history points. It also provides examples, including an example to illustrate the potential impact of the applicable time periods prescribed in §4A1.2(e). Finally, §§4A1.1 (Criminal History Category) and 4A1.2 are revised stylistically so that sentences “counted” as a single sentence are referred to instead as sentences “treated” as a single sentence.

The amendment ensures that those defendants who have committed more crimes, in addition to a predicate offense, remain subject to enhanced penalties under certain guidelines such as the career offender guideline. Conversely, by clarifying how the single sentence rule interacts with the time limits set forth in §4A1.2(e), the amendment provides that when a prior sentence was so remote in time that it does not independently receive criminal history points, it cannot serve as a predicate offense.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 796

AMENDMENT: The Commentary to §1B1.11 captioned “Background” is amended by striking “144 S. Ct.” and inserting “133 S. Ct.”.

The Commentary to §2B4.1 captioned “Statutory Provisions” is amended by striking “41 U.S.C. §§ 53, 54” and inserting “41 U.S.C. §§ 8702, 8707”.

The Commentary to §2B4.1 captioned “Background” is amended by striking “41 U.S.C. §§ 51, 53–54” and inserting “41 U.S.C. §§ 8702, 8707”.

The Commentary to §2C1.8 captioned “Statutory Provisions” is amended by striking “2 U.S.C.” and all that follows through “441k;” and after “18 U.S.C. § 607” inserting “; 52 U.S.C. §§ 30109(d), 30114, 30116, 30117, 30118, 30119, 30120, 30121, 30122, 30123, 30124(a), 30125, 30126”; and by striking “Statutory Index (Appendix A)” and inserting “Appendix A (Statutory Index)”.

The Commentary to §2C1.8 captioned “Application Notes” is amended in Note 1 by striking “2 U.S.C. § 441e(b)” and inserting “52 U.S.C. § 30121(b)”; by striking “2 U.S.C. § 431 et seq” and inserting “52 U.S.C. § 30101 et seq.”; and by striking “(2 U.S.C. § 431(8) and (9))” and inserting “(52 U.S.C. § 30101(8) and (9))”.

Section 2D1.11(e)(7) is amended in the line referenced to Norpseudoephedrine by striking “400” and inserting “400 G”.

The Commentary to §2H2.1 captioned “Statutory Provisions” is amended by striking “42 U.S.C. §§ 1973i, 1973j(a), (b)” and inserting “52 U.S.C. §§ 10307, 10308(a), (b)”.

The Commentary to §2H4.2 captioned “Application Notes” is amended in Note 2 by striking “et. seq.” and inserting “et seq.”.

The Commentary to §2M3.9 is amended by striking “§ 421” each place such term appears and inserting “§ 3121”; and by striking “§ 421(d)” and inserting “§ 3121(d)”.

The Commentary following §3D1.5 captioned “Illustrations of the Operation of the Multiple-Count Rules” is amended by striking the heading as follows:

“ Illustrations of the Operation of the Multiple-Count Rules”,

and inserting the following new heading:

“ Concluding Commentary to Part D of Chapter Three

Illustrations of the Operation of the Multiple-Count Rules”;

in Example 1 by striking “convicted on” and inserting “convicted of”; and by striking “\$12,000” and inserting “\$21,000”;

in Example 2 by striking “Defendant C” and inserting “Defendant B”; by striking “convicted on” and inserting “convicted of”; and by striking “offense level for bribery (22)” and inserting “offense level for bribery (20)”;

and in Example 3 by striking “Defendant D” and inserting “Defendant C”; by striking “\$27,000”, “\$12,000”, “\$15,000”, and “\$20,000” and inserting “\$1,000” in each place such terms appear; by striking “\$74,000” and inserting “\$4,000”; and by striking “16” both places such term appears and inserting “9”.

The Commentary to §5E1.2 captioned “Application Notes” is amended in Note 5 by striking “2 U.S.C. § 437g(d)(1)(D)” and inserting “52 U.S.C. § 30109(d)(1)(D)”; and by striking “2 U.S.C. § 441f” and inserting “52 U.S.C. § 30122”.

Appendix A (Statutory Index) is amended by striking the following line references:

“2 U.S.C. § 437g(d)	2C1.8
2 U.S.C. § 439a	2C1.8
2 U.S.C. § 441a	2C1.8
2 U.S.C. § 441a-1	2C1.8
2 U.S.C. § 441b	2C1.8
2 U.S.C. § 441c	2C1.8
2 U.S.C. § 441d	2C1.8
2 U.S.C. § 441e	2C1.8
2 U.S.C. § 441f	2C1.8
2 U.S.C. § 441g	2C1.8
2 U.S.C. § 441h(a)	2C1.8
2 U.S.C. § 441i	2C1.8
2 U.S.C. § 441k	2C1.8”,

and inserting at the end the following new line references:

“52 U.S.C. § 30109(d)	2C1.8
52 U.S.C. § 30114	2C1.8
52 U.S.C. § 30116	2C1.8
52 U.S.C. § 30117	2C1.8
52 U.S.C. § 30118	2C1.8

Amendment 796

52 U.S.C. § 30119	2C1.8
52 U.S.C. § 30120	2C1.8
52 U.S.C. § 30121	2C1.8
52 U.S.C. § 30122	2C1.8
52 U.S.C. § 30123	2C1.8
52 U.S.C. § 30124(a)	2C1.8
52 U.S.C. § 30125	2C1.8
52 U.S.C. § 30126	2C1.8”;

by striking the following line references:

“42 U.S.C. § 1973i(c)	2H2.1
42 U.S.C. § 1973i(d)	2H2.1
42 U.S.C. § 1973i(e)	2H2.1
42 U.S.C. § 1973j(a)	2H2.1
42 U.S.C. § 1973j(b)	2H2.1
42 U.S.C. § 1973j(c)	2X1.1
42 U.S.C. § 1973aa	2H2.1
42 U.S.C. § 1973aa-1	2H2.1
42 U.S.C. § 1973aa-1a	2H2.1
42 U.S.C. § 1973aa-3	2H2.1
42 U.S.C. § 1973bb	2H2.1
42 U.S.C. § 1973gg-10	2H2.1”,

and inserting after the line referenced to 50 U.S.C. App. § 2410 the following new line references:

“52 U.S.C. § 10307(c)	2H2.1
52 U.S.C. § 10307(d)	2H2.1
52 U.S.C. § 10307(e)	2H2.1
52 U.S.C. § 10308(a)	2H2.1
52 U.S.C. § 10308(b)	2H2.1
52 U.S.C. § 10308(c)	2X1.1
52 U.S.C. § 10501	2H2.1
52 U.S.C. § 10502	2H2.1
52 U.S.C. § 10503	2H2.1
52 U.S.C. § 10505	2H2.1
52 U.S.C. § 10701	2H2.1
52 U.S.C. § 20511	2H2.1”;

and by striking the line referenced to 50 U.S.C. § 421 and inserting after the line referenced to 50 U.S.C. § 1705 the following new line reference:

“50 U.S.C. § 3121 2M3.9”.

REASON FOR AMENDMENT: This amendment makes certain technical changes to the Guidelines Manual.

First, the amendment sets forth technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective February 2014, the Office of the Law Revision Counsel transferred provisions relating to voting and elections from titles 2 and 42 to a new title 52. It also transferred provisions of the National Security Act of 1947 from one place to another in title 50. To reflect the new section numbers of the reclassified provisions, changes are made to—

- (1) the Commentary to §2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property);
- (2) the Commentary to §2H2.1 (Obstructing an Election or Registration);
- (3) the Commentary to §2M3.9 (Disclosure of Information Identifying a Covert Agent);
- (4) Application Note 5 to §5E1.2 (Fines for Individual Defendants); and
- (5) Appendix A (Statutory Index).

Second, it makes stylistic and technical changes to the Commentary following §3D1.5 (Determining the Total Punishment) captioned “Illustrations of the Operation of the Multiple-Count Rules” to better reflect its purpose as a concluding commentary to Part D of Chapter Three.

Finally, it makes clerical changes to—

- (1) the Background Commentary to §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)), to correct a typographical error in a U.S. Reports citation;
- (2) the Commentary to §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), to correct certain United States Code citations to correspond with their respective references in Appendix A that were revised by Amendment 769 (effective November 1, 2012);
- (3) subsection (e)(7) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), to add a missing measurement unit to the line referencing Norpseudoephedrine; and
- (4) Application Note 2 to §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), to correct a typographical error in an abbreviation.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 797

AMENDMENT: The Commentary to §1B1.3 captioned “Application Notes”, as amended by Amendment 790, is further amended in Note 1 by inserting as the heading the following: “Sentencing Accountability and Criminal Liability.—”.

The Commentary to §1B1.3 captioned “Application Notes”, as amended by Amendment 790, is further amended by renumbering Notes 5 through 12 according to the following table:

<u>Before Amendment</u>	<u>After Amendment</u>
5	5(A)
11	5(B)

Amendment 797

11(A)	5(B)(i)
11(B)	5(B)(ii)
10	5(C)
6	6(A)
7	6(B)
8	7
9	8
12	9

and by rearranging those Notes, as so renumbered, to place them in proper numerical order.

The Commentary to §1B1.3 captioned “Application Notes”, as so renumbered and rearranged, is further amended by inserting headings at the beginning of certain notes, as follows (with Notes referred to by their new numbers):

<u>Note</u>	<u>Heading to Be Inserted at the Beginning</u>
5	<u>Application of Subsection (a)(2).—</u>
5(A)	<u>Relationship to Grouping of Multiple Counts.—</u>
5(B)	<u>“Same Course of Conduct or Common Scheme or Plan”.—</u>
5(C)	<u>Conduct Associated with a Prior Sentence.—</u>
6	<u>Application of Subsection (a)(3).—</u>
6(A)	<u>Definition of “Harm”.—</u>
6(B)	<u>Risk or Danger of Harm.—</u>
7	<u>Factors Requiring Conviction under a Specific Statute.—</u>
8	<u>Partially Completed Offense.—</u>
9	<u>Solicitation, Misprision, or Accessory After the Fact.—</u>

The Commentary to §2D1.1 captioned “Application Notes”, is amended in Note 8(D), in the heading relating to Date Rape Drugs (except flunitrazepam, GHB, or ketamine), by striking “flunitrazepam” and inserting “flunitrazepam”.

The Commentary to §2K2.1 captioned “Application Notes”, as amended by Amendment 790, is further amended in Note 14(E) by striking “Application Note 11” both places such term appears and inserting “Application Note 5(B)”.

Amendment 797

The Commentary to §2X3.1 captioned “Application Notes”, as amended by Amendment 790, is further amended in Note 1 by striking “Application Note 12” and inserting “Application Note 9”.

The Commentary to §2X4.1 captioned “Application Notes”, as amended by Amendment 790, is further amended in Note 1 by striking “Application Note 12” and inserting “Application Note 9”.

The Commentary to §8C2.8 captioned “Application Notes” is amended in Note 7 by striking the period at the end and inserting “).”.

REASON FOR AMENDMENT: This amendment makes certain technical and conforming changes to commentary in the Guidelines Manual.

First, the amendment reorganizes the commentary to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), so that the order of the application notes better reflects the order of the guideline provisions to which they relate. The Commission had previously reorganized notes 1 and 2 into notes 1 through 4, also redesignating notes 3 through 10 as notes 5 through 12, in a recently promulgated amendment. See Amendment 790. This amendment further rearranges the commentary, specifically notes 5 through 12. The following table shows the renumbering of notes 5 through 12 that would result from the amendment in comparison to the current Guidelines Manual and the recently promulgated amendment to §1B1.3.

<u>2014 Guidelines Manual</u>	<u>Recently Promulgated Amendment</u>	<u>Technical Amendment</u>
3	5	5(A)
9	11	5(B)
8	10	5(C)
4	6	6(A)
5	7	6(B)
6	8	7
7	9	8
10	12	9

The amendment also makes stylistic changes to the commentary to §1B1.3, such as adding headings to certain application notes. To reflect the renumbering of application notes in §1B1.3, conforming changes are also made to the commentary to §§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 2X3.1 (Accessory After the Fact), and 2X4.1 (Misprision of Felony).

Second, the amendment makes clerical changes to correct typographical errors in Application Note 8(D) to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and Application Note 7 to §8C2.8 (Determining the Fine Within the Range (Policy Statement)).

Effective Date: The effective date of this amendment is November 1, 2015.

Amendment 798

AMENDMENT 798

AMENDMENT: The Commentary to §4B1.1 captioned “Application Notes” is amended by inserting at the beginning of Note 1 the following new heading: “Definitions.—”; by inserting at the beginning of Note 2 the following new heading: ““Offense Statutory Maximum.—”; and by inserting at the end the following new Note 4:

- “4. Departure Provision for State Misdemeanors.—In a case in which one or both of the defendant’s ‘two prior felony convictions’ is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant’s criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in §4A1.3(b)(3)(A).”.

Section 4B1.2(a) is amended by striking paragraph (2) as follows:

- “ (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”,

and inserting the following:

- “ (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).”.

The Commentary to §4B1.2 captioned “Application Notes” is amended—

in Note 1 by inserting “Definitions.—” as a heading before the beginning of the note; by striking the second and third undesignated paragraphs as follows:

- “ ‘Crime of violence’ includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as ‘crimes of violence’ if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

‘Crime of violence’ does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a). Where the instant offense of conviction is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.”.

and inserting the following new paragraphs:

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

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

and by striking the fifth undesignated paragraph as follows:

“ Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a ‘crime of violence.’”;

in Note 2, at the beginning of the note, by inserting the following new heading: “Offense of Conviction as Focus of Inquiry.—”;

in Note 3, at the beginning of the note, by inserting the following new heading: “Applicability of §4A1.2.—”;

and by inserting at the end the following new Note 4:

“4. Upward Departure for Burglary Involving Violence.—There may be cases in which a burglary involves violence, but does not qualify as a ‘crime of violence’ as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a ‘crime of violence.’ In such a case, an upward departure may be appropriate.”.

REASON FOR AMENDMENT: This amendment is a result of the Commission’s multi-year study of statutory and guideline definitions relating to the nature of a defendant’s prior conviction (e.g., “crime of violence,” “aggravated felony,” “violent felony,” “drug trafficking offense,” and “felony drug offense”) and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal). As part of this study, the Commission considered feedback from the field, including conducting a roundtable discussion on these topics and considering the varying case law interpreting these statutory and guideline definitions. In particular, the Commission has received extensive comment, and is aware of numerous court opinions, expressing a view that the definition of “crime of violence” is complex and unclear. The amendment is informed by this public comment and case law, as well as the Supreme Court’s recent decision in Johnson v. United States, 135 S. Ct. 2551 (2015), regarding the statutory definition of “violent felony” in 18 U.S.C. § 924(e) (commonly referred to as the “Armed Career Criminal Act” or “ACCA”). While not addressing the guidelines, that decision has given rise to significant litigation regarding the guideline definition of “crime of violence.” Finally, the Commission analyzed a range of sentencing data, including a study of the sentences relative to the guidelines for the career offender guidelines. See U.S. Sentencing Comm’n, Quick Facts: Career Offenders (Nov. 2015) (highlighting the decreasing rate of within range guideline sentences (27.5% in fiscal year 2014), which has been coupled with increasing rates of government (45.6%) and non-government sponsored below range sentences (25.9%)).

Amendment 798

The amendment makes several changes to the definition of “crime of violence” at §4B1.2 (Definitions of Terms Used in Section 4B1.1), which, prior to this amendment, was defined as any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that

- has as an element the use, attempted use, or threatened use of physical force against the person of another (“force clause” or “elements clause”), see §4B1.2(a)(1);
- is murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or involves the use of explosives (“enumerated offenses”), see §4B1.2(a)(2) and comment. (n.1); or
- otherwise involves conduct that presents a serious potential risk of physical injury to another (“residual clause”), see §4B1.2(a)(2).

The “crime of violence” definition at §4B1.2 is used to trigger increased sentences under several provisions in the Guidelines Manual, the most significant of which is §4B1.1 (Career Offender). See also §§2K1.3, 2K2.1, 2S1.1, 4A1.1(e), 7B1.1. The career offender guideline implements a directive to the Commission set forth at 28 U.S.C. § 994(h), which in turn identifies offenders for whom the guidelines must provide increased punishment. Tracking the criteria set forth in section 994(h), the Commission implemented the directive by identifying a defendant as a career offender if (1) the defendant was at least eighteen years old at the time he or she committed the instant offense of conviction; (2) the instant offense is a felony that is a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. Where these criteria are met, the directive at section 994(h), and therefore §4B1.1, provides for significantly higher sentences under the guidelines, such that the guideline range is “at or near the maximum [term of imprisonment] authorized.” Commission data shows that application of §4B1.1 resulted in an increased final offense level, an increased Criminal History Category, or both for 91.3 percent of defendants sentenced under the career offender guideline in fiscal year 2014. See U.S. Sentencing Comm’n, Quick Facts: Career Offenders (Nov. 2015) (46.3% of career offenders received an increase in both final offense level (from an average of 23 levels to 31 levels) and criminal history category (from an average of category IV to category VI); 32.6% had just a higher final offense level (from an average of 23 levels to 30 levels); and 12.4% had just a higher Criminal History Category (from an average of category IV to category VI)).

Residual Clause

First, the amendment deletes the “residual clause” at §4B1.2(a)(2). Prior to the amendment, the term “crime of violence” in §4B1.2 included any offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” In Johnson, the Supreme Court considered an identical residual clause relating to the statutory definition of “violent felony” in the Armed Career Criminal Act. The Court held that using the “residual clause” to classify an offense as a “violent felony” violated due process because the clause was unconstitutionally vague. See Johnson, 135 S. Ct. at 2563. While the Supreme Court in Johnson did not consider or address the sentencing guidelines, significant litigation has ensued regarding whether the Supreme Court’s holding in Johnson should also apply to the residual clause in §4B1.2. Compare United States v. Matchett, 802 F.3d 1185 (11th Cir. 2015) (rejecting the argument that the residual clause in §4B1.2 is unconstitutionally vague in light of Johnson) and United States v. Wilson, 622 F. App’x 393, 405 n.51 (5th Cir. 2015) (in considering the applicability of Johnson, noting “[o]ur case law indicates that a defendant cannot bring a vagueness challenge against a Sentencing Guideline”), with United States v. Taylor, 803 F.3d 931 (8th Cir. 2015) (finding that previous circuit precedent holding that the guidelines cannot be unconstitutionally vague because they do not proscribe conduct is doubtful after Johnson); United States v. Madrid, 805 F.3d 1204, 1211 (10th Cir. 2015) (holding that that the residual

clause of §4B1.2(a)(2) is void for vagueness); United States v. Harbin, 610 F. App'x 562 (6th Cir. 2015) (finding that defendant is entitled to the same relief as offenders sentenced under the residual clause of the ACCA); and United States v. Townsend, 638 F. App'x 172, 177–78 (3d Cir. 2015) (remanding for resentencing in light of the government's concession that, pursuant to Johnson, the defendant should not have been sentenced as a career offender).

The Commission determined that the residual clause at §4B1.2 implicates many of the same concerns cited by the Supreme Court in Johnson, and, as a matter of policy, amends §4B1.2(a)(2) to strike the clause. Removing the residual clause has the advantage of alleviating the considerable application difficulties associated with that clause, as expressed by judges, probation officers, and litigants. Furthermore, removing the clause will alleviate some of the ongoing litigation and uncertainty resulting from the Johnson decision.

List of Enumerated Offenses

With the deletion of the residual clause under subsection (a)(2), there are two remaining components of the “crime of violence” definition – the “elements clause” and the “enumerated offenses clause.” The “elements clause” set forth in subsection (a)(1) remains unchanged by the amendment. Thus, any offense under federal or state law, punishable by imprisonment for a term exceeding one year, qualifies as a “crime of violence” if it has as an element the use, or attempted use, or threatened use of physical force against the person of another. Importantly, such an offense may, but need not, be specifically enumerated in subsection (a)(2) to qualify as a crime of violence.

The “enumerated offense clause” identifies specific offenses that qualify as crimes of violence. In applying this clause, courts compare the elements of the predicate offense of conviction with the elements of the enumerated offense in its “generic, contemporary definition.” As has always been the case, such offenses qualify as crimes of violence regardless of whether the offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another. While most of the offenses on the enumerated list under §4B1.2(a)(2) remain the same, the amendment does revise the list in a number of ways to focus on the most dangerous repeat offenders. The revised list is based on the Commission's consideration of public hearing testimony, a review of extensive public comment, and an examination of sentencing data relating to the risk of violence in these offenses and the recidivism rates of career offenders. Additionally, the Commission's revisions to the enumerated list also consider and reflect the fact that offenses not specifically enumerated will continue to qualify as a crime of violence if they satisfy the elements clause.

As amended, the enumerated offenses include murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, 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). For easier application, all enumerated offenses are now included in the guideline at §4B1.2; prior to the amendment, the list was set forth in both §4B1.2(a)(2) and the commentary at Application Note 1.

Manslaughter, which is currently enumerated in Application Note 1, is revised to include only voluntary manslaughter. While Commission analysis indicates that it is rare for involuntary manslaughter to be identified as a predicate for the career offender guideline, this change provides that only voluntary manslaughter should be considered. This is also consistent with the fact that involuntary manslaughter generally would not have qualified as a crime of violence under the “residual clause.” See Begay v. United States, 553 U.S. 137 (2008) (limiting crimes covered by the ACCA residual clause to those roughly similar in kind and degree of risk posed as the enumerated offenses, which typically involve “purposeful, violent, and aggressive conduct”).

Amendment 798

The amendment deletes “burglary of a dwelling” from the list of enumerated offenses. In implementing this change, the Commission considered that (1) burglary offenses rarely result in physical violence, (2) “burglary of a dwelling” is rarely the instant offense of conviction or the determinative predicate for purposes of triggering higher penalties under the career offender guideline, and (3) historically, career offenders have rarely been rearrested for a burglary offense after release. The Commission considered several studies and analyses in reaching these conclusions.

First, several recent studies demonstrate that most burglaries do not involve physical violence. See Bureau of Justice Statistics, National Crime Victimization Survey, Victimization During Household Burglary (Sept. 2010) (finding that a household member experienced some form of violent victimization in 7% of all household burglaries from 2003 to 2007); Richard S. Culp et al., Is Burglary a Crime of Violence? An Analysis of National Data 1998–2007, at 29 (2015), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf> (concluding that 7.6% of burglaries between 1998 and 2007 resulted in actual violence or threats of violence, while actual physical injury was reported in only 2.7% of all burglaries); see also United States Department of Justice, Federal Bureau of Investigation, Uniform Crime Report, Crime in the United States (2014) (classifying burglary as a “property crime” rather than a “violent crime”). Second, based upon an analysis of offenders sentenced in fiscal year 2014, the Commission estimates that removing “burglary of a dwelling” as an enumerated offense in §4B1.2(a)(2) will reduce the overall proportion of offenders who qualify as a career offender by less than three percentage points. The Commission further estimates that removing the enumerated offense would result in only about five percent of offenders sentenced under USSG §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) receiving a lower base offense level than would currently apply. Finally, a Commission analysis of recidivism rates for career offenders released during calendar years 2004 through 2006 indicates that about five percent of such offenders were rearrested for a burglary offense during the eight years after their release.

