

Prison and Sentencing Impact Assessments for 2024 Guideline Amendments to the Federal Sentencing Guidelines

For a complete description of the 2024 amendments, please visit https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202404_prelim-rf.pdf.

1) Rule for Calculating Loss

This proposed amendment would address a decision from the Third Circuit (*United States v. Banks*)¹ regarding the validity and enforceability of Application Note 3(A) of the Commentary to §2B1.1 to ensure consistent loss calculation across circuits. The proposed amendment would create Notes to the loss table in §2B1.1(b)(1) and move the general rule establishing loss as the greater of actual loss or intended loss from the commentary to the guideline itself as part of the Notes. The proposed amendment would also move the rule providing for the use of gain as an alternative measure of loss, as well as the definitions of “actual loss,” “intended loss,” “pecuniary harm,” and “reasonably foreseeable pecuniary harm” from the commentary to the Notes. The amendment would also make corresponding changes to several other guidelines.

The Commission estimates that approximately 750 individuals sentenced under §2B1.1 in fiscal year 2022 were sentenced using intended loss. Of those 750 individuals, approximately 50 were sentenced in the Third Circuit before the *Banks* decision. Therefore, the Commission estimates that approximately 50 people each year would be affected by the amendment. Because the amendment moves the loss rule from the commentary into the guidelines, the amendment would increase the loss calculations in these cases.

Commission data indicates that cases involving intended loss had higher loss amounts and longer sentences, on average, than those involving actual loss. However, due to the fact-specific nature of the loss calculation, the Commission cannot estimate the extent of any increase in the cases that would be affected by the amendment. Because of the small number of cases affected each year, the amendment would have a negligible impact on the Bureau of Prisons population.

2) