Prison and Sentencing Impact Assessments for 2018 Guideline Amendments to the Federal Sentencing Guidelines

For a complete description of the 2018 amendments, please visit https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20180430_RF.pdf.

1) Tribal Issues

This two-part amendment addresses federal sentencing issues related to offenses committed in Indian country. The amendment provides a definition of a "court protection order" in the *Guidelines Manual* to ensure, in part, that such orders issued by tribal courts receive treatment consistent with that of other issuing jurisdictions.

Between 2012 and 2016, the 2-level enhancements for violation of a court protection order were applied in 47 cases (1.7% of all cases sentenced under §§2A2.2, 2A6.1, and 2A6.2), with 38.3 percent of those cases involving Native American defendants. The Commission cannot estimate how the amendment might affect the frequency with which this enhancement is applied in the future.

The amendment also 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.

In fiscal year 2016, of the 1,250 Native Americans sentenced that year, 33.5 percent had tribal convictions reported in the Pre-Sentence Investigation Report. Of the individuals who were convicted of a tribal offense, 68.7 percent had been convicted of at least one violent tribal offense (23.0% of all Native Americans sentenced). Because departures are given at the court's discretion, the Commission cannot estimate how many individuals may be impacted by this amendment each year.

2) Bipartisan Budget Act

This amendment responds to the Bipartisan Budget Act of 2015 ("the Act"), Pub. L. 114–74 (Nov. 2, 2015), which amended three existing statutes 42 U.S.C. §§ 408, 1011, and 1383a in two ways. First, the Act added new subsections criminalizing conspiracy to commit fraud for selected substantive offenses already proscribed in the statutes. Second, the Act amended each of the sections adding a ten-year statutory maximum penalty for certain persons who commit fraud under the relevant Social Security programs.

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 individuals convicted under the above statutes and who were subject to the 10-year statutory maximum. 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 Office Guideline)).

No data exists for cases involving defendants convicted under the provisions of 42 U.S.C. §§ 408, 1011, and 1383a as amended by the Bipartisan Budget Act and subject to the 10-year statutory maximum. The amendments to those statutes were not enacted until November 2015 and Commission's most recent data does not include any convictions under the amended provisions. Therefore, the Commission cannot estimate the impact on sentences or the Bureau of Prisons population from the amendment.

3) Synthetic Drugs

The multi-part amendment involves synthetic drugs.

The first part of the amendment addresses fentanyl and fentanyl analogues. 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.

Commission data demonstrates an increase in drug trafficking cases involving fentanyl. In FY2016, only 16 drug trafficking cases involving fentanyl were reported to the Commission. That number increased to 106 cases in FY2016, and to 293 in FY2017. Among the 293 cases in FY2017, fentanyl was the primary drug involved in the offense in 170 cases. The Commission does not regularly collect information on whether a drug was misrepresented or knowingly marketed as another substance, and so cannot estimate the extent to which the amendment would increase sentences in fentanyl cases or the impact on the size of the Bureau of Prisons population. The Commission did undertake a special coding project examining fentanyl cases from fiscal year 2016 and found that 15.7 percent of drug traffickers appeared to have known they were trafficking fentanyl while a majority (52.9%) did not know. However, in approximately one-third of cases (31.4%) no determination could be made.

The amendment also 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.

In FY2017, 22 cases reported to the Commission appeared to involve a fentanyl analogue. Of those 22 fentanyl analogue cases, nine (40.9%) are estimated to be affected by the proposed amendment. The current average sentence in those cases was 79 months. Under the amendment, the average sentence would have been 101 months, an increase of 22 months, or 27.8 percent. However, because of the relatively small number of these cases, the proposed amendment would have little impact on the Bureau of Prisons population.

The amendment next addresses synthetic cathinones and synthetic cannabinoids. 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.

In FY2015, 191 cases were reported to the Commission as involving a synthetic cathinone as the primary drug type. The Commission estimates that approximately one-third of these individuals would be affected by the amendment. The current average sentence imposed in those cases was 38 months. Under the amendment, the average sentence would have been 42 months, an increase of 4 months, or 10.5 percent. However, because the amendment affects a relatively small number of individuals sentenced each year, the impact of the Bureau of Prison population would be negligible.

The amendment also establishes a marihuana 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 marihuana and applies a minimum base offense level of 12 to the class.

Commission data indicates that synthetic cannabinoids were the primary drug in 138 of the 161 drug trafficking cases sentenced in FY2015 that involved synthetic cannabinoids. In 92.4 percent of those cases with complete information, the court applied the 1:167 ratio provided by the amendment. In the remaining cases, the amendment would increase the offense level that applied in the cases. Due to the small number of cases where the guideline range would be affected by the amendment, the impact on the Bureau of Prison population would be negligible.

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 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. Because departures are entirely within the court's discretion, the Commission cannot estimate the impact of this portion of the amendment.

4) Marihuana Equivalency

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 estimates that this amendment will have no impact on sentencing or the Bureau of Prisons population.

5) Illegal Reentry Guidelines Enhancements

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 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. The amendment also adds the clarifying phrase "regardless of when the revocation occurred" to the definition of "sentence imposed" in Application Note 2.

The Commission estimates that this amendment will have no impact on sentencing or the Bureau of Prisons population.

6) Acceptance of Responsibility

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. 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).

The Commission cannot estimate the number of defendants potentially affected by this amendment. Although Commission data does include information on how often the court awarded a 2-level reduction under §3E1.1(a), the Commission does not record any reasons given by the court when the reduction is not awarded; therefore, the Commission cannot estimate how many more individuals will receive this adjustment each year.

7) Alternatives to Incarceration for First Time Offenders

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."

Using fiscal year 2016 data, 353 nonviolent first offenders (accounting for 0.5% of the Bureau of Prisons population) potentially would be impacted by the change in the third revised proposed amendment. Those 353 individuals, all of whom fell in Zone C and received sentences of imprisonment in excess of seven days, would be eligible for the amendment's expansion of sentencing options for nonviolent first offenders in Zone C. The Commission cannot estimate how many of these individuals might receive a sentence other than imprisonment pursuant to the amendment.

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 Commission's data does not include information on conditions of supervision.

8) Miscellaneous

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 persons who are required to register under the Sex Offender Registration and Notification Act (SORNA) at 34 U.S.C. § 20914. 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).

The Commission cannot estimate impact of a newly-enacted statute because it has no data on which to estimate the number of persons who may be sentenced under those statutes or the sentences that may be imposed.

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 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. In fiscal year 2017, there were 61 cases where 18 U.S.C. §2320 was at least one of the statutes of conviction. In 55 of those cases (90.2%) the court applied §2B5.3 as the primary sentencing guideline.

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 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 cannot estimate impact of a newly-enacted statute because it has no data on which to estimate the number of persons who may be sentenced under those statutes or the sentences that may be imposed.

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 Commission does not collect information on the conditions of supervision imposed by the courts.

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. The amendment is intended to clarify the Commission's original intent that Application Note 4 apply only to subsection (b)(3)(A).

In fiscal year 2017, 407 individuals were sentenced under this guideline. In the 393 cases for which the Commission had complete guideline information, 85.8% received the enhancement at (b)(3). The Commission does not have information on the number of cases in which Application Note 4 was applied.

9) Technical

This amendment makes various technical changes to the *Guidelines Manual*. The Commission estimates that these amendments will have no impact on sentencing or the Bureau of Prisons population.