In reaching this conclusion, the Commission also considered that courts have struggled with identifying a uniform contemporary, generic definition of “burglary of dwelling.” In particular, circuits have disagreed regarding whether the requirement in Taylor v. United States, 495 U.S. 575, 598 (1990), that the burglary be of a “building or other structure” applies in addition to the guidelines’ requirement that the burglary be of a “dwelling.” Compare United States v. Henriquez, 757 F.3d 144, 148–49 (4th Cir. 2014); United States v. McFalls, 592 F.3d 707 (6th Cir. 2010); United States v. Wenner, 351 F.3d 969 (9th Cir. 2003) with United States v. Ramirez, 708 F.3d 295, 301 (1st Cir. 2013); United States v. Murillo-Lopez, 444 F.3d 337, 340 (5th Cir. 2006); United States v. Rivera-Oros, 590 F.3d 1123 (10th Cir. 2009); United States v. McClenton, 53 F.3d 584 (3d Cir. 1995); United States v. Graham, 982 F.2d 315 (8th Cir. 1992).

Although “burglary of a dwelling” is deleted as an enumerated offense, the amendment adds an upward departure provision to §4B1.2 to address the unusual case in which the instant offense or a prior felony conviction was any burglary offense involving violence that did not otherwise qualify as a “crime of violence.” This departure provision allows courts to consider all burglary offenses, as opposed to just burglaries of a dwelling, and reflects the Commission’s determination that courts should consider an upward departure where a defendant would have received a higher offense level, higher Criminal History Category, or both (e.g., where the defendant would have been a career offender) if such burglary had qualified as a “crime of violence.”

Finally, the amendment adds offenses that involve the “use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or an explosive material as defined in 18 U.S.C. § 841(c)” to

the enumerated list at §4B1.2(a)(2). This addition is consistent with long-standing commentary in §4B1.2 categorically identifying possession of a firearm described in 26 U.S.C. § 5845(a) as a “crime of violence,” and therefore maintains the status quo. The Commission continues to believe that possession of these types of weapons (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) inherently presents a serious potential risk of physical injury to another person. Additionally, inclusion as an enumerated offense reflects Congress’s determination that such weapons are inherently dangerous and, when possessed unlawfully, serve only violent purposes. *See also* USSG App. C, amend. 674 (effective Nov. 1, 2004) (expanding the definition of “crime of violence” in Application Note 1 to §4B1.2 to include unlawful possession of any firearm described in 26 U.S.C. § 5845(a)).

Enumerated Offense Definitions

The amendment also adds definitions for the enumerated offenses of forcible sex offense and extortion. The amended guideline, however, continues to rely on existing case law for purposes of defining the remaining enumerated offenses. The Commission determined that adding several new definitions could result in new litigation, and that it was instead best not to disturb the case law that has developed over the years.

As amended, “forcible sex offense” includes offenses with an element that consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. Consistent with the definition in §2L1.2 (Unlawfully Entering or Remaining in the United States), this addition reflects the Commission’s determination that certain forcible sex offenses which do not expressly include as an element the use, attempted use, or threatened use of physical force against the person of another should nevertheless constitute “crimes of violence” under §4B1.2. *See also* USSG App. C, amend. 722 (effective Nov. 1, 2008) (clarifying the scope of the term “forcible sex offense” as that term is used in the definition of “crime of violence” in §2L1.2, Application Note 1(B)(iii)).

The new commentary also provides that 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. This addition makes clear that the term “forcible sex offense” in §4B1.2 includes sexual abuse of a minor and statutory rape where certain specified elements are present.

“Extortion” is defined as “obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury.” Under case law existing at the time of this amendment, courts generally defined extortion as “obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats” based on the Supreme Court’s holding in *United States v. Nardello*, 393 U.S. 286, 290 (1969) (defining “extortion” for purposes of the Hobbs Act). Consistent with the Commission’s goal of focusing the career offender and related enhancements on the most dangerous offenders, the amendment narrows the generic definition of extortion by limiting the offense to those having an element of force or an element of fear or threats “of physical injury,” as opposed to non-violent threats such as injury to reputation.

Departure Provision at §4B1.1

Finally, the amendment adds a downward departure provision in §4B1.1 for cases in which one or both of the defendant’s “two prior felony convictions” is based on an offense that is classified as a misdemeanor at the time of sentencing for the instant federal offense.

Amendment 799

An offense (whether a “crime of violence” or a “controlled substance offense”) is deemed to be a “felony” for purposes of the career offender guideline if it is punishable by imprisonment for a term exceeding one year. This definition captures some state offenses that are punishable by more than a year of imprisonment, but are in fact classified by the state as misdemeanors. Such statutes are found, for example, in Colorado, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont.

The Commission determined that the application of the career offender guideline where one or both of the defendant’s “two prior felony convictions” is an offense that is classified as a misdemeanor may result in a guideline range that substantially overrepresents the seriousness of the defendant’s criminal history or substantially overstates the seriousness of the instant offense. While recognizing the importance of maintaining a uniform and consistent definition of the term “felony” in the guidelines, the Commission determined that it is also appropriate for a court to consider the seriousness of the prior offenses (as reflected in the classification assigned by the convicting jurisdiction) in deciding whether the significant increases under the career offender guideline are appropriate. Such consideration is consistent with the structure used by Congress in the context of the Armed Career Criminal Act. See 18 U.S.C. § 921(a)(20) (providing, for purposes of Chapter 44 of Title 18, that “crime punishable by imprisonment for a term exceeding one year” does not include a State offense classified as a misdemeanor and punishable by two years or less). It is also consistent with the court’s obligation to account for the “nature and circumstances of the offense and the history and characteristics of the defendant.” See 18 U.S.C. § 3553(a)(1).

Effective Date: The effective date of this amendment is August 1, 2016.

AMENDMENT 799

AMENDMENT: Section 1B1.13 is amended in the heading by striking “as a Result of Motion by Director of Bureau of Prisons” and inserting “Under 18 U.S.C. § 3582(c)(1)(A)”.

The Commentary to §1B1.13 captioned “Application Notes” is amended in Note 1 by striking the heading as follows: “Application of Subdivision (1)(A).—”; by striking Note 1(A) as follows:

- “(A) Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the following circumstances:
- (i) The defendant is suffering from a terminal illness.
 - (ii) The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.
 - (iii) The death or incapacitation of the defendant’s only family member capable of caring for the defendant’s minor child or minor children.
 - (iv) As determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii).”;

by redesignating Notes 1(B) and 2 as Notes 3 and 5, respectively, and inserting before Note 3 (as so redesignated) the following new Notes 1 and 2:

- “1. Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:
- (A) Medical Condition of the Defendant.—
- (i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
- (ii) The defendant is—
- (I) suffering from a serious physical or medical condition,
- (II) suffering from a serious functional or cognitive impairment, or
- (III) experiencing deteriorating physical or mental health because of the aging process,
- that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.
- (B) Age of the Defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.
- (C) Family Circumstances.—
- (i) The death or incapacitation of the caregiver of the defendant’s minor child or minor children.
- (ii) The incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.
- (D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).
2. Foreseeability of Extraordinary and Compelling Reasons.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.”;

Amendment 799

in Note 3 (as so redesignated) by striking “subdivision (1)(A)” and inserting “this policy statement”;

and by inserting after Note 3 (as so redesignated) the following new Note 4:

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

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

The Commentary to §1B1.13 captioned “Background” is amended by striking “This policy statement implements 28 U.S.C. § 994(t).” and inserting the following:

“The Commission is required by 28 U.S.C. § 994(a)(2) to develop general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including, among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). In doing so, the Commission is authorized by 28 U.S.C. § 994(t) to ‘describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.’ This policy statement implements 28 U.S.C. § 994(a)(2) and (t).”.

REASON FOR AMENDMENT: This amendment is a result of the Commission’s review of the policy statement pertaining to “compassionate release” at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). The amendment broadens certain eligibility criteria and encourages the Director of the Bureau of Prisons to file a motion for compassionate release when “extraordinary and compelling reasons” exist.

Section 3582(c)(1)(A) of title 18, United States Code, authorizes a federal court, upon motion of the Director of the Bureau of Prisons, to reduce the term of imprisonment of a defendant if “extraordinary and compelling reasons” warrant such a reduction or the defendant is at least 70 years of age and meets certain other criteria. Such a reduction must be consistent with applicable policy statements issued by the Sentencing Commission. See 18 U.S.C. § 3582(c)(1)(A); see also 28 U.S.C. §§ 992(a)(2) (stating that the Commission shall promulgate general policy statements regarding “the sentence modification provisions set forth in section[] . . . 3582(c) of title 18”); and 994(t) (stating that the Commission, in promulgating any such policy statements, “shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples”). In turn, the Commission promulgated the policy statement at §1B1.13, which defines “extraordinary and compelling reasons” for compassionate release.

The Bureau of Prisons has developed its own criteria for the implementation of section 3582(c)(1)(A). See U.S. Department of Justice, Federal Bureau of Prisons, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A)

and 4205(g) (Program Statement 5050.49, CN-1). Under its program statement, a sentence reduction may be based on the defendant's medical circumstances (e.g., a terminal or debilitating medical condition; see 5050.49(3)(a)–(b)) or on certain non-medical circumstances (e.g., an elderly defendant, the death or incapacitation of the family member caregiver of an inmate's minor child, or the incapacitation of the defendant's spouse or registered partner when the inmate would be the only available caregiver; see 5050.49(4),(5),(6)).

The Commission has conducted an in-depth review of this topic, including consideration of Bureau of Prisons data documenting lengthy review of compassionate release applications and low approval rates, as well as two reports issued by the Department of Justice Office of the Inspector General that are critical of the Bureau of Prisons' implementation of its compassionate release program. See U.S. Department of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program*, I-2013-006 (April 2013); U.S. Department of Justice, Office of the Inspector General, *The Impact of the Aging Inmate Population on the Federal Bureau of Prisons*, E-15-05 (May 2015). In February 2016, the Commission held a public hearing on compassionate release and received testimony from witnesses and experts about the need to broaden the criteria for eligibility, to add guidance to the medical criteria, and to remove other administrative hurdles that limit the availability of compassionate release for otherwise eligible defendants.

The amendment revises §1B1.13 in several ways. First, the amendment broadens the Commission's guidance on what should be considered "extraordinary and compelling reasons" for compassionate release. It provides four categories of criteria: "Medical Condition of the Defendant," "Age of the Defendant," "Family Circumstances," and "Other Reasons."

The "Medical Condition of the Defendant" category has two prongs: one for defendants with terminal illness, and one that applies to defendants with a debilitating condition. For the first subcategory, the amendment clarifies that terminal illness means "a serious and advanced illness with an end of life trajectory," and it explicitly states that a "specific prognosis of life expectancy (i.e. a probability of death within a specific time period) is not required." These changes respond to testimony and public comment on the challenges associated with diagnosing terminal illness. In particular, while an end-of-life trajectory may be determined by medical professionals with some certainty, it is extremely difficult to determine death within a specific time period. For that reason, the Commission concluded that requiring a specified prognosis (such as the 18-month prognosis in the Bureau of Prisons' program statement) is unnecessarily restrictive both in terms of the administrative review and the scope of eligibility for compassionate release applications. For added clarity, the amendment also provides a non-exhaustive list of illnesses that may qualify as a terminal illness.

For the non-terminal medical category, the amendment provides three broad criteria to include defendants who are (i) suffering from a serious condition, (ii) suffering from a serious functional or cognitive impairment, or (iii) experiencing deteriorating health because of the aging process, for whom the medical condition substantially diminishes the defendant's ability to provide self-care within a correctional facility and from which he or she is not expected to recover. The primary change to this category is the addition of prong (II) regarding a serious functional or cognitive impairment. This additional prong is intended to include a wide variety of permanent, serious impairments and disabilities, whether functional or cognitive, that make life in prison overly difficult for certain inmates.

The amendment also adds an age-based category ("Age of the Defendant") for eligibility in §1B1.13. This new category would apply if the defendant (i) is at least 65 years old, (ii) is experiencing a serious deterioration in health because of the aging process, and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment (whichever is less). The age-based category resembles criteria in the Bureau of Prisons' program statement, but adds a

Amendment 799

limitation that the defendant must be experiencing seriously deteriorating health because of the aging process. The amendment also clarifies that the time-served aspect should be applied with regard to “whichever is less,” an important distinction from the Bureau of Prisons’ criteria, which has limited application to only those elderly offenders serving significant terms of imprisonment. The Commission determined that 65 years should be the age for eligibility under the age-based category after considering the Commission’s recidivism research, which finds that inmates aged 65 years and older exhibit a very low rate of recidivism (13.3%) as compared to other age groups. The Commission expects that the broadening of the medical conditions categories, cited above, will lead to increased eligibility for inmates who suffer from certain conditions or impairments, and who experience a diminished ability to provide self-care in prison, regardless of their age.

The amendment also includes a “Family Circumstances” category for eligibility that applies to (i) the death or incapacitation of the caregiver of the defendant’s minor child, or (ii) the incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver. The amendment deletes the requirement under prong (i) regarding the death or incapacitation of the “defendant’s only family member” caregiver, given the possibility that the existing caregiver may not be of family relation. The Commission also added prong (ii), which makes this category of criteria consistent with similar considerations in the Bureau of Prisons’ program statement.

Second, the amendment updates the Commentary in §1B1.13 to provide that an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction. The Commission heard from stakeholders and medical experts that the corresponding limitation in the Bureau of Prisons’ program statement ignores the often precipitous decline in health or circumstances that can occur after imprisonment. The Commission determined that potential foreseeability at the time of sentencing should not automatically preclude the defendant’s eligibility for early release under §1B1.13.

Finally, the amendment adds a new application note that encourages the Director of the Bureau of Prisons to file a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as “extraordinary and compelling reasons” in §1B1.13. The Commission heard testimony and received public comment concerning the inefficiencies that exist within the Bureau of Prisons’ administrative review of compassionate release applications, which can delay or deny release, even in cases where the applicant appears to meet the criteria for eligibility. While only the Director of the Bureau of Prisons has the statutory authority to file a motion for compassionate release, the Commission finds that “the court is in a unique position to assess whether the circumstances exist, and whether a reduction is warranted (and, if so, the amount of reduction), including the factors set forth 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant’s medical condition, the defendant’s family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.” The Commission’s policy statement is not legally binding on the Bureau of Prisons and does not confer any rights on the defendant, but the new commentary is intended to encourage the Director of the Bureau of Prisons to exercise his or her authority to file a motion under section 3582(c)(1)(A) when the criteria in this policy statement are met.

The amendment also adds to the Background that the Commission’s general policy-making authority at 28 U.S.C. § 994(a)(2) serves as an additional basis for this and other guidance set forth in §1B1.13, and the amendment changes the title of the policy statement. These changes are clerical.

Effective Date: The effective date of this amendment is November 1, 2016.

AMENDMENT 800

AMENDMENT: Section 2E3.1 is amended in subsection (a) by striking subsection (a)(2) as follows:

“(2) 10, if the offense involved an animal fighting venture; or”;

by redesignating subsections (a)(1) and (a)(3) as subsections (a)(2) and (a)(4), respectively; in subsection (a)(2) (as so redesignated) by striking “operation; or” and inserting “operation;”; by inserting before subsection (a)(2) (as so redesignated) the following new subsection (a)(1):

“(1) 16, if the offense involved an animal fighting venture, except as provided in subdivision (3) below;”;

and by inserting before subsection (a)(4) (as so redesignated) the following new subsection (a)(3):

“(3) 10, if the defendant was convicted under 7 U.S.C. § 2156(a)(2)(B); or”.

The Commentary to §2E3.1 captioned “Statutory Provisions” is amended by inserting after “7 U.S.C. § 2156” the following: “(felony provisions only)”.

The Commentary to §2E3.1 captioned “Application Notes” is amended in Note 1 by striking “: ‘Animal’ and inserting “, ‘animal’”;

and in Note 2 by striking “If the offense involved extraordinary cruelty to an animal that resulted in, for example, maiming or death to an animal, an upward departure may be warranted.”, and inserting the following:

“The base offense levels provided for animal fighting ventures in subsection (a)(1) and (a)(3) reflect that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. Nonetheless, there may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. For example, an upward departure may be warranted if (A) the offense involved extraordinary cruelty to an animal-beyond the violence inherent in such a venture (such as by killing an animal in a way that prolongs the suffering of the animal); or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).”.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. § 2156 by inserting after “§ 2156” the following: “(felony provisions only)”.

REASON FOR AMENDMENT: This amendment responds to two legislative changes to the Animal Welfare Act (the “Act”) (codified at 7 U.S.C. § 2156) made by Congress in 2008 and 2014. First, in 2008, Congress amended the Act to increase the maximum term of imprisonment for offenses involving an animal fighting venture from three years to five years. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–234, § 14207(b), 122 Stat. 1461, 1462 (May 22, 2008). Second, in 2014, Congress again amended the Act to create two new offenses – the offense of attending an animal fight and the offense of causing an individual under the age of 16 to attend an animal fight, with respective statutory maximum terms of imprisonment of one and three years. See Agricultural Act of 2014, Pub. L. 113–79, § 12308, 128 Stat. 990, 990 (Feb. 7, 2014).

Amendment 800

The amendment makes several changes to §2E3.1 (Gambling Offenses, Animal Fighting Offenses) to account for these legislative actions. The amendment is informed by extensive public comment, recent case law, and analysis of Commission data regarding the current penalties for animal fighting offenses.

Higher Penalties for Animal Fighting Venture Offenses

First, the amendment increases the base offense level for offenses involving an animal fighting venture from 10 to 16. This change reflects the increase in the statutory maximum penalty from three to five years for offenses prohibited under 7 U.S.C. § 2156(a)–(e). See 18 U.S.C. § 49 (containing the criminal penalties for violations of section 2156). The Commission also determined that the increased base offense level better accounts for the cruelty and violence that is characteristic of these crimes, as reflected in the extensive public comment and testimony noting that a defeated animal is often severely injured or killed during or after a fight and that the animals used in these crimes are commonly exposed to inhumane living conditions or other forms of neglect.

In making this change, the Commission was also informed by data evidencing a high percentage of above range sentences in these cases. During fiscal years 2011 through 2014, almost one-third (31.0%) of the seventy-four offenders who received the base offense level of 10 under §2E3.1 received an above range sentence, compared to a national above range rate of 2.0 percent for all offenders. For those animal fighting offenders sentenced above the range, the average extent of the upward departure was more than twice the length of imprisonment at the high end of the guideline range, resulting in an average sentence of 18 months (and a median sentence of 16 months). Comparably, the amended base offense level will result in a guideline range of 12 to 18 months for the typical animal fighting venture offender who is in Criminal History Category I and receives a three-level reduction for acceptance of responsibility under §3E1.1 (Acceptance of Responsibility). Additionally, for offenders in the higher criminal history categories, the guideline range at base offense level 16 allows for applicable Chapter Three increases while remaining within the statutory maximum.

New Offenses Relating to Attending an Animal Fighting Venture

The amendment also establishes a base offense level of 10 in §2E3.1 if the defendant was convicted under section 2156(a)(2)(B) for causing an individual under 16 to attend an animal fighting venture. The Commission believes this level of punishment best reflects Congress's intent in creating this new crime. A base offense level of 10 for this new offense will result in a guideline range (before acceptance of responsibility) of 6 to 12 months of imprisonment for offenders in Criminal History Category I, while allowing for a guideline range approaching the three-year statutory maximum for offenders in higher criminal history categories. The Commission also noted that assigning a base offense level of 10 is consistent with the policy decision made by the Commission when it assigned a base offense level of 10 to an animal fighting crime in 2008, which, at that time, also had a three-year statutory maximum penalty. See USSG App. C, amend. 721 (effective November 1, 2008).

Lastly, the amendment establishes a base offense level of 6 for the new class A misdemeanor of attending an animal fighting venture prohibited by section 2156(a)(2)(A) by including only the felony provisions of 7 U.S.C. §2156 in the Appendix A reference to §2E3.1. Consistent with other Class A misdemeanor offenses, this base offense level is established through application of §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

Departure Provision

The amendment also revises and expands the existing upward departure language in two ways.

First, the amendment clarifies the circumstances in which an upward departure for exceptional cruelty may be warranted. As reflected in the revised departure provision, the base offense levels provided for animal fighting ventures in subsections (a)(1) and (a)(3) reflect the fact that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. The Commission heard testimony that in a typical dog fight, dogs puncture and tear at each other, until one animal is too injured to continue, and during a cock fight, roosters strike each other with their beaks and with sharp blades that have been strapped to their legs, suffering punctured lungs, broken bones, and pierced eyes. Nonetheless, as informed by public comment and testimony, the Commission’s study indicates that some animal fighting offenses involve extraordinary cruelty to an animal beyond that which is common to such crimes, such as killing an animal in a way that prolongs the suffering of the animal. The Commission determined that such extraordinary cruelty may fall outside the heartland of conduct encompassed by the base offense level for animal fighting ventures and, therefore, that an upward departure may be warranted in those cases.

Similarly, the amendment expands the existing departure provision to include offenses involving animal fighting on an exceptional scale (such as offenses involving an unusually large number of animals) as another example of conduct that may warrant an upward departure. As with the example of extraordinary cruelty, the Commission determined that the base offense level under the revised guideline may understate the seriousness of the offense in those cases.

Effective Date: The effective date of this amendment is November 1, 2016.

AMENDMENT 801

AMENDMENT: Section 2G2.1 is amended in subsection (b)(3) by striking “If the offense involved distribution” and inserting “If the defendant knowingly engaged in distribution”;

and in subsection (b)(4) by inserting “(A)” before “sadistic or masochistic”, and by inserting after “violence” the following: “; or (B) an infant or toddler”.

The Commentary to §2G2.1 captioned “Statutory Provisions” is amended by inserting at the end the following: “For additional statutory provision(s), see Appendix A (Statutory Index).”.

The Commentary to §2G2.1 captioned “Application Notes” is amended by redesignating Notes 3, 4, 5, and 6 as Notes 5, 6, 7, and 8, respectively, and by inserting after Note 2 the following new Notes 3 and 4:

- “3. Application of Subsection (b)(3).— For purposes of subsection (b)(3), the defendant ‘knowingly engaged in distribution’ if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.
- 4. Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§3A1.1(b)).—If subsection (b)(4)(B) applies, do not apply §3A1.1(b).”.

Amendment 801

Section 2G2.2 is amended in subsection (b)(3) by striking “If the offense involved”;

in subparagraphs (A), (C), (D), and (E) by striking “Distribution” and inserting “If the offense involved distribution”;

in subparagraph (B) by striking “Distribution for the receipt, or expectation of receipt, of a thing of value,” and inserting “If the defendant distributed in exchange for any valuable consideration,”;

and in subparagraph (F) by striking “Distribution” and inserting “If the defendant knowingly engaged in distribution,”;

and in subsection (b)(4) by inserting “(A)” before “sadistic or masochistic”, and by inserting after “violence” the following: “; or (B) sexual abuse or exploitation of an infant or toddler”.

The Commentary to §2G2.2 captioned “Statutory Provisions” is amended by inserting at the end the following: “For additional statutory provision(s), see Appendix A (Statutory Index).”.

The Commentary to §2G2.2 captioned “Application Notes” is amended in Note 1 by striking the fourth undesignated paragraph as follows:

“‘Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain’ means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. ‘Thing of value’ means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the ‘thing of value’ is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.”,

and inserting the following:

“‘The defendant distributed in exchange for any valuable consideration’ means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.”;

by redesignating Notes 2 through 7 as Notes 3, 5, 6, 7, 8, and 9, respectively;

by inserting after Note 1 the following new Note 2:

“2. Application of Subsection (b)(3)(F).— For purposes of subsection (b)(3)(F), the defendant ‘knowingly engaged in distribution’ if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.”;

in Note 3 (as so redesignated) by inserting “(A)” after “(b)(4)” both places such term appears;

and by inserting after Note 3 (as so redesignated) the following new Note 4:

“4. Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§3A1.1(b)).—If subsection (b)(4)(B) applies, do not apply §3A1.1(b).”.

Section 2G3.1 is amended in subsection (b)(1) by striking “If the offense involved”;

in subparagraphs (A), (C), (D), and (E) by striking “Distribution” and inserting “If the offense involved distribution”;

in subparagraph (B) by striking “Distribution for the receipt, or expectation of receipt, of a thing of value,” and inserting “If the defendant distributed in exchange for any valuable consideration,”;

and in subparagraph (F) by striking “Distribution” and inserting “If the defendant knowingly engaged in distribution,”.

The Commentary to §2G3.1 captioned “Application Notes” is amended in Note 1 by striking the fourth undesignated paragraph as follows:

“‘Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain’ means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. ‘Thing of value’ means anything of valuable consideration.”,

and inserting the following:

“‘The defendant distributed in exchange for any valuable consideration’ means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other obscene material, preferential access to obscene material, or access to a child.”;

by redesignating Notes 2 and 3 as Notes 3 and 4, respectively;

and by inserting after Note 1 the following new Note 2:

“2. Application of Subsection (b)(1)(F).— For purposes of subsection (b)(1)(F), the defendant ‘knowingly engaged in distribution’ if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.”.

REASON FOR AMENDMENT: This amendment addresses circuit conflicts and application issues related to the child pornography guidelines. One issue generally arises under both the child pornography production guideline and the child pornography distribution guideline when the offense involves victims who are unusually young and vulnerable. The other two issues frequently arise when the offense involves a peer-to-peer file-sharing program or network. These issues were noted by the Commission in its 2012 report to Congress on child pornography offenses. See United States Sentencing Commission, “Report to the Congress: Federal Child Pornography Offenses,” at 33–35 (2012).

Offenses Involving Infants and Toddlers

First, the amendment addresses differences among the circuits when cases involve infant and toddler victims. The production guideline at §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) provides a 4-level enhancement if the offense involved a minor who had not attained the age of 12 years and a 2-level enhancement if the minor had not attained the age of 16 years.

Amendment 801

See §2G2.1(b)(1)(A)–(B). The non-production guideline at §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor) provides a 2-level enhancement if the material involved a prepubescent minor or a minor who had not attained the age of 12 years. See §2G2.2(b)(2).

A circuit conflict has arisen as to whether a defendant who receives an age enhancement under §§2G2.1 and 2G2.2 may also receive a vulnerable victim adjustment at §3A1.1 (Hate Crime Motivation or Vulnerable Victim) when the victim is extremely young and vulnerable, such as an infant or toddler. Section 3A1.1(b)(1) provides for a 2-level increase if the defendant knew or should have known that a victim was a “vulnerable victim,” which is defined in the accompanying commentary as a victim “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.” See §3A1.1, comment. (n.2). The commentary also provides that the vulnerable victim adjustment does not apply if the factor that makes the victim a “vulnerable victim,” such as age, is incorporated in the offense guidelines, “unless the victim was unusually vulnerable for reasons unrelated to age.” Id.

The Fifth and Ninth Circuits have held that it is permissible to apply both enhancements in cases involving infant or toddler victims because their level of vulnerability is not fully incorporated in the offense guidelines. See United States v. Jenkins, 712 F.3d 209, 214 (5th Cir. 2013); United States v. Wright, 373 F.3d 935, 943 (9th Cir. 2004). These circuits have reasoned that although the victim’s small physical size and extreme vulnerability tend to correlate with age, such characteristics are not the same as compared to most children under 12 years. Jenkins, 712 F.3d at 214; Wright, 373 F.3d at 942–43. The Fourth Circuit, by contrast, has held that the age enhancement and vulnerable victim adjustment may not be simultaneously applied because the child pornography guidelines fully address age-related factors. See United States v. Dowell, 771 F.3d 162, 175 (4th Cir. 2014). The Fourth Circuit reasoned that cognitive development or psychological susceptibility necessarily is related to age. Id.

The amendment resolves the circuit conflict by explicitly accounting for infant and toddler victims in the child pornography guidelines. Specifically, the amendment revises §§2G2.1 and 2G2.2 by adding a new basis for application of the “sadistic or masochistic” enhancement when the offense involves infants or toddlers. The amendment amends §2G2.1(b)(4) to provide for a 4-level increase “if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) an infant or toddler,” and amends §2G2.2(b)(4) to provide a 4-level increase “if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler.” The accompanying application note to each guideline provides that if subsection (b)(4)(B) applies, do not apply the vulnerable victim adjustment in Chapter Three.

The amendment reflects the Commission’s view, based on testimony and public comment, that child pornography offenses involving infants and toddlers warrant an enhancement. Because application of the vulnerable victim adjustment necessarily relies on a fact-specific inquiry, the Commission determined that expanding the “sadistic or masochistic” enhancement (§§2G2.1(b)(4) and 2G2.2(b)(4)) to include infant and toddler victims would promote more consistent application of the child pornography guidelines and reduce unwarranted sentencing disparities. In making its determination, the Commission was informed by case law indicating that most circuits have found depictions of the sexual abuse or exploitation of infants or toddlers involving penetration or pain portray sadistic conduct. See, e.g., United States v. Hoey, 508 F.3d 687, 691 (1st Cir. 2007) (“We agree with the many circuits which have found that images depicting the sexual penetration of young and prepubescent children by adult males

represent conduct sufficiently likely to involve pain such as to support a finding that it is inherently ‘sadistic’ or similarly ‘violent’”); United States v. Delmarle, 99 F.3d 80, 83 (2d Cir. 1996) (“[S]ubjection of a young child to a sexual act that would have to be painful is excessively cruel and hence is sadistic”); United States v. Maurer, 639 F.3d 72, 79 (3d Cir. 2011) (“[W]e join other circuits in holding that the application of §2G2.2(b)(4) is appropriate where an image depicts sexual activity involving a prepubescent minor that would have caused pain to the minor.”); United States v. Burgess, 684 F.3d 445, 454 (4th Cir. 2012) (image depicting vaginal penetration of five-year-old girl by adult male, which would “necessarily cause physical pain to the victim,” qualified for sentencing enhancement under §2G2.2(b)); United States v. Lyckman, 235 F.3d 234, 238–39 (5th Cir. 2000) (agreeing with the Second, Seventh, and Eleventh Circuits that application of subsection (b)(4) is warranted when the image depicts “the physical penetration of a young child by an adult male.”); United States v. Groenendal, 557 F.3d 419, 424–26 (6th Cir. 2009) (penetration of a prepubescent child by an adult male constitutes inherently sadistic conduct that justifies application of §2G2.2(b)(4)); United States v. Meyers, 355 F.3d 1040, 1043 (7th Cir. 2004) (finding vaginal intercourse between a prepubescent girl and an adult male sadistic); United States v. Belflower, 390 F.3d 560, 562 (8th Cir. 2004) (images involving the anal penetration of minor boy or girl adult male are per se sadistic or violent within the meaning of subsection (b)(4)); United States v. Henderson, 649 F.3d 995 (9th Cir. 2010) (vaginal penetration of prepubescent minor qualifies for (b)(4) enhancement); United States v. Kimler, 335 F.3d 1132, 1143 (10th Cir. 2003) (finding no expert testimony necessary for a sentence enhancement [(b)(4)] when the images depicted penetration of prepubescent children by adults); United States v. Bender, 290 F.3d 1279, 1286 (11th Cir. 2002) (photograph was sadistic within the meaning of subsection (b)(4) when it depicts the “subjugation of a young child to a sexual act that would have to be painful”). The Commission intends the new enhancement to apply to any sexual images of an infant or toddler.

The Two and Five Level Distribution Enhancements

Next, the amendment addresses differences among the circuits involving application of the tiered distribution enhancements in §2G2.2. Section 2G2.2(b)(3) provides for an increase for distribution of child pornographic material ranging from 2 to 7 levels depending on certain factors. See §2G2.2(b)(3)(A)–(F). The circuits have reached different conclusions regarding the mental state required for application of the 2-level enhancement for “generic” distribution as compared to the 5-level enhancement for distribution not for pecuniary gain. The circuit conflicts involving these two enhancements have arisen frequently, although not exclusively, in cases involving the use of peer-to-peer file-sharing programs or networks.

Peer-to-Peer File-Sharing Programs

The Commission’s 2012 report to Congress discussed the use of file-sharing programs, such as Peer-to-Peer (“P2P”), in the context of cases involving distribution of child pornography. See 2012 Report at 33–35, 48–62. Specifically, P2P is a software application that enables computer users to share files easily over the Internet. These applications do not require a central server or use of email. Rather, the file-sharing application allows two or more users to essentially have access each other’s computers and to directly swap files from their computers. Some file-sharing programs require a user to designate files to be shared during the installation process, meaning that at the time of installation the user can “opt in” to share files, and the software will automatically scan the user’s computer and then compile a list of files to share. Other programs employ a default file-sharing setting, meaning the user can “opt out” of automatically sharing files by changing the default setting to limit which, if any, files are available for sharing. Once the user has downloaded and set up the file-sharing software, the user can begin searching for files shared on the connected network using search keywords in the same way one regularly uses a search engine such as Google. Users may choose to “opt in” for a

Amendment 801

variety of reasons, including, for example, to obtain faster download speeds, to have access to a greater range of material, or because the particular site mandates sharing.

The 2-Level Distribution Enhancement

The circuits have reached different conclusions regarding whether application of the 2-level distribution enhancement at §2G2.2(b)(3)(F) requires a mental state (*mens rea*), particularly in cases involving use of a file-sharing program or network. The Fifth, Tenth, and Eleventh Circuits have held that the 2-level distribution enhancement applies if the defendant used a file-sharing program, regardless of whether the defendant did so purposefully, knowingly, or negligently. See, e.g., United States v. Baker, 742 F.3d 618, 621 (5th Cir. 2014); United States v. Ray, 704 F.3d 1307, 1312 (10th Cir. 2013); United States v. Creel, 783 F.3d 1357, 1360 (11th Cir. 2015). The Second, Fourth, and Seventh Circuits have held that the 2-level distribution enhancement requires a showing that the defendant knew of the file-sharing properties of the program. See, e.g., United States v. Baldwin, 743 F.3d 357, 361 (2d Cir. 2015) (requiring knowledge); United States v. Robinson, 714 F.3d 466, 468 (7th Cir. 2013) (knowledge); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009) (knowledge or reckless disregard). The Eighth Circuit has held that knowledge is required, but knowledge may be inferred from the fact that a file-sharing program was used, absent “concrete evidence” of ignorance. See United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010). The Sixth Circuit has held that there is a “presumption” that “users of file-sharing software understand others can access their files.” United States v. Conner, 521 Fed. App’x 493, 499 (6th Cir. 2013); see also United States v. Abbring, 788 F.3d 565, 567 (6th Cir. 2015) (“the whole point of a file-sharing program is to share, sharing creates a transfer, and transferring equals distribution”).

The amendment generally adopts the approach of the Second, Fourth, and Seventh Circuits. It amends §2G2.2(b)(3)(F) to provide that the 2-level distribution enhancement applies if “the defendant knowingly engaged in distribution.” Based on testimony, public comment, and data analysis, the Commission determined that the 2-level distribution enhancement is appropriate only in cases in which the defendant knowingly engaged in distribution. An accompanying application note clarifies that: “For purposes of subsection (b)(3)(F), the defendant ‘knowingly engaged in distribution’ if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.” Similar changes are made to the 2-level distribution enhancement at §2G2.1(b)(3) and the obscenity guideline, §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), which contains a similarly tiered distribution enhancement.

The 5-Level Distribution Enhancement

Finally, the amendment responds to differences among the circuits in applying the 5-level enhancement for distribution not for pecuniary gain at §2G2.2(b)(3)(B). While courts generally agree that mere use of a file-sharing program or network, without more, is insufficient for application of the 5-level distribution enhancement, the circuits have taken distinct approaches with respect to the circumstances under which the 5-level rather than the 2-level enhancement is appropriate in such circumstances. The Fourth Circuit has held that the 5-level distribution enhancement applies when the defendant (1) “knowingly made child pornography in his possession available to others by some means”; and (2) did so “for the specific purpose of obtaining something of valuable consideration, such as more pornography.” United States v. McManus, 734 F.3d 315, 319 (4th Cir. 2013). In contrast, while holding that the 5-level enhancement applies when the defendant knew he was distributing child pornographic material in exchange for a thing of value, the Fifth Circuit has indicated that when the defendant knowingly uses file-sharing software, the requirements for the 5-level enhancement are generally satisfied. See United States v. Groce, 784 F.3d 291, 294 (5th Cir. 2015).

The amendment revises §2G2.2(b)(3)(B) and commentary to clarify that the 5-level enhancement applies “if the defendant distributed in exchange for any valuable consideration.” The amendment further explains in the accompanying application note that this means “the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.” The amendment makes parallel changes to the obscenity guideline at §2G3.1, which has a similar tiered distribution enhancement.

As with the 2-level distribution enhancement, the amendment resolves differences among the circuits in applying the 5-level distribution enhancement by clarifying the mental state required for distribution of child pornographic material for non-pecuniary gain, particularly when the case involves a file-sharing program or network. The Commission determined that the amendment is an appropriate way to account for the higher level of culpability when the defendant had the specific purpose of distributing child pornographic material to another person in exchange for valuable consideration.

Effective Date: The effective date of this amendment is November 1, 2016.

AMENDMENT 802

Amendment: Section 2L1.1 is amended in subsection (b)(4) by striking the following:

“If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor’s parent or grandparent, increase by 2 levels.”,

and inserting the following:

“If the offense involved the smuggling, transporting, or harboring of a minor who was unaccompanied by the minor’s parent, adult relative, or legal guardian, increase by 4 levels.”.

The Commentary to §2L1.1 captioned “Application Notes” is amended in Note 1 by striking the third undesignated paragraph as follows:

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

and inserting the following:

“‘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.”;

in the paragraph that begins “‘Minor’ means” by striking “16 years” and inserting “18 years”;

and by inserting after the paragraph that begins “‘Parent’ means” the following new paragraph:

“‘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).”;

Amendment 802

by renumbering Notes 2 through 6 according to the following table:

<u>Before Amendment</u>	<u>After Amendment</u>
4	2
5	3
6	5
2	6
3	7

and by rearranging those Notes, as so renumbered, to place them in proper order;

and by inserting after Note 3 (as so renumbered) the following new Note 4:

“4. Application of Subsection (b)(7) to Conduct Constituting Criminal Sexual Abuse.— Consistent with Application Note 1(L) of §1B1.1 (Application Instructions), ‘serious bodily injury’ is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.”.

Section 2L1.2 is amended by striking subsections (a) and (b) as follows:

- “
- (a) Base Offense Level: 8
 - (b) Specific Offense Characteristic
 - (1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

 - (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;
 - (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points;
 - (C) a conviction for an aggravated felony, increase by 8 levels;
 - (D) a conviction for any other felony, increase by 4 levels; or
 - (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.”.

and inserting the following:

- “
- (a) Base Offense Level: 8
 - (b) Specific Offense Characteristics
 - (1) (Apply the Greater) If the defendant committed the instant offense after sustaining—
 - (A) a conviction for a felony that is an illegal reentry offense, increase by 4 levels; or
 - (B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by 2 levels.
 - (2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained—
 - (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;
 - (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;
 - (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;
 - (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or
 - (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.
 - (3) (Apply the Greatest) If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in—
 - (A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;
 - (B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;
 - (C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;
 - (D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

Amendment 802

- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.”.

The Commentary to §2L1.2 captioned “Statutory Provisions” is amended by striking “8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326” and inserting “8 U.S.C. § 1253, § 1325(a) (second or subsequent offense only), § 1326”.

The Commentary to §2L1.2 captioned “Application Notes” is amended by striking Notes 1 through 7 as follows:

“1. Application of Subsection (b)(1).—

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

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

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

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

- (iv) ‘Drug trafficking offense’ means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
 - (v) ‘Firearms offense’ means any of the following:
 - (I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).
 - (II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).
 - (III) A violation of 18 U.S.C. § 844(h).
 - (IV) A violation of 18 U.S.C. § 924(c).
 - (V) A violation of 18 U.S.C. § 929(a).
 - (VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.
 - (vi) ‘Human trafficking offense’ means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.
 - (vii) ‘Sentence imposed’ has the meaning given the term ‘sentence of imprisonment’ in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.
 - (viii) ‘Terrorism offense’ means any offense involving, or intending to promote, a ‘Federal crime of terrorism’, as that term is defined in 18 U.S.C. § 2332b(g)(5).
- (C) Prior Convictions.—In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D),

Amendment 802

and (E) apply without regard to whether the conviction receives criminal history points.

2. Definition of ‘Felony’.—For purposes of subsection (b)(1)(A), (B), and (D), ‘felony’ means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.
3. Application of Subsection (b)(1)(C).—
 - (A) Definitions.—For purposes of subsection (b)(1)(C), ‘aggravated felony’ has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.
 - (B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).
4. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):
 - (A) ‘Misdemeanor’ means any federal, state, or local offense punishable by a term of imprisonment of one year or less.
 - (B) ‘Three or more convictions’ means at least three convictions for offenses that are not treated as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).
5. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.
6. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).
7. Departure Based on Seriousness of a Prior Conviction.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which the 12-level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.”;

by redesignating Notes 8 and 9 as Notes 6 and 7, respectively, and inserting before Note 6 (as so redesignated) the following new Notes 1, 2, 3, 4, and 5:

“1. In General.—

- (A) ‘Ordered Deported or Ordered Removed from the United States for the First Time’.—For purposes of this guideline, a defendant shall be considered ‘ordered deported or ordered removed from the United States’ if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction. ‘For the first time’ refers to the first time the defendant was ever the subject of such an order.
- (B) Offenses Committed Prior to Age Eighteen.—Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

2. Definitions.—For purposes of this guideline:

‘Crime of violence’ means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. ‘Forcible sex offense’ includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. ‘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.

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

‘Felony’ means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

‘Illegal reentry offense’ means (A) an offense under 8 U.S.C. § 1253 or § 1326, or (B) a second or subsequent offense under 8 U.S.C. § 1325(a).

‘Misdemeanor’ means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

‘Sentence imposed’ has the meaning given the term ‘sentence of imprisonment’ in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History). The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

3. Criminal History Points.—For purposes of applying subsections (b)(1), (b)(2), and (b)(3), use only those convictions that receive criminal history points under §4A1.1(a),

Amendment 802

(b), or (c). In addition, for purposes of subsections (b)(1)(B), (b)(2)(E), and (b)(3)(E), use only those convictions that are counted separately under §4A1.2(a)(2).

A conviction taken into account under subsection (b)(1), (b)(2), or (b)(3) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. Cases in Which Sentences for An Illegal Reentry Offense and Another Felony Offense were Imposed at the Same Time.—There may be cases in which the sentences for an illegal reentry offense and another felony offense were imposed at the same time and treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). In such a case, use the illegal reentry offense in determining the appropriate enhancement under subsection (b)(1), if it independently would have received criminal history points. In addition, use the prior sentence for the other felony offense in determining the appropriate enhancement under subsection (b)(3), if it independently would have received criminal history points.
5. Departure Based on Seriousness of a Prior Offense.—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (see §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.”.

The Commentary to §5G1.3 captioned “Application Notes” is amended in Note 2(B) by striking “an aggravated felony” and inserting “a prior conviction”.

REASON FOR AMENDMENT: This multi-part amendment is a result of the Commission’s multi-year study of immigration offenses and related guidelines, and reflects extensive data collection and analysis relating to immigration offenses and offenders. Based on this data, legal analysis, and public comment, the Commission identified a number of specific areas where changes were appropriate. The first part of this amendment makes several discrete changes to the alien smuggling guideline, §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien), while the second part significantly revises the illegal reentry guideline, §2L1.2 (Unlawfully Entering or Remaining in the United States).

Alien Smuggling

The first part of the amendment amends the alien smuggling guideline (§2L1.1). A 2014 letter from the Deputy Attorney General asked the Commission to examine several aspects of this guideline in light of changing circumstances surrounding the commission of these offenses. See Letter from James M. Cole to Hon. Patti B. Saris (Oct. 9, 2014). In response, the Commission undertook a data analysis that, in conjunction with additional public comment, suggested two primary areas for change in the guideline.

Unaccompanied Minors

The specific offense characteristic at §2L1.1(b)(4) provides an enhancement “[i]f the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor’s parent or grandparent.” The amendment makes several changes to this enhancement.

First, the amendment increases the enhancement at subsection (b)(4) from 2 levels to 4 levels, and broadens its scope to offense-based rather than defendant-based. These two changes were made in light of data, testimony, and public comment indicating that: (1) in recent years there has been a significant increase in the number of unaccompanied minors smuggled into the United States; (2) unaccompanied minors being smuggled are often exposed to deprivation and physical danger (including sexual abuse); (3) the smuggling of unaccompanied minors places a particularly severe burden on public resources when they are taken into custody; and (4) alien smuggling is typically conducted by multimember commercial enterprises that accept smuggling victims without regard to their age, such that an individual defendant is likely to be aware of the risk that unaccompanied minors are being smuggled as part of the offense.

Second, the amendment narrows the scope of the enhancement at subsection (b)(4) by revising the meaning of an “unaccompanied” minor. Prior to the amendment, the enhancement did not apply if the minor was accompanied by the minor’s parent or grandparent. The amendment narrows the class of offenders who would receive the enhancement by specifying that the enhancement does not apply if the minor was accompanied by the minor’s “parent, adult relative, or legal guardian.” This change reflects the view that minors who are accompanied by a parent or another responsible adult relative or legal guardian ordinarily are not subject to the same level of risk as minors unaccompanied by such adults.

Third, the amendment expands the definition of “minor” in the guideline, as it relates to the enhancement in subsection (b)(4), to include an individual under the age of 18. The guideline currently defines “minor” to include only individuals under 16 years of age. The Commission determined that an expanded definition of minor that includes 16- and 17-year-olds is consistent with other aspects of federal immigration law, including the statute assigning responsibility for unaccompanied minors under age 18 to the Department of Health and Human Services. See 6 U.S.C. § 279(g)(2)(B). The Commission also believed that it was appropriate to conform the definition of minor in the alien smuggling guideline to the definition of minor in §3B1.4 (Using a Minor to Commit a Crime).

Clarification of the Enhancement Applicable to Sexual Abuse of Aliens

The amendment addresses offenses in which an alien (whether or not a minor) is sexually abused. Specifically, it ensures that a “serious bodily injury” enhancement of 4 levels will apply in such a case. It achieves this by amending the commentary to §2L1.1 to clarify that the term “serious bodily injury” included in subsection (b)(7)(B) has the meaning given that term in the commentary to §1B1.1 (Application Instructions). That instruction states that “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

The Commission’s data indicated that the (b)(7)(B) enhancement has not been applied in some cases in which a smuggled alien had been sexually assaulted. The Commission determined that this clarification is warranted to ensure that the 4-level enhancement is consistently applied when the offense involves the sexual abuse of an alien.

Illegal Reentry

The second part of the amendment is the product of the Commission’s multi-year study of the illegal reentry guideline. In considering this amendment, the Commission was informed by the Commission’s 2015 report, Illegal Reentry Offenses; its previous consideration of the “categorical approach” in the context of the definition of “crimes of violence”; and extensive public testimony and public comment, in particular from judges from the southwest border districts where the majority of illegal reentry prosecutions occur.

Amendment 802

The amendment responds to three primary concerns. First, the Commission has received significant comment over several years from courts and stakeholders that the “categorical approach” used to determine the particular level of enhancement under the existing guideline is overly complex and resource-intensive and often leads to litigation and uncertainty. The existing guideline’s single specific offense characteristic provides for enhancements of between 4 levels and 16 levels, based on the nature of a defendant’s most serious conviction that occurred before the defendant was “deported” or “unlawfully remained in the United States.” Determining whether a predicate conviction qualifies for a particular level of enhancement requires application of the categorical approach to the penal statute underlying the prior conviction. See generally *United States v. Taylor*, 495 U.S. 575 (1990) (establishing the categorical approach). Instead of the categorical approach, the amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. The level of the sentencing enhancement for a prior conviction generally will be determined by the length of the sentence imposed for the prior offense, not by the type of offense for which the defendant had been convicted. The definition of “sentence imposed” is the same definition that appears in Chapter Four of the Guidelines Manual.

Second, comment received by the Commission and sentencing data indicated that the existing 16- and 12-level enhancements for certain prior felonies committed before a defendant’s deportation were overly severe. In fiscal year 2015, only 29.7 percent of defendants who received the 16-level enhancement were sentenced within the applicable sentencing guideline range, and only 32.4 percent of defendants who received the 12-level enhancement were sentenced within the applicable sentencing guideline range.

Third, the Commission’s research identified a concern that the existing guideline did not account for other types of criminal conduct committed by illegal reentry offenders. The Commission’s 2015 report found that 48.0 percent of illegal reentry offenders were convicted of at least one offense (other than their instant illegal reentry conviction) after their first deportations.

The amendment addresses these concerns by accounting for prior criminal conduct in a broader and more proportionate manner. The amendment reduces somewhat the level of enhancements for criminal conduct occurring before the defendant’s first order of deportation and adds a new enhancement for criminal conduct occurring after the defendant’s first order of deportation. It also responds to concerns that prior convictions for illegal reentry offenses may not be adequately accounted for in the existing guideline by adding an enhancement for prior illegal reentry and multiple prior illegal entry convictions.

The manner in which the amendment responds to each of these concerns is discussed in more detail below.

Accounting for Prior Illegal Reentry Offenses

The amendment provides at subsection (b)(1) a new tiered enhancement based on prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. A defendant who has one or more felony illegal reentry convictions will receive an increase of 4 levels. “Illegal reentry offense” is defined in the commentary to include all convictions under 8 U.S.C. §§ 1253 (failure to depart after an order of removal) and 1326 (illegal reentry), as well as second or subsequent illegal entry convictions under § 1325(a). A defendant who has two or more misdemeanor illegal entry convictions under 8 U.S.C. § 1325(a) will receive an increase of 2 levels.

The Commission’s data indicates that the extent of a defendant’s history of illegal reentry convictions is associated with the number of his or her prior deportations or removals from the United States, with the average illegal reentry defendant having been removed from the

United States 3.2 times. Illegal Reentry Offenses, at 14. Over one-third (38.1%) of the defendants were previously deported after an illegal entry or reentry conviction. Id. at 15. The Commission determined that a defendant's demonstrated history of violating §§ 1325(a) and 1326 is appropriately accounted for in a separate enhancement. Because defendants with second or successive § 1325(a) convictions (whether they were charged as felonies or misdemeanors) have entered illegally more than once, the Commission determined that this conduct is appropriately accounted for under this enhancement.

For a defendant with a conviction under § 1326, or a felony conviction under § 1325(a), the 4-level enhancement in the new subsection (b)(1)(A) is identical in magnitude to the enhancement the defendant would receive under the existing subsection (b)(1)(D). The Commission concluded that an enhancement is also appropriate for defendants previously convicted of two or more misdemeanor offenses under § 1325(a).

Accounting for Other Prior Convictions

Subsections (b)(2) and (b)(3) of the amended guideline account for convictions (other than illegal entry or reentry convictions) primarily through a sentence-imposed approach, which is similar to how Chapter Four of the Guidelines Manual determines a defendant's criminal history score based on his or her prior convictions. The two subsections are intended to divide the defendant's criminal history into two time periods. Subsection (b)(2) reflects the convictions, if any, that the defendant sustained before being ordered deported or removed from the United States for the first time. Subsection (b)(3) reflects the convictions, if any, that the defendant sustained after that event (but only if the criminal conduct that resulted in the conviction took place after that event).

The specific offense characteristics at subsections (b)(2) and (b)(3) each contain a parallel set of enhancements of:

- 10 levels for a prior felony conviction that received a sentence of imprisonment of five years or more;
- 8 levels for a prior felony conviction that received a sentence of two years or more;
- 6 levels for a prior felony conviction that received a sentence exceeding one year and one month;
- 4 levels for any other prior felony conviction
- 2 levels for three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.

The (b)(2) and (b)(3) specific offense characteristics are to be calculated separately, but within each specific offense characteristic, a defendant may receive only the single greatest applicable increase.

The Commission determined that the new specific offense characteristics more appropriately provide for incremental punishment to reflect the varying levels of culpability and risk of recidivism reflected in illegal reentry defendants' prior convictions. The (b)(2) specific offense characteristic reflects the same general rationale as the illegal reentry statute's increased statutory maximum penalties for offenders with certain types of serious pre-deportation predicate offenses (in particular, "aggravated felonies" and "felonies"). See 8 U.S.C. § 1326(b)(1) and (b)(2). The Commission's data analysis of offenders' prior felony convictions showed that the more serious types of offenses, such as drug-trafficking offenses, crimes of violence, and sex offenses, tended to receive sentences of imprisonment of two years or more, while the less serious felony offenses, such as felony theft or drug possession, tended to receive much shorter sentences. The sentence-length benchmarks in (b)(2) are based on this data.

Amendment 802

The (b)(3) specific offense characteristic focuses on post-reentry criminal conduct which, if it occurred after a defendant's most recent illegal reentry, would receive no enhancement under the existing guideline. The Commission concluded that a defendant who sustains criminal convictions occurring before and after the defendant's first order of deportation warrants separate sentencing enhancement.

The Commission concluded that the length of sentence imposed by a sentencing court is a strong indicator of the court's assessment of the seriousness of the predicate offense at the time, and this approach is consistent with how criminal history is generally scored in the Chapter Four of the Guidelines Manual. In amending the guideline, the Commission also took into consideration public testimony and comment indicating that tiered enhancements based on the length of the sentence imposed, rather than the classification of a prior offense under the categorical approach, would greatly simplify application of the guideline. With respect an offender's prior felony convictions, the amendment eliminates the use of the categorical approach, which has been criticized as cumbersome and overly legalistic.

The amendment retains the use of the categorical approach for predicate misdemeanor convictions in the new subsections (b)(2)(E) and (b)(3)(E) in view of a congressional directive requiring inclusion of an enhancement for certain types of misdemeanor offenses. See Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104–208, § 344, 110 Stat. 3009.

The amendment also addresses another frequent criticism of the existing guideline – that its use of a single predicate conviction sustained by a defendant before being deported or removed from the United States to impose an enhancement of up to 16 levels is often disproportionate to a defendant's culpability or recidivism risk. The Commission's data shows an unusually high rate of downward variances and departures from the guideline for such defendants. For example, the Commission's report found that less than one-third of defendants who qualify for a 16-level enhancement have received a within-range sentence, while 92.7 percent of defendants who currently qualify for no enhancement receive a within-range sentence. Illegal Reentry Report, at 11.

The lengths of the terms of imprisonment triggering each level of enhancement were set based on Commission data showing differing median sentence lengths for a variety of predicate offense categories. For example, the Commission's data indicated that sentences for more serious predicate offenses, such as drug-trafficking and felony assault, exceeded the two- and five-year benchmarks far more frequently than did sentences for less serious felony offenses, such as drug possession and theft. With respect to drug-trafficking offenses, the Commission found that 34.6 percent of such offenses received sentences of between two and five years, and 17.0 percent of such offenses received sentences of five years or more. With respect to felony assault offenses, the Commission found that 42.1 percent of such offenses received sentences of between two and five years, and 9.0 percent of such offenses received sentences of five years or more. With respect to felony drug possession offenses, 67.7 percent of such offenses received sentences of 13 months or less, while only 21.3 percent received sentences between two years and five years and only 3.0 percent received sentences of five years or more. With respect to felony theft offenses, 57.1 percent of such offenses received sentences of 13 months or less, while only 17.4 percent received sentences between two years and five years and only 2.0 percent received sentences of five years or more.

The Commission considered public comment suggesting that the term of imprisonment a defendant actually served for a prior conviction was a superior means of assessing the seriousness of the prior offense. The Commission determined that such an approach would be administratively impractical due to difficulties in obtaining accurate documentation. The Commis-

sion determined that a sentence-imposed approach is consistent with the Chapter Four criminal history rules, easily applied, and appropriately calibrated to account for the seriousness of prior offenses.

Departure Provision

The amendment adds a new departure provision, at Application Note 5, applicable to situations where “an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense.” This departure accounts for three situations in which an enhancement based on the length of a prior imposed sentence appears either inadequate or excessive in light of the defendant’s underlying conduct. For example, if a prior serious conviction (*e.g.*, murder) is not accounted for because it is not within the time limits set forth in §4A1.2(e) and did not receive criminal history points, an upward departure may be warranted. Conversely, if the time actually served by the defendant for the prior offense was substantially less than the length of the original sentence imposed, a downward departure may be warranted.

Excluding Stale Convictions

For all three specific offense characteristics, the amendment considers prior convictions only if the convictions receive criminal history points under the rules in Chapter Four. Counting only convictions that receive criminal history points addresses concerns that the existing guideline sometimes has provided for an unduly severe enhancement based on a single offense so old it did not receive criminal history points. The Commission’s research has found that a defendant’s criminal history score is a strong indicator of recidivism risk, and it is therefore appropriate to employ the criminal history rules in this context. *See* U.S. Sentencing Comm’n, Recidivism Among Federal Offenders: A Comprehensive Overview (2016). The limitation to offenses receiving criminal history points also promotes ease of application and uniformity throughout the guidelines. *See* 28 U.S.C. § 994(c)(2) (directing the Commission to establish categories of offenses based on appropriate mitigating and aggravating factors); *cf.* USSG §2K2.1, comment. (n.10) (imposing enhancements based on a defendant’s predicate convictions only if they received criminal history points).

Application of the “Single Sentence Rule”

The amendment also contains an application note addressing the situation when a defendant was simultaneously sentenced for an illegal reentry offense and another federal felony offense. It clarifies that, in such a case, the illegal reentry offense counts towards subsection (b)(1), while the other felony offense counts towards subsection (b)(3).

Because the amendment is intended to make a distinction between illegal reentry offenses and other types of offenses, the Commission concluded that it was appropriate to ensure that such convictions are separately accounted for under the applicable specific offense characteristics, even if they might otherwise constitute a “single sentence” under §4A1.2(a)(2). For example, if the single sentence rule applied, a defendant who was sentenced simultaneously for an illegal reentry and a federal felony drug-trafficking offense might receive an enhancement of only 4 levels under subsection (b)(1), even though, if the two sentences had been imposed separately, the drug offense would result in an additional enhancement of between 4 and 10 levels under subsection (b)(3).

Definition of “Crime of Violence”

The amendment continues to use the term “crime of violence,” although now solely in reference to the 2-level enhancement for three or more misdemeanor convictions at subsections (b)(2)(E)

Amendment 803

and (b)(3)(E). The amendment conforms the definition of “crime of violence” in Application Note 2 to that adopted for use in the career offender guideline effective August 1, 2016. See Notice of Submission to Congress of Amendment to the Sentencing Guidelines Effective August 1, 2016, 81 FR 4741 (Jan. 27, 2016). Uniformity and ease of application weigh in favor of using a consistent definition for the same term throughout the Guidelines Manual.

Effective Date: The effective date of this amendment is November 1, 2016.

AMENDMENT 803

AMENDMENT: Section 5B1.3 is amended in the heading by striking “Conditions—” and inserting “Conditions”;

in subsections (a)(1) through (a)(8) by striking the initial letter of the first word in each subsection and inserting the appropriate capital letter for the word, and by striking the semicolon at the end of each subsection and inserting a period;

in subsection (a)(6), as so amended, by inserting before the period at the end the following: “. If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule”;

by striking subsection (a)(9) as follows:

- “(9) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or
- (B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;”

and inserting the following:

- “(9) If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (see 18 U.S.C. § 3563(a)).”;

and in subsection (a)(10) by striking “the defendant” and inserting “The defendant”;

in subsection (b) by striking “The court” and inserting the following:

“Discretionary Conditions

The court”;

in subsection (c) by striking “(Policy Statement) The” and inserting the following:

“Standard’ Conditions (Policy Statement)

The”;

and by striking paragraphs (1) through (14) as follows:

- “(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
- (2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- (3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- (4) the defendant shall support the defendant’s dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);
- (5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- (6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;
- (7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;
- (8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
- (9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- (10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- (11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

Amendment 803

- (12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- (13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;
- (14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.”,

and inserting the following:

- “(1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of the time the defendant was sentenced, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- (2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
- (3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
- (4) The defendant shall answer truthfully the questions asked by the probation officer.
- (5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
- (6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
- (7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
- (8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of

a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

- (9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.
- (10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
- (11) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- (12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
- (13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.”;

and in subsection (d) by striking “(Policy Statement) The” and inserting the following:

“Special’ Conditions (Policy Statement)

The”;

by striking paragraph (1) as follows:

“(1) Possession of Weapons

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

and inserting the following:

“(1) Support of Dependents

(A) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

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

and in paragraph (4) by striking “Program Participation” in the heading; by inserting “(A)” before “a condition requiring”; and by inserting before the period at the end the following: “; and (B) a condition specifying that the defendant shall not use or possess alcohol”.

Amendment 803

The Commentary to §5B1.3 captioned “Application Note” is amended by striking Note 1 as follows:

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

and inserting the following:

- “1. Application of Subsection (c)(4).—Although the condition in subsection (c)(4) requires the defendant to ‘answer truthfully’ the questions asked by the probation officer, a defendant’s legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer’s question shall not be considered a violation of this condition.”

Section 5D1.3 is amended is amended in the heading by striking “Conditions—” and inserting “Conditions”;

in subsections (a)(1) through (a)(6) by striking the initial letter of the first word in each subsection and inserting the appropriate capital letter for the word, and by striking the semicolon at the end of each subsection and inserting a period;

in subsection (a)(6), as so amended, by inserting before the period at the end the following: “. If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule”;

by striking subsection (a)(7) as follows:

- “(7) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or
- (B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;”

and inserting the following:

“(7) If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (see 18 U.S.C. § 3583(d)).”;

and in subsection (a)(8) by striking “the defendant” and inserting “The defendant”;

in subsection (b) by striking “The court” and inserting the following:

“Discretionary Conditions

The court”;

in subsection (c) by striking “(Policy Statement) The” and inserting the following:

“‘Standard’ Conditions (Policy Statement)

The”;

and by striking paragraphs (1) through (15) as follows:

- “(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
- (2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- (3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- (4) the defendant shall support the defendant’s dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);
- (5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- (6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;
- (7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;
- (8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
- (9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

Amendment 803

- (10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- (11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- (12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- (13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;
- (14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;
- (15) the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.”,

and inserting the following:

- “(1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
- (2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.
- (3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.
- (4) The defendant shall answer truthfully the questions asked by the probation officer.
- (5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
- (6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.
- (7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the

defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

- (8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- (9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.
- (10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
- (11) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- (12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.
- (13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.”;

and in subsection (d) by striking “(Policy Statement) The” and inserting the following:

“Special’ Conditions (Policy Statement)

The”;

by striking paragraph (1) as follows:

“(1) Possession of Weapons

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

and inserting the following:

Amendment 803

“(1) Support of Dependents

- (A) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.
- (B) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant shall make the payments and comply with the other terms of the order.”;

in paragraph (4) by striking “Program Participation” in the heading; by inserting “(A)” before “a condition requiring”; and by inserting before the period at the end the following: “; and (B) a condition specifying that the defendant shall not use or possess alcohol”;

and by inserting at the end the following new paragraph (8):

“(8) Unpaid Restitution, Fines, or Special Assessments

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay.”.

The Commentary to §5D1.3 captioned “Application Note” is amended by striking Note 1 as follows:

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

and inserting the following:

- “1. Application of Subsection (c)(4).—Although the condition in subsection (c)(4) requires the defendant to ‘answer truthfully’ the questions asked by the probation officer, a defendant’s legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer’s question shall not be considered a violation of this condition.”.

REASON FOR AMENDMENT: This amendment is a result of the Commission’s multi-year review of sentencing practices relating to federal probation and supervised release. The amendment makes several changes to the guidelines and policy statements related to conditions of probation, §5B1.3 (Conditions of Probation), and supervised release, §5D1.3 (Conditions of Supervised Release).

When imposing a sentence of probation or a sentence of imprisonment that includes a period of supervised release, the court is required to impose certain conditions of supervision listed by statute. 18 U.S.C. §§ 3563(a) and 3583(d). Congress has also empowered courts to impose additional conditions of probation and supervised release that are reasonably related to statutory sentencing factors contained in 18 U.S.C. § 3553(a), so long as those conditions “involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in 3553(a)(2).” 18 U.S.C. § 3563(b); see also 18 U.S.C. § 3583(d). Additional conditions

of supervised release must also be consistent with any pertinent policy statements issued by the Commission. See 18 U.S.C. § 3583(d)(3).

The Commission is directed by its organic statute to promulgate policy statements on the appropriate use of the conditions of probation and supervised release, see 28 U.S.C. § 994(a)(2)(B), and has implemented this directive in §§5B1.3 and 5D1.3. The provisions follow a parallel structure, first setting forth those conditions of supervision that are required by statute in their respective subsections (a) and (b), and then providing guidance on discretionary conditions, which are categorized as “standard” conditions, “special” conditions, and “additional” special conditions, in subsections (c), (d), and (e), respectively.

In a number of cases, defendants have raised objections (with varied degrees of success) to the conditions of supervised release and probation imposed upon them at the time of sentencing. See, e.g., United States v. Munoz, 812 F.3d 809 (10th Cir. 2016); United States v. Kappes, 782 F.3d 828, 848 (7th Cir. 2015); United States v. Siegel, 753 F.3d 705 (7th Cir. 2014); United States v. Bahr, 730 F.3d 963 (9th Cir. 2013); United States v. Maloney, 513 F.3d 350, 357–59 (3d Cir. 2008); United States v. Saechao, 418 F.3d 1073, 1081 (9th Cir. 2005). Challenges have been made on the basis that certain conditions are vaguely worded, pose constitutional concerns, or have been categorized as “standard” conditions in a manner that has led to their improper imposition upon particular offenders.

The amendment responds to many of the concerns raised in these challenges by revising, clarifying, and rearranging the conditions contained in §§5B1.3 and 5D1.3 in order to make them easier for defendants to understand and probation officers to enforce. Many of the challenged conditions are those laid out in the Judgment in a Criminal Case Form, AO245B, which are nearly identical to the conditions in §§5B1.3 and 5D1.3.

The amendment was supported by the Criminal Law Committee (CLC) of the Judicial Conference of the United States. The CLC has long taken an active and ongoing role in developing, monitoring and recommending revisions to the condition of supervision, which represent the core supervision practices required by the federal supervision model. The changes in the amendment are consistent with proposed changes to the national judgment form recently endorsed by the CLC and Administrative Office of the U.S. Courts, after an exhaustive review of those conditions aided by probation officers from throughout the country.

As part of this broader revision, the conditions in §§5B1.3 and 5D1.3 have been renumbered. Where the specific conditions discussed below are identified by a guidelines provision reference, that numeration is in reference to their pre-amendment order.

Court-Established Payment Schedules

First, the amendment amends §§5B1.3(a)(6) and 5D1.3(a)(6) to set forth as a “mandatory” condition that if there is a court-established payment schedule for making restitution or paying a special assessment, the defendant shall adhere to the schedule. Previously, those conditions were classified as “standard.” As a conforming change, similar language at §§5B1.3(c)(14) and 5D1.3(c)(14) is deleted. This change is made to more closely adhere to the requirements of 18 U.S.C. § 3572(d).

Sex Offender Registration and Notification Act

Second, the amendment amends §§5B1.3(a)(9) and 5D1.3(a)(7) to clarify that, if the defendant is required to register under the Sex Offender Registration and Notification Act (SORNA), the defendant shall comply with the requirements of the SORNA. Language in the guideline provisions and the accompanying commentary indicating that the Act applies in some states and

Amendment 803

not in others is correspondingly deleted. After receiving testimony from the Department of Justice suggesting the current condition could be misread, the Commission determined that the condition's language should be simplified and updated to unambiguously reflect that federal sex offender registration requirements apply in all states.

Reporting to the Probation Officer

Third, the amendment divides the initial and regular reporting requirements, §§5B1.3(a)(2) and 5D1.3(a)(2), into two more definite provisions. The amendment also amends the conditions to require that the defendant report to the probation office in the jurisdiction where he or she is authorized to reside, within 72 hours of release unless otherwise directed, and that the defendant must thereafter report to the probation officer as instructed by the court or the probation officer.

Leaving the Jurisdiction

Fourth, the amendment revises §§5B1.3(c)(1) and 5D1.3(c)(1), which prohibit defendants from leaving the judicial district without permission, for clarity and to insert a mental state (mens rea) requirement that a defendant must not leave the district “knowingly.” Testimony received by the Commission has observed that a rule prohibiting a defendant from leaving the district without permission of the court or probation officer may be unfairly applied to a defendant who unknowingly moves between districts. The Commission concluded that this change appropriately responds to that concern.

Answering Truthfully: Following Instructions

Fifth, the amendment divides §§5B1.3(c)(3) and 5D1.3(c)(3) into separate conditions which individually require the defendant to “answer truthfully” the questions of the probation officer and to follow the instructions of the probation officer “related to the conditions of supervision.”

The amendment also adds commentary to clarify that a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of the “answer truthfully” condition. The Commission determined that this approach adequately addresses Fifth Amendment concerns raised by some courts, see, e.g., United States v. Kappes, 782 F.3d 828, 848 (7th Cir. 2015) and United States v. Saechao, 418 F.3d 1073, 1081 (9th Cir. 2005), while preserving the probation officer's ability to adequately supervise the defendant.

Residence and Employment

Sixth, the amendment clarifies the standard conditions relating to a defendant's residence, §§5B1.3(c)(6) and 5D1.3(c)(6), and the requirement that the defendant work full time, §§5B1.3(c)(5) and 5D1.3(c)(5). The revised conditions spell out in plain language that the defendant must live at a place “approved by the probation officer,” and that the defendant must work full time (at least 30 hours per week) at a lawful type of employment — or seek to do so — unless excused by the probation officer. The defendant must also notify the probation officer of changes in residence or employment at least 10 days in advance of the change or, if this is not possible, within 72 hours of becoming aware of a change. The Commission determined that these changes are appropriate to ensure that defendants are made aware of what will be required of them while under supervision. These requirements and associated benchmarks (e.g., 30 hours per week) are supported by testimony from the CLC as appropriate to meet supervision needs.

Visits by Probation Officer

Seventh, the amendment amends the conditions requiring the defendant to permit the probation officer to visit the defendant at any time, at home or elsewhere, and to permit the probation officer to confiscate items prohibited by the defendant's terms of release, §§5B1.3(c)(10) and 5D1.3(c)(10). The revision provides plain language notice to defendants and guidance to probation officers.

The Seventh Circuit has criticized this condition as intrusive and not necessarily connected to the offense of conviction, *see United States v. Kappes*, 782 F.3d 828, 850–51 (7th Cir. 2015) and *United States v. Thompson*, 777 F.3d 368, 379–80 (7th Cir. 2015), but the Commission has determined that, in some circumstance, adequate supervision of defendants may require probation officers to have the flexibility to visit defendants at off-hours, at their workplaces, and without advance notice to the supervisee. For example, some supervisees work overnight shifts and, in order to verify that they are in compliance with the condition of supervision requiring employment, a probation officer might have to visit them at their workplace very late in the evening.

Association with Criminals

Eighth, the amendment revises and clarifies the conditions mandating that the defendant not associate with persons engaged in criminal activity or persons convicted of a felony unless granted permission to do so by the probation officer, §§5B1.3(c)(9) and 5D1.3(c)(9). As amended, the condition requires that the defendant must not “communicate or interact with” any person whom the defendant “knows” to be engaged in “criminal activity” and prohibits the defendant from communicating or interacting with those whom the defendant “knows” to have been “convicted of a felony” without advance permission of the probation officer.

These revisions address concerns expressed by the Seventh Circuit that the condition is vague and lacks a *mens rea* requirement. *See United States v. Kappes*, 782 F.3d 828, 848–49 (7th Cir. 2015); *see also United States v. King*, 608 F.3d 1122, 1128 (9th Cir. 2010) (upholding the condition by interpreting it to have an implicit *mens rea* requirement). The revision adds an express mental state requirement and replaces the term “associate” with more definite language.

Arrested or Questioned by a Law Enforcement Officer

Ninth, the amendment makes clerical changes to the “standard” conditions requiring that the defendant notify the probation officer after being arrested or questioned by a law enforcement officer. *See* §§5B1.3(11) and 5D1.3(11).

Firearms and Dangerous Weapons

Tenth, the amendment reclassifies the “special” conditions which require that the defendant not possess a firearm or other dangerous weapon, §§5B1.3(d)(1) and 5D1.3(d)(1), as “standard” conditions and clarifies those conditions. As amended, the defendant must not “own, possess, or have access to” a firearm, ammunition, destructive device, or dangerous weapon. After reviewing the testimony from the CLC and others, the Commission determined that reclassifying this condition as a “standard” condition will promote public safety and reduce safety risks to probation officers. The amendment also defines “dangerous weapon” as “anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers.”

Amendment 803

Acting as an Informant

Eleventh, the amendment rewords the “standard” condition at §§5B1.3(c)(12) and 5D1.3(c)(12) requiring that the defendant not enter into an agreement to act as an informant without permission of the court. The condition is revised to improve clarity.

Duty to Notify of Risks Posed by the Defendant

Twelfth, the amendment revises the conditions requiring the defendant, at the direction of the probation officer, to notify others of risks the defendant may pose based on his or her personal history or characteristics, §§5B1.3(c)(13) and 5D1.3(c)(13). As amended, the condition provides that, if the probation officer determines that the defendant poses a risk to another person, the probation officer may require the defendant to tell the person about the risk and permits the probation officer to confirm that the defendant has done so. The Commission determined that this revision is appropriate to address criticism by the Seventh Circuit regarding potential ambiguity in how the condition is currently phrased. See United States v. Thompson, 777 F.3d 368, 379 (7th Cir. 2015).

Support of Dependents

Thirteenth, the amendment clarifies and moves the dependent support requirement from the list of “standard” conditions, §§5B1.3(c)(4) and 5D1.3(c)(4), to the list of “special” conditions in subsection (d). As amended, the conditions require that, if the defendant has dependents, he or she must support those dependents; and if the defendant is ordered to make child support payments, he or she must make the payments and comply with the other terms of the order.

These changes address concerns expressed by the Seventh Circuit that the current condition — which requires a defendant to “support his or her dependents and meet other family responsibilities” — is vague and does not apply to defendants who have no dependents. See United States v. Kappes, 782 F.3d 828, 849 (7th Cir. 2015) and United States v. Thompson, 777 F.3d 368, 379–80 (7th Cir. 2015). The amendment uses plainer language to provide better notice to the defendant about what is required. The Commission determined that this condition need not apply to all defendants but only to those with dependents.

Alcohol; Controlled Substances; Frequenting Places Where Controlled Substances are Sold

Fourteenth, the standard conditions requiring that the defendant refrain from excessive use of alcohol, not possess or distribute controlled substances or paraphernalia, and not frequent places where controlled substances are illegally sold, §§5B1.3(c)(7)–(8) and 5D1.3(c)(7)–(8), have been deleted. The Commission determined that these conditions are either best dealt with as special conditions or are redundant with other conditions. Specifically, to account for the supervision needs of defendants with alcohol abuse problems, a new special condition that the defendant “must not use or possess alcohol” has been added. The requirement that the defendant abstain from the illegal use of controlled substances is covered by the “mandatory” conditions prohibiting commission of additional crimes and requiring substance abuse testing. Finally, the prohibition on frequenting places where controlled substances are illegally sold is encompassed by the “standard” condition that defendants not associate with those they know to be criminals or who are engaged in criminal activity.

Amendment 804

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

and by inserting after the line referenced to 18 U.S.C. § 2332h the following:

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

REASON FOR AMENDMENT: This amendment responds to recently enacted legislation and miscellaneous guideline application issues.

USA FREEDOM Act

The Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (“USA FREEDOM Act”) of 2015, Pub. L. 114–23 (June 2, 2015), set forth changes to statutes related to maritime navigation and nuclear terrorism and provided new and expanded criminal offenses to implement the United States’ obligations under certain provisions of four international conventions. The USA FREEDOM Act also specified that the new crimes constitute “federal crimes of terrorism.” See 18 U.S.C. § 2332b(g)(5). The amendment responds to the USA FREEDOM Act by referencing the new offenses in Appendix A (Statutory Index) to various Chapter Two guidelines covering murder and assault, weapons, national security, and environmental offenses.

First, the USA FREEDOM Act enacted 18 U.S.C. § 2280a (Violence against maritime navigation and maritime transport involving weapons of mass destruction). Subsections 2280a(a)(1)(A) and (a)(1)(B)(i) prohibit certain acts against maritime navigation committed in a manner that causes or is likely to cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. Subsections 2280a(a)(1)(B)(ii)–(vi) prohibit certain other acts against maritime navigation. Subsection 2280a(a)(1)(C) prohibits transporting another person on board a ship knowing the person has committed a violation under 18 U.S.C. § 2280 (Violence against maritime navigation) or certain subsections of section 2280a, or an offense under a listed counterterrorism treaty. Subsection 2280a(a)(1)(D) prohibits injuring or killing a person in connection with the commission of certain offenses under section 2280a. Subsection 2280a(a)(1)(E) prohibits attempts and conspiracies under the statute. The penalty for a violation of these subsections is a term of imprisonment for not more than 20 years. If the death of a person results, the penalty is imprisonment for any term of years or for life. Subsection 2280a(a)(2) prohibits threats to commit offenses under subsection 2280a(a)(1)(A), with a penalty of imprisonment of up to five years.

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

Toxic Substances or Pesticides); 2X1.1 (Conspiracy); 2X2.1 (Aiding and Abetting); and 2X3.1 (Accessory After the Fact).

Second, the USA FREEDOM Act enacted 18 U.S.C. § 2281a (Additional offenses against maritime fixed platforms). Subsection 2281a(a)(1) prohibits certain acts that occur either on a fixed platform or to a fixed platform committed in a manner that may cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. The penalty for a violation of subsection 2281a(a)(1) is a term of imprisonment for not more than 20 years. If the death of a person results, the penalty is imprisonment for any term of years or for life. Subsection 2281a(a)(2) prohibits threats to commit offenses under subsection 2281a(a)(1), and the penalty for a violation of subsection 2281a(a)(2) is imprisonment of up to five years.

The new offenses at 18 U.S.C. § 2281a are referenced to §§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.4, 2M6.1, 2Q1.1, 2Q1.2, and 2X1.1.

Third, the USA FREEDOM Act enacted 18 U.S.C. § 2332i (Acts of nuclear terrorism). Section 2332i prohibits the possession or use of certain radioactive materials or devices with the intent to cause death or serious bodily injury or to cause substantial damage to property or the environment, as well as threats to commit any such acts. The penalty for a violation of section 2332i is imprisonment for any term of years or for life.

The new offenses at 18 U.S.C. § 2332i are referenced to §§2A6.1, 2K1.4, 2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities), 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities), and 2M6.1.

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

The three new statutes provide a wide range of elements – meaning that the statutes can be violated in a large number of alternative ways. The Commission performed a section-by-section analysis of the elements of the new statutes and identified the Chapter Two offense guidelines that appear most analogous. As a result, the Commission determined that referencing the new statutes in Appendix A (Statutory Index) to a range of guidelines will allow the courts to select the most appropriate guideline in light of the nature of the conviction. For example, a reference to §2K1.4 (Arson; Property Damage by Use of Explosives) is provided to account for when the defendant is convicted under section 2280a(a)(1)(A)(i) for the use of an explosive device on a ship in a manner that causes or is likely to cause death or serious injury. See USSG App. A, Introduction (Where the statute is referenced to more than one guideline section, the court is to “use the guideline most appropriate for the offense conduct charged in the count of which the defendant was convicted.”). The Commission also found it persuasive that other similar statutes are referenced in Appendix A to a similar list of Chapter Two guidelines. Referencing these three new statutes in a manner consistent with the treatment of existing related statutes is reasonable to achieve parity, and will lead to consistent application of the guidelines.

Firearms As Nonmailable Items under 18 U.S.C. § 1715

Section 1715 of title 18 of the United States Code (Firearms as nonmailable; regulations) makes it unlawful to deposit for mailing or delivery by the mails pistols, revolvers, and other firearms capable of being concealed on the person, and the penalty for a violation of this statute is a term of imprisonment up to two years. Section 1715 is not referenced in Appendix A (Statutory Index). The amendment amends Appendix A to reference offenses under section 1715 to

Amendment 805

§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). The amendment also amends §2K2.1 to provide a base offense level of 6 under §2K2.1(a)(8) for convictions under section 1715.

The Commission received public comment suggesting that the lack of specific guidance for section 1715 offenses caused unwarranted sentencing disparity. Commission data provided further support for the need for an amendment to address this issue. Although the data indicated that courts routinely applied §2K2.1 to violations of section 1715, it also evidenced that courts were reaching different results in the base offense level applied. The Commission was persuaded by the data and public comment that an Appendix A reference and corresponding changes to §2K2.1 would reduce those unwarranted sentencing disparities. The Commission determined that §2K2.1 is the most analogous guideline for these types of firearms offenses. By providing an Appendix A reference for section 1715, the amendment ensures that §2K2.1 will be consistently applied to these offenses. Moreover, the Commission decided that the accompanying changes to §2K2.1 will eliminate the disparate application of the base offense levels in that guideline. The Commission selected the base offense level of 6 for these offenses because similar statutory provisions with similar penalties are referenced to §2K2.1(a)(8). The Commission concluded that referencing section 1715 will promote consistency in application and avoid unwarranted sentencing disparities.

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

The Background Commentary in §2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax) states that “[t]he offense is a felony that is infrequently prosecuted.” Section 2T1.6 applies to violations of 26 U.S.C. § 7202 (Willful failure to collect or pay over tax) which requires employers to withhold from an employee’s paychecks money representing the employee’s personal income and Social Security taxes. If an employer willfully fails to collect, truthfully account for, or pay over such taxes, 26 U.S.C. § 7202 provides both civil and criminal remedies. The amendment makes a clerical change to the Background Commentary to §2T1.6 to delete the statement that section 7202 offenses are infrequently prosecuted. The amendment makes additional clerical changes in the Introductory Commentary to Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes), and the Background Commentary to §§2T2.1 (Non-Payment of Taxes) and 2T2.2 (Regulatory Offenses) which has similar language.

The amendment reflects public comment received by the Commission that indicated while the statement in the Background Commentary to §2T1.6 may have been accurate when the commentary was originally written in 1987, the number of prosecutions under section 7202 have since increased. Additionally, the Commission decided that removing language characterizing the frequency of prosecutions for the tax offenses sentenced under §§2T1.6, 2T2.1, and 2T2.2 will remove the perception that the Commission has taken a position regarding the relative frequency of prosecution of such offenses.

Effective Date: The effective date of this amendment is November 1, 2016.

AMENDMENT 805

AMENDMENT: The Commentary to §1B1.1 captioned “Application Notes” is amended in Note 1 by redesignating paragraphs (D) through (L) as paragraphs (E) through (M), respectively; and by inserting the following new paragraph (D):

“(D) ‘Court protection order’ means ‘protection order’ as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).”.

The Commentary to §2B3.1 captioned “Application Notes” is amended in Note 2 by striking “Application Note 1(D)(ii) of §1B1.1” and inserting “Application Note 1(E)(ii) of §1B1.1”.

The Commentary to §2L1.1 captioned “Application Notes” is amended in Note 4 by striking “Application Note 1(L) of §1B1.1” and inserting “Application Note 1(M) of §1B1.1”.

Section 4A1.3(a)(2) is amended by striking “subsection (a)” and inserting “subsection (a)(1)”; and by striking “sentences for foreign and tribal offenses” and inserting “sentences for foreign and tribal convictions”.

The Commentary to §4A1.3 captioned “Application Notes” is amended—

in Note 2 by inserting at the end the following new paragraph (C):

“(C) Upward Departures Based on Tribal Court Convictions.—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.
- (iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.
- (iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.
- (v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.
- (vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).”;

and in Note 3 by striking “A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(B)” and inserting “A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A)”.

REASON FOR AMENDMENT: This two-part amendment addresses federal sentencing issues related to offenses committed in Indian country. The amendment responds to the findings and recommendations made by the Commission’s ad hoc Tribal Issues Advisory Group in its report to the Commission. See Report of the Tribal Issues Advisory Group (May 16, 2016), <https://www.ussc.gov/research/research-publications/report-tribal-issues-advisory-group>.

Amendment 805

The amendment adds a definition of “court protection order” in the guidelines. This issue was initially raised by the Commission’s Victims Advisory Group and subsequently addressed in the Tribal Issues Advisory Group’s May 2016 report. The amendment amends §1B1.1 (Application Instructions) to add a definition of “court protection order” that incorporates by reference the statutory definition of a “protection order” as set forth in 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b). Under the Guidelines Manual, the violation of a court protection order is a specific offense characteristic in three Chapter Two offense guidelines. See USSG §§2A2.2 (Aggravated Assault), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2A6.2 (Stalking or Domestic Violence).

The amendment responds to concerns that the term “court protection order” has not been defined in the guidelines and should be clarified. Providing a clear definition of a “court protection order” in the Guidelines Manual will ensure that orders used for sentencing enhancements are the result of court proceedings assuring appropriate due process protections, that there is a consistent identification and treatment of such orders, and that such orders issued by tribal courts receive treatment consistent with that of other issuing jurisdictions. The amendment also makes conforming technical changes to the Commentary of §§2B1.3 (Robbery) and 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).

The amendment addresses the treatment of tribal court convictions in Chapter Four (Criminal History and Criminal Livelihood) of the Guidelines Manual. Subsection (i) of §4A1.2 (Definitions and Instructions for Computing Criminal History) provides that sentences resulting from tribal court convictions are not counted in calculating a defendant’s criminal history score but may be considered for an upward departure under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). Section 4A1.3 provides for an upward departure for prior sentences that are not used in computing the criminal history category, such as sentences for tribal convictions, where reliable information suggests that the defendant’s criminal history category under-represents the seriousness of the defendant’s prior record.

Tribal court convictions have been excluded from the criminal history score but have been a legitimate basis for upward departure since the original guidelines were promulgated in 1987. In recent years, some tribal courts have gained enhanced sentencing authority under the Tribal Law and Order Act of 2010, Pub. L. 111–211 (July 29, 2010), and expanded jurisdiction over non-Indian defendants in domestic abuse cases under the Violence Against Women Act Reauthorization Act of 2013, Pub. L. 113–4 (Mar. 7, 2013). Many tribal courts have also begun to increase due process protections and reliable record-keeping.

In recognition of these developments, the amendment provides additional guidance to courts on how to apply the departure provision at §4A1.3 in cases involving a defendant with a history of tribal convictions. Specifically, the amendment amends the Commentary to §4A1.3 at Application Note 2(c) to provide the following non-exhaustive list of six factors that courts may consider in deciding whether or to what extent an upward departure based on a tribal conviction may be appropriate:

- (i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.
- (ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.
- (iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

- (iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.
- (v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.
- (vi) The tribal court conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

Because of the many cultural and historical differences among federally-recognized tribes, and especially among their tribal court systems, the Commission determined that — despite recent developments in Indian law to enlarge the scope of tribal court jurisdiction and the availability of due process in tribal court proceedings — a single approach to the consideration of tribal convictions would be difficult and could potentially lead to a disparate result among Indian defendants in federal courts. The amendment, therefore, reflects the Commission’s view that additional guidance about how to apply the departure provision at §4A1.3 in cases involving a defendant with a history of tribal convictions is appropriate, and that the non-exhaustive list of factors provides appropriate guidance and a more structured analytical framework under §4A1.3. The Commission intends, as informed by the Tribal Issues Advisory Group Report and public comment, that none of the factors should be determinative, but collectively the factors reflect important considerations to help courts balance the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences because of varying tribal court practices and circumstances, and the goal of accurately assessing a defendant’s criminal history.

The amendment also includes two technical changes to §4A1.3. First, the amendment amends §4A1.3(a)(2)(A) to change the phrase “sentences for foreign and tribal offenses” to “sentences for foreign and tribal convictions” to track the parallel language in §4A1.2(h) and (i). Second, the amendment makes a clerical change in Application Note 3 to correct an inaccurate reference to §4A1.3(b)(2)(B).

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 806

AMENDMENT: Section 2B1.1(b) is amended by redesignating paragraphs (13) through (19) as paragraphs (14) through (20), respectively; and by inserting the following new paragraph (13):

“(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years’ imprisonment applies, increase by 4 levels. If the resulting offense level is less than 12, increase to level 12.”;

and in paragraph (17) (as so redesignated) by striking “subsections (b)(2) and (b)(16)(B)” and inserting “subsections (b)(2) and (b)(17)(B)”.

The Commentary to §2B1.1 captioned “Application Notes” is amended—

by redesignating Notes 11 through 20 as Notes 12 through 21, respectively; and by inserting the following new Note 11:

Amendment 806

“11. Interaction of Subsection (b)(13) and §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(13) applies, do not apply §3B1.3.”;

in Note 12 (as so redesignated) by striking “(b)(14)” both places such term appears and inserting “(b)(15)”;

in Note 13 (as so redesignated) by striking “(b)(16)(A)” both places such term appears and inserting “(b)(17)(A)”;

in Note 14 (as so redesignated) by striking “(b)(16)(B)” and inserting “(b)(17)(B)”;

by striking “(b)(16)(B)(i)” and inserting “(b)(17)(B)(i)”;

and by striking “(b)(16)(B)(ii)” and inserting “(b)(17)(B)(ii)”;

in Note 15 (as so redesignated) by striking “(b)(18)” both places such term appears and inserting “(b)(19)”;

by striking “(b)(18)(A)(iii)” both places such term appears and inserting “(b)(19)(A)(iii)”;

and by striking “(b)(16)(B)” both places such term appears and inserting “(b)(17)(B)”;

in Note 16 (as so redesignated) by striking “(b)(19)” each place such term appears and inserting “(b)(20)”;

and in Note 21(B) (as so redesignated) by striking “(b)(18)(A)(iii)” and inserting “(b)(19)(A)(iii)”.

The Commentary to §2B1.1 captioned “Background” is amended by striking “(b)(13)” and inserting “(b)(14)”;

by striking “(b)(15)(B)” and inserting “(b)(16)(B)”;

by striking “(b)(16)(A)” and inserting “(b)(17)(A)”;

by striking “(b)(16)(B)(i)” and inserting “(b)(17)(B)(i)”;

by striking “Subsection (b)(17) implements the directive in section 209” and inserting “Subsection (b)(18) implements the directive in section 209”;

by striking “Subsection (b)(18) implements the directive in section 225(b)” and inserting “Subsection (b)(19) implements the directive in section 225(b)”;

and by striking “(b)(18)(B)” and inserting “(b)(19)(B)”.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. § 408 by inserting “, 2X1.1” at the end;

in the line referenced to 42 U.S.C. § 1011 by inserting “, 2X1.1” at the end;

and in the line referenced to 42 U.S.C. § 1383a(a) by inserting “, 2X1.1” at the end.

REASON FOR AMENDMENT: This amendment responds to the Bipartisan Budget Act of 2015 (“the Act”), Pub. L. 114–74 (Nov. 2, 2015), which made numerous changes to the statutes governing Social Security fraud offenses at 42 U.S.C. §§ 408, 1011, and 1383a. The Act added new subsections criminalizing conspiracy to commit fraud for selected substantive offenses already proscribed in Title 42 and added an increased statutory penalty provision for certain persons who commit fraud offenses under the relevant Social Security programs.

In response to these statutory changes, the amendment makes changes to both §2B1.1 (Theft, Property Destruction, and Fraud) and Appendix A (Statutory Index). The amendment to §2B1.1 addresses the increased penalty provisions of the Act by adding a new specific offense characteristic with a 4-level enhancement and a minimum offense level of 12 for those defendants subject to a 10-year statutory maximum, and adds commentary precluding the application of an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) when the new enhancement applies. The amendment to Appendix A references the new conspiracy subsections to the appropriate guidelines.

First, the amendment adds a specific offense characteristic to §2B1.1 in response to the enhanced penalty provisions of the Act. The new enhancement provides for a 4-level increase, as

well as a minimum offense level of 12, for those defendants convicted under the relevant statutes and subject to the 10-year statutory maximum. The enhancement reflects both Congress's and the Commission's determination regarding the seriousness of these offenses, and further reflects the difficulty in calculating the true harm caused by such defendants, including the harm to the integrity and financial strength of the Social Security program and to legitimate Social Security program benefit recipients who face delays as a result of the review of claims submitted in these cases. The Commission was also persuaded in its determination by the significant administrative efforts and costs resulting from the regulatory requirement that the Social Security Administration review and redetermine the benefit eligibility for every benefit recipient associated with the defendant, whether part of the fraudulent conduct or not. The new enhancement reflects the increased harm caused by these types of cases compared to those types of fraud sentenced under §2B1.1 for which the loss table more appropriately reflects the severity of the offense.

Similar to other minimum offense levels in §2B1.1, the minimum offense level is intended to account for the difficulty in calculating the amount of loss, as well as the unique and non-monetary harms associated with offenses sentenced under the Act. As previously explained in similar contexts, "[t]he Commission frequently adopts a minimum offense level in circumstances in which, as in these cases, loss as calculated by the guidelines is difficult to compute or does not adequately account for the harm caused by the offense." USSG App. C, Amendment 719 (effective Nov. 1, 2008).

In establishing the 4-level increase, the Commission also added commentary precluding the application of an adjustment under §3B1.3 to those defendants who are subject to the Act's increased statutory maximum penalty. In the Act, Congress specifically defined positions of trust in the context of Social Security fraud by subjecting to the increased statutory maximum penalties those defendants who were:

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

The Commission precluded application of §3B1.3 to these defendants because the new 4-level enhancement fully accounts for their special position. Addressing the abuse of special position in this manner will avoid uncertainty, prolonged sentencing hearings, and appeals regarding application of the abuse of trust adjustment to offenders subject to the increased statutory maximum penalties of the Act.

Second, the amendment amends Appendix A to reference the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)). The Commission determined that referencing these conspiracy provisions to §2X1.1, as well as the guideline referenced in the statutory index for the substantive offense, is consistent with the instructions at §1B1.2 (Applicable Guidelines).

Effective Date: The effective date of this amendment is November 1, 2018.

Amendment 807

AMENDMENT 807

AMENDMENT: Section 2D1.1 is amended—

by redesignating subsections (b)(13) through (b)(17) as subsections (b)(14) through (b)(18), respectively; and by inserting the following new subsection (b)(13):

“(13) If the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels.”;

and in each of subsections (c)(1) through (c)(14) by striking “of Fentanyl” each place such term appears and inserting “of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide)”.

The annotation to §2D1.1(c) captioned “Notes to Drug Quantity Table” is amended by inserting at the end the following new Note (J):

“(J) Fentanyl analogue, for the purposes of this guideline, means any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).”.

The Commentary to §2D1.1 captioned “Application Notes” is amended—

in Note 6 by striking “Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance” and inserting “Except as otherwise provided, any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and any analogue of that controlled substance”; and by striking “For purposes of this guideline ‘analogue’ has the meaning” and inserting “Unless otherwise specified, ‘analogue,’ for purposes of this guideline, has the meaning”;

in Note 8(D)—

in the table under the heading “Schedule I or II Opiates*” —

by striking the following two lines:

“1 gm of Alpha-Methylfentanyl = 10 kg of marihuana”

“1 gm of 3-Methylfentanyl = 10 kg of marihuana”;

and by inserting after the line referenced to Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) the following line:

“1 gm of a Fentanyl Analogue = 10 kg of marihuana”;

in the table under the heading “Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*”, by striking the following line:

“1 gm of Methcathinone = 380 gm of marihuana”;

by inserting after the table under the heading “Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*” the following new table:

“Synthetic Cathinones (except Schedule III, IV, and V Substances)*

1 gm of a synthetic cathinone
(except a Schedule III, IV, or V substance) = 380 gm of marihuana

*Provided, that the minimum offense level from the Drug Quantity Table for any synthetic cathinone (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.”;

by inserting after the table under the heading “Schedule I Marihuana” the following new table:

“Synthetic Cannabinoids (except Schedule III, IV, and V Substances)*

1 gm of a synthetic cannabinoid
(except a Schedule III, IV, or V substance) = 167 gm of marihuana

*Provided, that the minimum offense level from the Drug Quantity Table for any synthetic cannabinoid (except a Schedule III, IV, or V substance) individually, or in combination with another controlled substance, is level 12.

‘Synthetic cannabinoid,’ for purposes of this guideline, means any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB₁ receptors).”;

in Note 16 by striking “§2D1.1(b)(15)(D)” and inserting “§2D1.1(b)(16)(D)”;

in Note 18 by striking “(b)(13)” and inserting “(b)(14)”;

by striking “(b)(13)(A)” each place such term appears and inserting “(b)(14)(A)”;

by striking “(b)(13)(C)–(D)” and inserting “(b)(14)(C)–(D)”;

by striking “(b)(13)(C)(ii)” and inserting “(b)(14)(C)(ii)”;

and by striking “(b)(13)(D)” and inserting “(b)(14)(D)”.

in Note 19 by striking “(b)(14)” each place such term appears and inserting “(b)(15)”;

and by striking “(b)(13)(A)” and inserting “(b)(14)(A)”;

in Note 20 by striking “(b)(15)” and inserting “(b)(16)”;

by striking “(b)(15)(B)” both places such term appears and inserting “(b)(16)(B)”;

by striking “(b)(15)(C)” each place such term appears and inserting “(b)(16)(C)”;

and by striking “(b)(15)(E)” both places such term appears and inserting “(b)(16)(E)”;

in Note 21 by striking “(b)(17)” each place such term appears and inserting “(b)(18)”;

and in Note 27 by inserting at the end the following new paragraphs:

“(D) Departure Based on Potency of Synthetic Cathinones.—In addition to providing marihuana equivalencies for specific controlled substances and groups of substances, the Drug Equivalency Tables provide marihuana equivalencies for certain classes of controlled substances, such as synthetic cathinones. In the case of a synthetic cathinone that is not specifically referenced in this guideline, the marihuana equivalency for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class, such as methcathinone or alpha-PVP. In such a case, a departure may be warranted. For example, an upward departure may

Amendment 807

be warranted in cases involving MDPV, a substance of which a lesser quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone. In contrast, a downward departure may be warranted in cases involving methylone, a substance of which a greater quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

(E) Departures for Certain Cases involving Synthetic Cannabinoids.—

- (i) Departure Based on Concentration of Synthetic Cannabinoids.—Synthetic cannabinoids are manufactured as powder or crystalline substances. The concentrated substance is then usually sprayed on or soaked into a plant or other base material, and trafficked as part of a mixture. Nonetheless, there may be cases in which the substance involved in the offense is a synthetic cannabinoid not combined with any other substance. In such a case, an upward departure would be warranted.

There also may be cases in which the substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material. In such a case, a downward departure may be warranted.

- (ii) Downward Departure Based on Potency of Synthetic Cannabinoids.—In the case of a synthetic cannabinoid that is not specifically referenced in this guideline, the marijuana equivalency for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class, such as JWH-018 or AM-2201. In such a case, a downward departure may be warranted.”.

The Commentary to §2D1.1 captioned “Background” is amended by striking “(b)(13)(A)” and inserting “(b)(14)(A)”; by striking “(b)(13)(C)(ii)” and inserting “(b)(14)(C)(ii)”; by striking “Subsection (b)(15) implements the directive to the Commission in section 6(3)” and inserting “Subsection (b)(16) implements the directive to the Commission in section 6(3)”; and by striking “Subsection (b)(16) implements the directive to the Commission in section 7(2)” and inserting “Subsection (b)(17) implements the directive to the Commission in section 7(2)”.

The Commentary to §2D1.6 captioned “Application Note” is amended in Note 1 by striking “, fentanyl” and inserting “, fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide)”.

Section 2D1.14(a)(1) is amended by striking “(b)(17)” and inserting “(b)(18)”.

The Commentary to §3B1.4 captioned “Application Notes” is amended in Note 2 by striking “§2D1.1(b)(15)(B)” and inserting “§2D1.1(b)(16)(B)”.

The Commentary to §3C1.1 captioned “Application Notes” is amended in Note 7 by striking “§2D1.1(b)(15)(D)” and inserting “§2D1.1(b)(16)(D)”.

REASON FOR AMENDMENT: This amendment is a result of the Commission’s multi-year study of offenses involving synthetic cathinones (such as methylone, MDPV, and mephedrone) and synthetic cannabinoids (such as JWH-018 and AM-2201), as well as tetrahydrocannabinol (THC), fentanyl, and fentanyl analogues. The study included extensive data collection, review

of scientific literature, multiple public comment periods, and four public hearings. The resulting amendment makes various changes to §2D1.1 pertaining to synthetic controlled substances.

The amendment first addresses fentanyl and fentanyl analogues. The Commission learned that while fentanyl has long been a drug of abuse, there are several indications that its abuse has become both more prevalent and more dangerous in recent years. For example, the Drug Enforcement Administration observed a dramatic increase in fentanyl reports between 2013 and 2015, and the Centers for Disease Control and Prevention reported that there were 9,580 deaths involving synthetic opioids (a category including fentanyl) in 2015, a 72.2 percent increase from 2014. The Commission received testimony and other information indicating that fentanyl and its analogues are often trafficked mixed with other controlled substances, including heroin and cocaine. In other instances, fentanyl is placed in pill or tablet form by drug traffickers. Although some purchasers of these substances may be aware that they contain fentanyl (or even seek them out for that reason), others may believe that they are purchasing heroin or pharmaceutically manufactured opioid pain relievers.

Because of fentanyl's extreme potency, the risk of overdose death is great, particularly when the user is inexperienced or unaware of what substance he or she is using. To address this harm, the amendment adds a new specific offense characteristic at §2D1.1(b)(13) to provide for a 4-level increase whenever the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue. The Commission determined that it is appropriate for traffickers who knowingly misrepresent fentanyl or a fentanyl analogue as another substance to receive additional punishment. If an offender does not know the substance contains fentanyl or a fentanyl analogue, the enhancement does not apply. The specific offense characteristic includes a mens rea requirement to ensure that only the most culpable offenders are subjected to these increased penalties.

The amendment also makes a definitional change in the Guidelines Manual. Title 21, United States Code, refers to fentanyl by reference to its chemical name (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) and sets mandatory minimum penalties for certain quantities of this substance and for analogues of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide, although lesser quantities of the analogues are required to trigger the mandatory minimum penalties. See, e.g., 21 U.S.C. § 841(b)(1)(A)(vi). Consistent with its past practice concerning setting drug-trafficking penalties, the Commission relied upon the statutory framework in setting penalties for fentanyl and fentanyl analogues. Fentanyl has a marijuana equivalency of 1:2,500, while fentanyl analogues have a marijuana equivalency of 1:10,000. In the Guidelines Manual, however, the Commission did not use the chemical name for fentanyl reflected in Title 21. Instead, the Commission used the terms “fentanyl” and “fentanyl analogue” in the Drug Quantity Table.

Commission data suggests that offenses involving fentanyl analogues are increasing in the federal caseload. In studying these cases, the Commission has learned that the reference to “fentanyl analogue” in the Drug Quantity Table may interact in an unintended way with the definition of “analogue” provided by Application Note 6 and Section 802(32) of Title 21, United States Code. Because the guideline incorporates by reference the statutory definition of “controlled substance analogue,” and that definition specifically excludes already listed “controlled substances,” it appears that a scheduled fentanyl analogue cannot constitute a “controlled substance analogue,” and thus does not constitute a fentanyl “analogue” for purposes of §2D1.1. This may have the result that, at sentencing, fentanyl analogues that have already been scheduled must go through the Application Note 6 process to determine the substance most closely related to them.

Amendment 807

Additionally, based on implementation of Application Note 6, many courts have then sentenced such analogue cases at the lower fentanyl ratio rather than the higher ratio applicable to fentanyl analogues in the Drug Quantity Table. To address this problem, the amendment adopts a new definition of “fentanyl analogue” as “any substance (including any salt, isomer, or salt of isomer), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide).” This portion of the amendment also amends the Drug Quantity Table to clarify that §2D1.1 uses the term “fentanyl” to refer to the chemical name identified by statute and deletes the current listings for alpha-methylfentanyl and 3-methylfentanyl from the Drug Equivalency Tables.

The Commission determined that adopting this definition of “fentanyl analogue” will create a class of fentanyl analogues identical to that already created by statute, clarify the legal confusion that has resulted from the current definition of “analogue” in §2D1.1, and reaffirm that fentanyl analogues are treated differently than fentanyl under the guidelines as well as the statute. Striking the separate references to alpha-methylfentanyl and 3-methylfentanyl will result in the treatment of these substances in common with all other fentanyl analogues. This change, in combination with the adoption of the definition of “fentanyl analogue” and addition of fentanyl analogue to the Drug Equivalency Tables, will limit the use of the listing for “fentanyl” to those cases involving the specific substance named in Title 21.

Next, the amendment addresses synthetic cathinones and synthetic cannabinoids. The Commission received comment from the Department of Justice and others expressing concern that the guidelines do not contain specific “marihuana equivalencies” for synthetic cathinones, such as methyldone, mephedrone, and MDPV, or synthetic cannabinoids, such as JWH-018 and AM-2201. For substances that do not appear in either the Drug Quantity Table or the Drug Equivalency Table, Application Note 6 provides courts the process for calculating drug quantities. The note directs courts to identify the “most closely related controlled substance referenced in [§2D1.1]” and to then use that drug’s ratio to marihuana to calculate the quantity for purposes of determining the base offense level. Commenters advised that this process is a time-consuming, burdensome task that leads to sentencing disparities. Because Commission data indicated that the majority of cases relying on the Application Note 6 process involved synthetic cathinones and synthetic cannabinoids, the Commission concluded that this amendment will alleviate the burden associated with its application.

Synthetic cathinones, also known as “bath salts,” are human-made substances chemically related to cathinone, a stimulant found in the khat plant. Although the Commission’s study originally focused on specified cathinones, such as methyldone, MDPV, and mephedrone, the Commission received comments indicating that new substances are regularly developed and trafficked and that it would not be feasible to establish a new ratio as each new substance enters the market. Given the large number of potential substances, the Commission found it impracticable to add individual marihuana equivalencies for every synthetic cathinone. In contrast, the Commission determined a class-based approach for synthetic cathinones should capture both current and future synthetic cathinones.

The Commission has determined that synthetic cathinones constitute a well-defined class. Specifically, testimony and comment presented to the Commission consistently indicated that the whether a substance is a synthetic cathinone is not subject to debate. Likewise, comments and testimony made clear that synthetic cathinones share stimulant characteristics and hallucinogenic effects. The Commission determined that a precise definition is not necessary for such substances and that a class-based structure could be reasonably adopted. The Commission likewise determined that, because the class would encompass methcathinone, currently the lone specifically listed synthetic cathinone, the separate reference to methcathinone in the Drug Equivalency Table should be deleted. Given the Commission’s priority to alleviate the burdens associated with the Application Note 6 process and the impracticality of adding many

new marihuana equivalencies, the Commission concluded the class-based approach strikes a middle ground between precision and ease of guideline application.

The amendment creates an entry in the Drug Equivalency Tables for the class of synthetic cathinones, providing a marihuana equivalency of 1 gram of a synthetic cathinone (except a Schedule III, IV, or V substance) equals 380 grams of marihuana and applies a minimum base offense level of 12 to the class of synthetic cathinones. The Commission set a minimum base offense level of 12 for the class of synthetic cathinones to maintain consistency with the treatment of other controlled substances. With limited exceptions, all other Schedule I and II controlled substances are subject to the same minimum base offense level. The Commission was not presented with testimony or commentary that indicated a compelling basis to except synthetic cathinones from the minimum offense level.

The Commission adopted the 380-gram equivalency for three reasons. First, a review of the Commission's data indicated that the 380-gram equivalency was both the median and approximate mean ratio utilized by the courts when sentencing synthetic cathinone cases pursuant to Application Note 6. Thus, the Commission determined that the 380-gram equivalency best reflects the current sentencing practices for courts engaging in the Application Note 6 analysis.

Second, the Commission concluded that a ratio consistent with the existing methcathinone ratio was appropriate. The Commission set the methcathinone ratio based upon a scientific study that found that methcathinone was approximately 1.92 times more potent than amphetamine. At the time, amphetamine had a marihuana equivalency of 1:200, equivalent to the current marihuana equivalency of cocaine. The Commission's current study of cathinones did not uncover any new scientific evidence undermining its rationale for setting the methcathinone ratio.

Third, the Commission was presented with substantial information about synthetic cathinones' risks. Testimony before the Commission established that the effects and potencies of synthetic cathinones range from "at least as dangerous as cocaine" to methamphetamine-like. Medical experts discussed the substantial potential health impacts of cathinone use, while law enforcement witnesses offered reports of cathinone users' aggressive behavior posing threats to first responders. With cocaine at a 1:200 ratio and methamphetamine at a 1:2,000 ratio, the Commission concluded that the ratio of 1:380 minimized the risk of frequent over-punishment for substances in this class while providing penalty levels sufficient to account for the specific harms caused by distribution of these substances.

In adopting a class-based approach for both ease of application and because of the impracticability of listing every new substance in the class as it enters the market, the Commission recognizes, however, that some substances may be significantly more or less potent than the typical substances in the class that the ratio was intended to reflect. Therefore, the Commission added a departure provision to address those substances for which a greater or lesser quantity is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

To provide guidance to the court in determining whether to apply the departure, the departure provision identifies substances that the Commission found to be fair representatives of the synthetic cathinones that would fall within the spectrum of substances included in the class, as well as those that may warrant a departure. Specifically, the departure provision notes that: a typical cathinone has a potency comparable to methcathinone or alpha-PVP; methylone is an example of a lower potency substance; and MDPV is an example of a higher potency substance.

Amendment 807

Synthetic cannabinoids mimic the effects of tetrahydrocannabinol (“THC”), the main psychoactive chemical in marijuana. Unlike THC, however, most synthetic cannabinoids are “full agonists.” That is, they activate the body’s type 1 cannabinoid receptors (CB₁) to a greater degree (i.e., at 100%) than THC, which activates the CB₁ receptors only at 30 to 50 percent. Additionally, unlike THC, synthetic cannabinoids do not contain the additional substances that moderate their adverse effects. To the contrary, they may contain additional substances that augment their hallucinogenic effects. Further, some forms of packaged mixtures (e.g., “K2”, “Spice”) may contain preservatives, additives, and other chemicals such as benzodiazepines that may compound the adverse effects caused by the cannabinoids. Also unlike THC, synthetic cannabinoids have been associated with physical harms such as organ failure and death.

Through the Commission’s multi-year synthetic drug study, the Commission learned that hundreds of synthetic cannabinoids exist. When first marketed, synthetic cannabinoids generally have not yet been scheduled as controlled substances. Often, once a synthetic cannabinoid is scheduled, a new one is created to replace it. Given the large number of potential substances, the Commission found it impracticable to add individual marijuana equivalencies for every synthetic cannabinoid. In contrast, the Commission determined that a class-based approach for synthetic cannabinoids would be a better means to capture both current and future synthetic cannabinoids.

Based on hearing testimony, the scientific literature, and public comment, the Commission determined that all synthetic cannabinoids can be covered by a single class because these substances share a similar pharmacological effect: all synthetic cannabinoids bind to and activate the CB₁ receptor. Given the Commission’s priority to alleviate the burdens associated with the Application Note 6 process and the impracticality of adding many new marijuana equivalencies, the Commission concluded the class-based approach strikes a middle ground between precision and ease of guideline application.

The amendment defines the term “synthetic cannabinoid” as “any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB₁ receptors).” The amendment establishes a marijuana equivalency for the class of synthetic cannabinoids of 1 gram of a synthetic cannabinoid (except a Schedule III, IV, or V substance) equals 167 grams of marijuana and applies a minimum base offense level of 12 to the class.

The marijuana equivalency selected for the class is identical to the existing marijuana equivalencies for both organic and synthetic tetrahydrocannabinol (THC). The Commission originally derived the organic and synthetic THC equivalencies from a comparison of standard dosage units of THC (3 mg) and marijuana (500 mg) and the relationship between the two, rather than the actual amount of THC commonly found in a dose of marijuana. During its current study, the Commission considered whether to incorporate THC (synthetic) into the new synthetic cannabinoid class. As noted, the new synthetic cannabinoid class will be subject to the minimum base offense level of 12 applicable to most Schedule I and II controlled substances. The Commission set a minimum base offense level of 12 to the class for consistency with other Schedule I and II controlled substances. THC (synthetic) is not currently subject to the same minimum offense level. Thus, incorporating THC (synthetic) into the synthetic cannabinoid class would effectively change penalties for certain THC (synthetic) offenses, an outcome contrary to the Commission’s intent. Consequently, THC (synthetic) is exempted from the class, its separate marijuana equivalency is retained, and that equivalency is applicable only in cases involving THC (synthetic).

Nevertheless, the Commission used the same marijuana equivalency for the class of synthetic cannabinoids. Commission data for cases involving synthetic cannabinoids indicates that the

courts almost uniformly apply the marijuana equivalency for THC to such cases. Hence, the 1:167 ratio for the synthetic cannabinoid class reflects the courts' current sentencing practices. Although synthetic cannabinoids activate the CB₁ receptor to a greater degree than THC, the evidence also established that synthetic cannabinoids exhibit a range of potencies. Those most frequently encountered in the Commission's data exhibited potencies ranging from one to six times that of THC. Adoption of the existing THC marijuana equivalency minimizes the risk of frequent over-punishment for substances in this class while providing penalty levels that are sufficient to account for the specific harms caused by distribution of these substances.

Finally, the amendment provides two departure provisions addressing synthetic cannabinoids. First, the amendment provides for a departure based on the concentration of a synthetic cannabinoid. The Commission learned that synthetic cannabinoids are manufactured as a powder or crystalline substance and are typically sprayed on or mixed with inert material (such as plant matter) before retail sale. As a result, a synthetic cannabinoid seized after it has been prepared for retail sale will typically weigh significantly more than the undiluted form of the same controlled substance.

Given the central role of drug quantity in setting the base offense level, an individual convicted of an offense involving a synthetic cannabinoid mixture would likely be subject to a guideline penalty range significantly higher than another individual convicted of an offense involving an undiluted synthetic cannabinoid (but who could nevertheless produce an equivalent amount of consumable product). In a case involving undiluted synthetic cannabinoid, an upward departure may be appropriate for that reason. By contrast, in a case where the mixture containing synthetic cannabinoids contained a high quantity of inert material, a downward departure may be warranted.

The second departure provision provides that a downward departure may be appropriate where a substantially greater quantity of the synthetic cannabinoid involved in the offense is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class. The two synthetic cannabinoids specifically cited in the Commission's priority, JWH-018 and AM-2201, are three and a half times and five times more potent, respectively, than THC. If an offense involves a substantially less potent synthetic cannabinoid than JWH-018 or AM-2201, the court may wish to consider whether a downward departure is appropriate.

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 808

AMENDMENT: The Commentary to §1B1.10 captioned "Application Notes" is amended in Note 5 by striking "Drug Equivalency Tables" and inserting "Drug Equivalency Tables (currently called Drug Conversion Tables)".

Section 2D1.1(c)(1), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

“ ● 90,000 KG or more of Converted Drug Weight.”

Section 2D1.1(c)(2), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

Amendment 808

- “ ● At least 30,000 KG but less than 90,000 KG of Converted Drug Weight.”

Section 2D1.1(c)(3), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

- “ ● At least 10,000 KG but less than 30,000 KG of Converted Drug Weight.”

Section 2D1.1(c)(4), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

- “ ● At least 3,000 KG but less than 10,000 KG of Converted Drug Weight.”

Section 2D1.1(c)(5), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

- “ ● At least 1,000 KG but less than 3,000 KG of Converted Drug Weight.”

Section 2D1.1(c)(6), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

- “ ● At least 700 KG but less than 1,000 KG of Converted Drug Weight.”

Section 2D1.1(c)(7), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

- “ ● At least 400 KG but less than 700 KG of Converted Drug Weight.”

Section 2D1.1(c)(8), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

- “ ● At least 100 KG but less than 400 KG of Converted Drug Weight.”

Section 2D1.1(c)(9), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

- “ ● At least 80 KG but less than 100 KG of Converted Drug Weight.”

Section 2D1.1(c)(10), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

- “ ● At least 60 KG but less than 80 KG of Converted Drug Weight.”

Section 2D1.1(c)(11), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

- “ ● At least 40 KG but less than 60 KG of Converted Drug Weight.”

Section 2D1.1(c)(12), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

- “ ● At least 20 KG but less than 40 KG of Converted Drug Weight.”

Section 2D1.1(c)(13), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

- “ ● At least 10 KG but less than 20 KG of Converted Drug Weight.”

Section 2D1.1(c)(14), as amended by Amendment 807, is further amended by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon; and by adding at the end the following:

- “ ● At least 5 KG but less than 10 KG of Converted Drug Weight.”

Section 2D1.1(c)(15) is amended by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon, and by adding at the end the following:

- “ ● At least 2.5 KG but less than 5 KG of Converted Drug Weight.”

Section 2D1.1(c)(16) is amended by striking the period at the end of the line referenced to Schedule V substances and inserting a semicolon; and by adding at the end the following:

- “ ● At least 1 KG but less than 2.5 KG of Converted Drug Weight.”

Section 2D1.1(c)(17) is amended by striking the period at the end of the line referenced to Schedule V substances and inserting a semicolon; and by adding at the end the following:

- “ ● Less than 1 KG of Converted Drug Weight.”

The annotation to §2D1.1(c) captioned “Notes to Drug Quantity Table”, as amended by Amendment 807, is further amended by inserting at the end the following new Note (K):

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

The Commentary to §2D1.1 captioned “Application Notes”, as amended by Amendment 807, is further amended—

in Note 6 by striking “marihuana equivalency” and inserting “converted drug weight”; and by inserting after “the most closely related controlled substance referenced in this guideline.” the following: “See Application Note 8.”;

Amendment 808

in the heading of Note 8 by striking “Drug Equivalency Tables” and inserting “Drug Conversion Tables”;

in Note 8(A) by striking “Drug Equivalency Tables” both places such term appears and inserting “Drug Conversion Tables”; by striking “to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana” and inserting “to find the converted drug weight of the controlled substance involved in the offense”; by striking “Find the equivalent quantity of marihuana” and inserting “Find the corresponding converted drug weight”; by striking “Use the offense level that corresponds to the equivalent quantity of marihuana” and inserting “Use the offense level that corresponds to the converted drug weight determined above”; by striking “an equivalent quantity of 5 kilograms of marihuana” and inserting “5 kilograms of converted drug weight”; and by striking “the equivalent quantity of marihuana would be 500 kilograms” and inserting “the converted drug weight would be 500 kilograms”;

in Note 8(B) by striking “Drug Equivalency Tables” each place such term appears and inserting “Drug Conversion Tables”; by striking “convert each of the drugs to its marihuana equivalent” and inserting “convert each of the drugs to its converted drug weight”; by striking “For certain types of controlled substances, the marihuana equivalencies” and inserting “For certain types of controlled substances, the converted drug weights assigned”; by striking “e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of marihuana” and inserting “e.g., the combined converted weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of converted drug weight”; by striking “determine the marihuana equivalency for each schedule separately” and inserting “determine the converted drug weight for each schedule separately”; and by striking “Then add the marihuana equivalencies to determine the combined marihuana equivalency” and inserting “Then add the converted drug weights to determine the combined converted drug weight”;

in Note 8(C)(i) by striking “of marihuana” each place such term appears and inserting “of converted drug weight”; and by striking “The total is therefore equivalent to 95 kilograms” and inserting “The total therefore converts to 95 kilograms”;

in Note 8(C)(ii) by striking the following:

“The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 8 in the Drug Quantity Table.”,

and inserting the following:

“The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The marihuana converts to 500 grams of converted drug weight. The diazepam, a Schedule IV drug, converts to 625 grams of converted drug weight. The total, 1.125 kilograms of converted drug weight, has an offense level of 8 in the Drug Quantity Table.”;

in Note 8(C)(iii) by striking “is equivalent” both places such term appears and inserting “converts”; by striking “of marihuana” each place such term appears and inserting “of converted drug weight”; and by striking “The total is therefore equivalent” and inserting “The total therefore converts”;

in Note 8(C)(iv) by striking “marihuana equivalency” each place such term appears and insert-

ing “converted drug weight”; by striking “76 kilograms of marihuana” and inserting “76 kilograms”; by striking “79.99 kilograms of marihuana” both places such term appears and inserting “79.99 kilograms of converted drug weight”; by striking “equivalent weight” each place such term appears and inserting “converted weight”; by striking “9.99 kilograms of marihuana” and inserting “9.99 kilograms”; and by striking “2.49 kilograms of marihuana” and inserting “2.49 kilograms”;

in Note 8(D)—

in the heading, by striking “Drug Equivalency Tables” and inserting “Drug Conversion Tables”;

under the heading relating to Schedule I or II Opiates, by striking the heading as follows:

“Schedule I or II Opiates*”,

and inserting the following new heading:

“Schedule I or II Opiates*” Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating Cocaine and Other Schedule I and II Stimulants (and their immediate precursors), by striking the heading as follows:

“Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*”,

and inserting the following new heading:

“Cocaine and Other Schedule I and II Stimulants
(and their immediate precursors)*” Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating to Synthetic Cathinones (except Schedule III, IV, and V Substances), by striking the heading as follows:

“Synthetic Cathinones (except Schedule III, IV, and V Substances)*”,

and inserting the following new heading:

“Synthetic Cathinones
(except Schedule III, IV, and V Substances)*” Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the heading as follows:

“LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*”,

and inserting the following new heading:

“LSD, PCP, and Other Schedule I and II Hallucinogens
(and their immediate precursors)*” Converted Drug Weight”;

Amendment 808

and by striking “of marihuana” each place such term appears;

under the heading relating to Schedule I Marihuana, by striking the heading as follows:

“Schedule I Marihuana”,

and inserting the following new heading:

“Schedule I Marihuana Converted Drug Weight”;

and by striking “of marihuana” each place such term appears;

under the heading relating to Synthetic Cannabinoids (except Schedule III, IV, and V Substances), by striking the heading as follows:

“Synthetic Cannabinoids (except Schedule III, IV, and V Substances)*”,

and inserting the following new heading:

“Synthetic Cannabinoids
(except Schedule III, IV, and V Substances)* Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Flunitrazepam, by striking the heading as follows:

“Flunitrazepam**”,

and inserting the following new heading:

“Flunitrazepam** Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Schedule I or II Depressants (except gamma-hydroxybutyric acid), by striking the heading as follows:

“Schedule I or II Depressants (except gamma-hydroxybutyric acid)”,

and inserting the following new heading:

“Schedule I or II Depressants
(except gamma-hydroxybutyric acid) Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Gamma-hydroxybutyric Acid, by striking the heading as follows:

“Gamma-hydroxybutyric Acid”,

and inserting the following new heading:

“Gamma-hydroxybutyric Acid Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Schedule III Substances (except ketamine), by striking the heading as follows:

“Schedule III Substances (except ketamine)***”,

and inserting the following new heading:

“Schedule III Substances (except ketamine)*** Converted Drug Weight”;

by striking “1 gm of marihuana” and inserting “1 gm”; by striking “equivalent weight” and inserting “converted weight”; and by striking “79.99 kilograms of marihuana” and inserting “79.99 kilograms of converted drug weight”;

under the heading relating to Ketamine, by striking the heading as follows:

“Ketamine”,

and inserting the following new heading:

“Ketamine Converted Drug Weight”;

and by striking “of marihuana”;

under the heading relating to Schedule IV Substances (except flunitrazepam), by striking the heading as follows:

“Schedule IV Substances (except flunitrazepam)*****”,

and inserting the following new heading:

“Schedule IV Substances (except flunitrazepam)***** Converted Drug Weight”;

by striking “0.0625 gm of marihuana” and inserting “0.0625 gm”; and by striking “*****Provided, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of marihuana.” and inserting “*****Provided, that the combined converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of converted drug weight.”;

under the heading relating to Schedule V Substances, by striking the heading as follows:

“Schedule V Substances*****”,

and inserting the following new heading:

“Schedule V Substances***** Converted Drug Weight”;

by striking “0.00625 gm of marihuana” and inserting “0.00625 gm”; and by striking “*****Provided, that the combined equivalent weight of Schedule V substances shall not exceed 2.49 kilograms of marihuana.” and inserting “*****Provided, that the combined converted weight of Schedule V substances shall not exceed 2.49 kilograms of converted drug weight.”;

Amendment 808

under the heading relating to List I Chemicals (relating to the manufacture of amphetamine or methamphetamine), by striking the heading as follows:

“List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)*****”,

and inserting the following new heading:

“List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)***** Converted Drug Weight”;

by striking “of marihuana” each place such term appears; and by striking “*****Provided, that in a case involving” and inserting “*****Provided, that in a case involving”;

under the heading relating to Date Rape Drugs (except flunitrazepam, GHB, or ketamine), by striking the heading as follows:

“Date Rape Drugs (except flunitrazepam, GHB, or ketamine)”,

and inserting the following new heading:

“Date Rape Drugs (except flunitrazepam, GHB, or ketamine)” Converted Drug Weight”;

and by striking “marihuana” both places such term appears;

and in the text before the heading relating to Measurement Conversion Table, by striking “To facilitate conversions to drug equivalencies” and inserting “To facilitate conversions to converted drug weight”;

in Note 27(D) by striking “marihuana equivalencies” both places such term appears and inserting “converted drug weights”; by striking “Drug Equivalency Tables” and inserting “Drug Conversion Tables”; and by striking “marihuana equivalency” and inserting “converted drug weight”;

and in Note 27(E)(ii) by striking “marihuana equivalency” and inserting “converted drug weight”.

The Commentary to §2D1.1 captioned “Background”, as amended by Amendment 807, is further amended by adding at the end the following new paragraph:

“The Drug Conversion Tables set forth in Application Note 8 were previously called the Drug Equivalency Tables. In the original 1987 Guidelines Manual, the Drug Equivalency Tables provided four conversion factors (or ‘equivalents’) for determining the base offense level in cases involving either a controlled substance not referenced in the Drug Quantity Table or multiple controlled substances: heroin, cocaine, PCP, and marihuana. In 1991, the Commission amended the Drug Equivalency Tables to provide for one substance, marihuana, as the single conversion factor in §2D1.1. See USSG App. C, Amendment 396 (effective November 1, 1991). In 2018, the Commission amended §2D1.1 to replace marihuana as the conversion factor with the new term ‘converted drug weight’ and to change the title of the Drug Equivalency Tables to the ‘Drug Conversion Tables.’”.

The Commentary to §2D1.11 captioned “Application Notes” is amended in Note 9 by striking “Drug Equivalency Table” and inserting “Drug Conversion Table”.

The Concluding Commentary to Part D of Chapter Three is amended in Example 2 by striking “marihuana equivalents” and inserting “converted drug weight”; by striking “Drug Equivalency Tables” and inserting “Drug Conversion Tables”; and by striking “of marihuana” each place such term appears and inserting “of converted drug weight”.

REASON FOR AMENDMENT: This amendment makes technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). It replaces the term “marihuana equivalency,” which is used in the Drug Equivalency Tables for determining penalties for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances, with the term “converted drug weight.”

The Commission received comment expressing concern that the term “marihuana equivalency” is misleading and results in confusion for individuals not fully versed in the guidelines. Some commenters suggested that the Commission should replace “marihuana equivalency” with another term.

Specifically, the amendment adds the new term “converted drug weight” to all provisions of the Drug Quantity Table at §2D1.1(c) and changes the title of the “Drug Equivalency Tables” to “Drug Conversion Tables.” In addition, the amendment makes technical changes throughout the Guidelines Manual to account for the new term.

This amendment is not intended as a substantive change in policy for §2D1.1.

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 809

AMENDMENT: Section 2L1.2(b)(2) is amended by striking “If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained—” and inserting “If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in—”.

Section 2L1.2(b)(3) is amended by striking “If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in—” and inserting “If, after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct that, at any time, resulted in—”.

The Commentary to §2L1.2 captioned “Application Notes” is amended—

in Note 2 in the paragraph that begins “‘Sentence imposed’ has the meaning” by striking “includes any term of imprisonment given upon revocation of probation, parole, or supervised release” and inserting “includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred”;

in Note 4 by striking “subsection (b)(3),” and inserting “subsection (b)(2) or (b)(3), as appropriate,”;

Amendment 809

and by redesignating Notes 5 through 7 as Notes 6 through 8, respectively; and by inserting the following new Note 5:

- “5. Cases in Which the Criminal Conduct Underlying a Prior Conviction Occurred Both Before and After the Defendant Was First Ordered Deported or Ordered Removed.— There may be cases in which the criminal conduct underlying a prior conviction occurred both before and after the defendant was ordered deported or ordered removed from the United States for the first time. For purposes of subsections (b)(2) and (b)(3), count such a conviction only under subsection (b)(2).”

REASON FOR AMENDMENT: This amendment responds to two application issues that arose after §2L1.2 (Unlawfully Entering or Remaining in the United States) was extensively amended in 2016. See USSG App. C, Amendment 802 (effective Nov. 1, 2016).

The specific offense characteristic at §2L1.2(b)(2) applies a sliding scale of enhancements, based on sentence length, if the “defendant sustained” a “conviction” before being ordered removed for the first time. Correspondingly, §2L1.2(b)(3) applies a parallel scale of enhancements if the defendant “engaged in criminal conduct resulting in” a conviction “at any time after” the first order of removal. In most situations, any prior felony conviction that received criminal history points will qualify under either subsection (b)(2) or (b)(3), with the extent of the increase depending on the length of the sentence imposed. In some scenarios, a felony will not qualify for an upward adjustment under either subsection (b)(2) or (b)(3) even though it received criminal history points. Those scenarios occur when a defendant committed a crime before being ordered removed for the first time but was not convicted (or sentenced) for that crime until after that first order of removal.

The amendment addresses this issue by establishing that the application of the §2L1.2(b)(2) enhancement depends on the timing of the underlying “criminal conduct,” and not on the timing of the resulting conviction. It does so by amending the first paragraph of subsection (b)(2) to state that the enhancement applies if pre-first removal conduct resulted in a conviction “at any time,” and makes a conforming change to the first paragraph of subsection (b)(3). In order to address how to treat an offense involving conduct that occurred both before and after a defendant’s first order of removal, the amendment adds a new Application Note 5 explaining that an offense involving such conduct should be counted only under subsection (b)(2). The Commission determined that a defendant with a prior non-illegal reentry felony conviction that received criminal history points should receive an enhancement for that conviction under either subsection (b)(2) or (b)(3). A defendant should not avoid an enhancement for an otherwise qualifying conviction because the conviction occurred after a defendant’s first order of removal or deportation but was premised on conduct that occurred before that order. Because a conviction could be premised on conduct that occurred both before and after the first order of removal or deportation, the Commission adopted Application Note 5 to explain that such convictions are only counted once, under subsection (b)(2).

The specific offense characteristics at §2L1.2(b)(2) and (b)(3) increase a defendant’s offense level based on the length of the “sentence imposed” for a prior felony conviction. An application note defines “sentence imposed” to mean “sentence of imprisonment” as that term is used in the criminal history guideline, §4A1.2. See USSG §2L1.2, comment. (n.2.). Consistent with that definition, the application note also directs that “[t]he length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.” Id.

Another part of the commentary to §2L1.2 directs that only convictions receiving criminal history points under “§4A1.1(a), (b), or (c)” (which assign points based on the length of the prior sentence imposed) are to be counted under §2L1.2(b). See USSG §2L1.2, comment. (n.3). In

determining the length of a sentence for purposes of Chapter Four (and thus the number of criminal history points to be applied), the length of any term imposed on revocation of probation, parole, supervised release, or other similar status is added to the original term of imprisonment and the total term is used to calculate criminal history points under §4A1.1(a), (b), or (c). See USSG §4A1.2(k)(1).

A Fifth Circuit opinion interpreted §2L1.2(b)(2) to bar consideration of a revocation that did not occur until *after* a defendant's first order of removal, even if the defendant was convicted prior to the first order of the removal. See *United States v. Franco-Galvan*, 864 F.3d 338 (5th Cir. 2017). The court found that Application Note 2, despite its instruction that "the length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release," was insufficiently clear to resolve the "temporal" question of when a revocation must occur, given that the Commission had resolved a prior circuit conflict in 2012 by directing that revoked time should not be counted in the situation. See USSC App. C, Amendment 764 (effective Nov. 1, 2012). A subsequent decision of the Ninth Circuit reached the same result. See *United States v. Martinez*, 870 F.3d 1163 (9th Cir. 2017). Although both cases involved an enhancement under subsection (b)(2), the same logic would seem to apply to enhancements under subsection (b)(3) when the conviction and revocation were separated by an intervening order of removal or deportation.

The amendment resolves this issue by adding the clarifying phrase "regardless of when the revocation occurred" to the definition of "sentence imposed" in Application Note 2. The Commission determined that, consistent with the purposes of the 2016 amendment to §2L1.2, the data underlying it, and the statement in Application Note 2, the length of a sentence imposed for purposes of §2L1.2(b)(2) and (b)(3) should include any additional term of imprisonment imposed upon revocation of probation, suspended sentence, or supervised release, regardless of whether the revocation occurred before or after the defendant's first (or any subsequent) order of removal. As the reason for amendment for Amendment 802 explained, "[t]he Commission determined that a sentence-imposed approach is consistent with the Chapter Four criminal history rules, easily applied, and appropriately calibrated to account for the seriousness of prior offenses." USSC, App. C, Amendment 802 (effective Nov. 1, 2016). Excluding sentence length added by post-removal revocations would be inconsistent with the purpose of Amendment 802 and its underlying data analysis. Id.

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 810

AMENDMENT: The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 1(A) by striking "However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility" and inserting "A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous".

REASON FOR AMENDMENT: This amendment responds to concerns that some courts have interpreted the commentary to §3E1.1 (Acceptance of Responsibility) to automatically preclude application of the 2-level reduction for acceptance of responsibility when the defendant makes an unsuccessful good faith, non-frivolous challenge to relevant conduct. Application Note 1 provides a non-exhaustive list of appropriate considerations in determining whether a defendant has clearly demonstrated acceptance of responsibility. Among those considerations is whether

Amendment 811

the defendant truthfully admitted the conduct comprising the offense(s) of conviction and truthfully admitted or did not falsely deny any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). See USSG §3E1.1, comment. (n.1(A)). The application note further provides that “a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.” The amendment clarifies that an unsuccessful challenge to relevant conduct does not necessarily establish that the challenge was either a false denial or frivolous. Specifically, the amendment adds “but the fact that a defendant’s challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous” to the end of Application Note 1(A).

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 811

AMENDMENT: The Commentary to §5C1.1 captioned “Application Notes” is amended by redesignating Notes 4 through 9 as Notes 5 through 10, respectively; and by inserting the following new Note 4:

- “4. If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3). See 28 U.S.C. § 994(j). For purposes of this application note, a ‘nonviolent first offender’ is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction. The phrase ‘comparable judicial dispositions of any kind’ includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of nolo contendere and juvenile adjudications.”.

The Commentary to §5F1.2 captioned “Application Notes” is amended in Note 1 by striking “Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention” and inserting “Electronic monitoring is an appropriate means of surveillance for home detention”; and by striking “alternative means of surveillance may be used so long as they are as effective as electronic monitoring” and inserting “alternative means of surveillance may be used if appropriate”.

The Commentary to §5F1.2 captioned “Background” is amended by striking “The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring” and inserting “The Commission has concluded that electronic monitoring is an appropriate means of surveillance for home detention”; and by striking “the court should be confident that an alternative form of surveillance will be equally effective” and inserting “the court should be confident that an alternative form of surveillance is appropriate considering the facts and circumstances of the defendant’s case”.

Section 5H1.3 is amended by striking “See §5C1.1, Application Note 6” and inserting “See §5C1.1, Application Note 7”.

Section 5H1.4 is amended by striking “See §5C1.1, Application Note 6” and inserting “See §5C1.1, Application Note 7”.

REASON FOR AMENDMENT: The amendment adds a new application note to the Commentary at §5C1.1 (Imposition of a Term of Imprisonment), which states that if a defendant is a “nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.” This new application note is consistent with the statutory language in 28 U.S.C. § 994(j) regarding the “general appropriateness of imposing a sentence other than imprisonment” for “a first offender who has not been convicted of a crime of violence or an otherwise serious offense” and cites the statutory provision in support. It also is consistent with a recent Commission recidivism study, which demonstrated that offenders with zero criminal history points have a lower recidivism rate than offenders with one criminal history point, and that offenders with zero criminal history points and no prior contact with the criminal justice system have an even lower recidivism rate. See Tracey Kyckelhahn & Trishia Cooper, U.S. Sentencing Comm’n, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* at 6–9 (2017).

Where permitted by statute, the Guidelines Manual provides for non-incarceration sentences for offenders in Zones A and B of the Sentencing Table. Zone A (in which all sentencing ranges are zero to six months regardless of criminal history category) permits the full spectrum of sentencing options: (1) a fine only; (2) a term of probation only; (3) probation with conditions of confinement (home detention, community confinement, or intermittent confinement); (4) a “split sentence” (a term of imprisonment followed by a term of supervised release with condition of confinement that substitutes for a portion of the guideline term); or (5) a term of imprisonment only. Zone B (which includes sentencing ranges that have a low-end of one month and a high-end of 15 months, and vary by criminal history category) also authorizes non-prison sentences. However, Zone B sentencing options are more restrictive, authorizing (1) probation with conditions of confinement; (2) a “split sentence”; or (3) a term of imprisonment only. Consistent with the statutory mandate in section 994(j), the application note is intended to serve as a reminder to courts to consider imposing non-incarceration sentences for a defined class of “nonviolent first offenders” whose applicable guideline ranges are in Zones A or B of the Sentencing Table.

For purposes of the new application note, the amendment defines a “nonviolent first offender” as a defendant who (1) has no prior convictions or other comparable judicial dispositions of any kind; and (2) did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense. It explains that “comparable judicial dispositions of any kind” includes “diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of nolo contendere and juvenile adjudications.”

The amendment adopts language from the statutory and guidelines “safety-valve” provisions to exclude offenders who “use[d] violence or credible threats of violence or possess[ed] a firearm or other dangerous weapon in connection with the offense.” See 18 U.S.C. § 3553(f)(2); USSG §5C1.2(a)(2). This real-offense definition of “violent” offense avoids the complicated application of the “categorical approach” to determine whether an offense qualifies as “violent.” See *United States v. Starks*, 861 F.3d 306, 324 (1st Cir. 2017) (describing the “immensely complicated analysis required by the categorical approach”); see also USSG §5C1.2, comment. (n.3) (noting that the determination of whether “the offense” was violent or involved a firearm requires a court to consider not only the offense of conviction but also “all relevant conduct”). It also ensures that only nonviolent offenders are covered by the new application note.

The amendment also deletes language from the commentary to §5F1.2 (Home Detention) that generally encouraged courts to use electronic monitoring (also called location monitoring) when home detention is made a condition of supervision, and instead instructs that electronic monitoring or any alternative means of surveillance may each be used, as “appropriate.” The goal of this change is to increase the use of probation with home detention as an alternative to

Amendment 812

incarceration. The Commission received testimony indicating that location monitoring is resource-intensive and otherwise demanding on probation officers. Additionally, it heard testimony that imposing location monitoring by default is inconsistent with the evidence-based “risk-needs-responsivity” (RNR) model of supervision and may be counterproductive for certain lower-risk offenders. For many low-risk offenders, less intensive surveillance methods (e.g., telephonic contact, video conference, unannounced home visits by probation officers) are sufficient to enforce home detention. The revised language would allow probation officers and courts to exercise discretion to use surveillance methods that they deem appropriate in light of evidence-based practices.

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 812

AMENDMENT: The Commentary to §2A3.5 captioned “Statutory Provision” is amended by striking “§ 2250(a)” and inserting “§ 2250(a), (b)”.

The Commentary to §2A3.5 captioned “Application Notes” is amended by redesignating Note 2 as Note 3; and by inserting the following new Note 2:

“2. Application of Subsection (b)(1).—For purposes of subsection (b)(1), a defendant shall be deemed to be in a ‘failure to register status’ during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).”

Section 2A3.6(a) is amended by striking “§ 2250(c)” and inserting “§ 2250(d)”.

The Commentary to §2A3.6 captioned “Statutory Provisions” is amended by striking “2250(c)” and inserting “2250(d)”.

The Commentary to §2A3.6 captioned “Application Notes” is amended—

in Note 1 by striking “Section 2250(c)” and inserting “Section 2250(d)”; and by inserting after “18 U.S.C. § 2250(a)” the following: “or (b)”;

in Note 3 by striking “§ 2250(c)” and inserting “§ 2250(d)”;

and in Note 4 by striking “§ 2250(c)” and inserting “§ 2250(d)”.

Section 2B5.3(b)(5) is amended by striking “counterfeit drug” and inserting “drug that uses a counterfeit mark on or in connection with the drug”.

The Commentary to §2B5.3 captioned “Application Notes” is amended in Note 1 by striking the third undesignated paragraph as follows:

“‘Counterfeit drug’ has the meaning given that term in 18 U.S.C. § 2320(f)(6).”;

and by inserting after the paragraph that begins “‘Counterfeit military good or service’ has the meaning” the following new paragraph:

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

The Commentary to §2G1.3 captioned “Application Notes” is amended in Note 4 by striking “(b)(3)” each place such term appears and inserting “(b)(3)(A)”.

Section 5D1.3(a)(6)(A) is amended by striking “18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664” and inserting “18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution”.

Appendix A (Statutory Index) is amended—

in the line referenced to 15 U.S.C. § 2615 by striking “§ 2615” and inserting “§ 2615(b)(1)”;

by inserting before the line referenced to 15 U.S.C. § 6821 the following new line reference:

“15 U.S.C. § 2615(b)(2) 2Q1.1”;

in the line referenced to 18 U.S.C. § 2250(a) by striking “§ 2250(a)” and inserting “§ 2250(a), (b)”;

and in the line referenced to 18 U.S.C. § 2250(c) by striking “§ 2250(c)” and inserting “§ 2250(d)”.

REASON FOR AMENDMENT: This multi-part amendment responds to recently enacted legislation and miscellaneous guideline application issues.

First, the amendment responds to section 6 of the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. 114–119 (Feb. 8, 2016), which added a new registration requirement for certain sex offenders required to register under the Sex Offender Registration and Notification Act (SORNA) at 34 U.S.C. § 20914. SORNA requires sex offenders to register in the sex offender registry, and keep their registration current, by providing certain identifying information including names, addresses, and Social Security Numbers. The new requirement at 34 U.S.C. § 20914(7) directs sex offenders to provide information relating to intended travel outside the United States, including any anticipated dates and places of departure, arrival or return, air carrier and flight numbers, and destination country. The Act also established a new offense at 18 U.S.C. § 2250(b). For those required to register under SORNA, knowingly failing to provide this travel-related information and engaging or attempting to engage in the intended travel outside of the United States, carries a statutory maximum of 10 years of imprisonment. Section 2250 offenses are referenced in Appendix A (Statutory Index) to §2A3.5 (Failure to Register as a Sex Offender). The amendment amends Appendix A so the new offense at 18 U.S.C. § 2250(b) is referenced to §2A3.5. The amendment also adds a new Application Note 2 to the Commentary to §2A3.5 providing that for purposes of §2A3.5(b)(1), a defendant shall be considered in a “failure to register status” during the time the defendant engaged in conduct described in either section 2250(a) (failing to register or update registration) or section 2250(b) (failing to provide required travel-related information). This application note reflects the Commission’s determination that failing to provide information about intended foreign travel meets the definition of failing to update registration information in the sex offender registry. In addition, the amendment makes clerical changes to §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to reflect the adoption of section 2250(b) and the associated redesignation of section 2250(c) as section 2250(d).

Second, the amendment responds to section 3 of the Transnational Drug Trafficking Act of 2016, Pub. L. 114–154 (May 16, 2016), which made changes relating to the trafficking of counterfeit drugs by amending the language in the penalty provision at 18 U.S.C. § 2320. The Act amended section 2320(b)(3) to replace the term “counterfeit drug” with the phrase “a drug

Amendment 812

that uses a counterfeit mark on or in connection with the drug.” The Act also revised section 2320(f) to define the term “drug” by reference to the term as defined in the Federal Food, Drug, and Cosmetic Act found at 21 U.S.C. § 321. Section 2320 offenses are referenced in Appendix A (Statutory Index) to §2B5.3 (Criminal Infringement of Copyright or Trademark). The amendment replaces the term “counterfeit drug” at §2B5.3(b)(5) with the new phrase in the revised section 2320(b)(3), to remain consistent with the language of the statute. Similarly, the amendment amends the commentary to §2B5.3 to remove a definition for the obsolete term “counterfeit drug” and replace it with definitions of the terms “drug” and “counterfeit mark” as found in the revised statute.

Third, the amendment responds to section 12 of the Frank R. Lautenberg Chemical Safety for the 21st Century Act of 2016, Pub. L. 114–182 (June 22, 2016), which amended section 16 of the Toxic Substances Control Act (15 U.S.C. § 2615) by adding a new provision at section 2615(b)(2). The new provision prohibits any person from knowingly and willfully violating specific provisions of the Toxic Substances Control Act, knowing at the time of the violation that the violation puts a person in imminent danger of death or bodily injury, with a maximum penalty of 15 years of imprisonment. The Toxic Substances Control Act is referenced in Appendix A (Statutory Index) to §2Q1.2 (Mishandling of Hazardous or Toxic Substances of Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce). The amendment continues to reference the preexisting offense, now codified at section 2615(b)(1), to §2Q1.2, but references the new offense, codified at section 2615(b)(2), to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants). The Commission determined §2Q1.1 is the most analogous guideline because it covers similar “knowing endangerment” provisions and has a similar mens rea element found in similar statutes referenced in Appendix A to §2Q1.1.

Fourth, the amendment responds to section 2 of the Justice for All Reauthorization Act of 2016, Pub. L. 114–324 (Dec. 16, 2016), which amended 18 U.S.C. § 3583(d) (relating to conditions of supervised release) to require a court, when imposing a sentence of supervised release, to include as a condition that the defendant make restitution in accordance with sections 3663 and 3663A of Title 18 of the United States Code, or any other statute authorizing a sentence of restitution. The amendment amends subsection (a)(6)(A) of §5D1.3 (Conditions of Supervised Release) to include a mandatory condition of supervised release in conformance with the new statutory requirement. The amendment also parallels the Judicial Conference of the United States’ recent revision of the Judgment in a Criminal Case form to include a new mandatory condition of supervised release.

Fifth, the amendment clarifies an application issue that has arisen with respect to §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor), which applies to several offenses involving the transportation of a minor for illegal sexual activity. A two-level enhancement at §2G1.3(b)(3) applies if the offense involved the use of a computer to either (A) persuade, entice or coerce a minor, or to facilitate the travel of a minor, to engage in prohibited sexual conduct, or (B) to entice, offer, or solicit a person to engage in prohibited sexual conduct with a minor. While Application Note 4 sets forth guidance on this enhancement, it fails to distinguish between the two prongs of subsection (b)(3). As a result, an application issue has arisen regarding whether the note prohibits application of the enhancement where a computer was used to solicit a third party to engage in prohibited sexual conduct with a minor, as set out in subsection (b)(3)(B). Courts have concluded that the application note is inconsistent with the language of §2G1.3(b)(3), and that application of the enhancement for the use of a computer in third party solicitation cases is proper. See e.g., United States v.

Cramer, 777 F.3d 597, 606 (2d Cir. 2015); United States v. McMillian, 777 F.3d 444, 449–50 (7th Cir. 2015); United States v. Hill, 782 F.3d 842, 846 (11th Cir. 2015); United States v. Pringler, 765 F.3d 455 (5th Cir. 2014). The amendment is intended to clarify the Commission’s original intent that Application Note 4 apply only to subsection (b)(3)(A).

Effective Date: The effective date of this amendment is November 1, 2018.

AMENDMENT 813

AMENDMENT: Chapter One, Part A is amended—

in Subpart 1(4)(b) (Departures) by inserting an asterisk after “§5K2.19 (Post-Sentencing Rehabilitative Efforts)”; and by inserting after the first paragraph the following note:

“*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (See USSG App. C, amendment 768.)”;

and in the note at the end of Subpart 1(4)(d) (Probation and Split Sentences) by striking “Supplement to Appendix C” and inserting “USSG App. C”.

The Commentary to §1B1.13 captioned “Application Notes” is amended in Note 4 by striking “factors set forth 18 U.S.C. § 3553(a)” and inserting “factors set forth in 18 U.S.C. § 3553(a)”.

The Commentary to §2A3.5 captioned “Application Notes” is amended in Note 1 in the paragraph that begins “‘Sex offense’ has the meaning” by striking “42 U.S.C. § 16911(5)” and inserting “34 U.S.C. § 20911(5)”; and in the paragraph that begins “‘Tier I offender’, ‘Tier II offender’, and ‘Tier III offender’ have the meaning” by striking “42 U.S.C. § 16911” and inserting “34 U.S.C. § 20911”.

The Commentary to §2B1.1 captioned “Application Notes” is amended in Note 2(A)(i) by striking “determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of conviction” and inserting the following: “specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of §1B1.2 (Applicable Guidelines)”.

The Commentary to §2B1.5 captioned “Application Notes” is amended—

in Note 1(A) by striking clause (ii) and redesignating clauses (iii) through (vii) as clauses (ii) through (vi), respectively;

in Note 1(A)(i) by striking “16 U.S.C. § 470w(5)” and inserting “54 U.S.C. § 300308”;

in Note 3(C) by striking “16 U.S.C. § 470a(a)(1)(B)” and inserting “54 U.S.C. § 302102”;

in Note 3(E) by striking “the Antiquities Act of 1906 (16 U.S.C. § 431)” and inserting “54 U.S.C. § 320301”;

and in Note 3(F) by striking “16 U.S.C. § 1c(a)” and inserting “54 U.S.C. § 100501”.

Section 2D1.11 is amended in subsection (d)(6) by striking “Pseudoephedrine” and inserting “Pseudoephedrine”; and in subsection (e)(2), under the heading relating to List I Chemicals, by striking the period at the end and inserting a semicolon.

Amendment 813

The Commentary to §2M2.1 captioned “Statutory Provisions” is amended by striking “§ 2153” and inserting “§§ 2153”; and by inserting at the end the following: “For additional statutory provision(s), see Appendix A (Statutory Index).”.

The Commentary to §2Q1.1 captioned “Statutory Provisions” is amended by striking “42 U.S.C. § 6928(e)” and inserting “42 U.S.C. §§ 6928(e), 7413(c)(5)”; and by inserting at the end the following: “For additional statutory provision(s), see Appendix A (Statutory Index).”.

The Commentary to §2Q1.2 captioned “Statutory Provisions” is amended by striking “7413” and inserting “7413(c)(1)–(4)”.

The Commentary to §2Q1.3 captioned “Statutory Provisions” is amended by striking “7413” and inserting “7413(c)(1)–(4)”.

The Commentary to §2Q1.3 captioned “Application Notes” is amended in Note 8 by striking “Adequacy of Criminal History Category” and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to §2R1.1 captioned “Application Notes” is amended in Note 7 by striking “Adequacy of Criminal History Category” and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to §2X5.2 captioned “Statutory Provisions” is amended by striking “42 U.S.C. § 14133” and inserting “34 U.S.C. § 12593”.

Section 4A1.2 is amended in subsections (h), (i), and (j) by striking “Adequacy of Criminal History Category” each place such term appears and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to §4A1.2 captioned “Application Notes” is amended in Notes 6 and 8 by striking “Adequacy of Criminal History Category” both places such term appears and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

The Commentary to §4B1.4 captioned “Background” is amended by striking “Adequacy of Criminal History Category” and inserting “Departures Based on Inadequacy of Criminal History Category (Policy Statement)”.

Section 5B1.3(a)(10) is amended by striking “42 U.S.C. § 14135a” and inserting “34 U.S.C. § 40702”.

Section 5D1.3 is amended in subsection (a)(4) by striking “release on probation” and inserting “release on supervised release”; and in subsection (a)(8) by striking “42 U.S.C. § 14135a” and inserting “34 U.S.C. § 40702”.

Section 8C2.1(a) is amended by striking “§§2C1.1, 2C1.2, 2C1.6” and inserting “§§2C1.1, 2C1.2”.

Appendix A (Statutory Index) is amended—

by striking the line referenced to 16 U.S.C. § 413;

in the line referenced to 18 U.S.C. § 371 by rearranging the guidelines to place them in proper numerical order;

in the line referenced to 18 U.S.C. § 1591 by rearranging the guidelines to place them in proper numerical order;

by inserting after the line referenced to 18 U.S.C. § 1864 the following new line reference:

“18 U.S.C. § 1865(c) 2B1.1”;

by inserting after the line referenced to 33 U.S.C. § 3851 the following new line references:

“34 U.S.C. § 10251 2B1.1
 34 U.S.C. § 10271 2B1.1
 34 U.S.C. § 12593 2X5.2
 34 U.S.C. § 20962 2H3.1
 34 U.S.C. § 20984 2H3.1”;

and by striking the lines referenced to 42 U.S.C. § 3791, 42 U.S.C. § 3795, 42 U.S.C. § 14133, 42 U.S.C. § 16962, and 42 U.S.C. § 16984.

REASON FOR AMENDMENT: This amendment makes various technical changes to the Guidelines Manual.

First, the amendment sets forth clarifying changes to two guidelines. The amendment amends Chapter One, Part A, Subpart 1(4)(b) (Departures) to provide an explanatory note addressing the fact that §5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. The amendment also makes minor clarifying changes to Application Note 2(A) to §2B1.1 (Theft, Property Destruction, and Fraud), to make clear that, for purposes of subsection (a)(1)(A), an offense is “referenced to this guideline” if §2B1.1 is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction.

Second, the amendment makes technical changes to provide updated references to certain sections in the United States Code that were restated in legislation. As part of an Act to codify existing law relating to the National Park System, Congress repealed numerous sections in Title 16 of the United States Code, and restated them in Title 18 and a newly enacted Title 54. See Pub. L. 113–287 (Dec. 19, 2014). The amendment amends the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources) to correct outdated references to certain sections in Title 16 that were restated, with minor revisions, when Congress enacted Title 54. It also deletes from the Commentary to §2B1.5 the provision relating to the definition of “historic resource,” as that term was omitted from Title 54. In addition, the amendment makes a technical change to Appendix A (Statutory Index), to correct an outdated reference to 16 U.S.C. § 413 by replacing it with the appropriate reference to 18 U.S.C. § 1865(c).

Third, the amendment makes additional technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective September 1, 2017, the Office of Law Revision Counsel transferred certain provisions bearing on crime control and law enforcement, previously scattered throughout various parts of the United States Code, to a new Title 34. To reflect the new section numbers of the reclassified provisions, the amendment makes changes to: the Commentary to §2A3.5 (Failure to Register as a Sex Offender); the Commentary to §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)); subsection (a)(10) of §5B1.3 (Conditions of Probation); subsection (a)(8) of §5D1.3 (Conditions of Supervised Release); and Appendix A (Statutory Index).

Amendment 813

Fourth, the amendment makes clerical changes in §§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.4 (Armed Career Criminal), to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Finally, the amendment also makes clerical changes to—

- the Commentary to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)), by inserting a missing word in Application Note 4;
- subsection (d)(6) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), by correcting a typographical error in the line referencing Pseudoephedrine;
- subsection (e)(2) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), by correcting a punctuation mark under the heading relating to List I Chemicals;
- the Commentary to §2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) captioned “Statutory Provisions,” by adding a missing section symbol and a reference to Appendix A (Statutory Index);
- the Commentary to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) captioned “Statutory Provisions,” by adding a missing reference to 42 U.S.C. § 7413(c)(5) and a reference to Appendix A (Statutory Index);
- the Commentary to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) captioned “Statutory Provisions,” by adding a specific reference to 42 U.S.C. § 7413(c)(1)–(4);
- the Commentary to §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification) captioned “Statutory Provisions,” by adding a specific reference to 42 U.S.C. § 7413(c)(1)–(4);
- subsection (a)(4) to §5D1.3. (Conditions of Supervised Release), by changing an inaccurate reference to “probation” to “supervised release”;
- subsection (a) of §8C2.1 (Applicability of Fine Guidelines), by deleting an outdated reference to §2C1.6, which was deleted by consolidation with §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity) effective November 1, 2004; and
- the lines referencing “18 U.S.C. § 371” and “18 U.S.C. § 1591” in Appendix A (Statutory Index), by rearranging the order of certain Chapter Two guidelines references to place them in proper numerical order.

Effective Date: The effective date of this amendment is November 1, 2018.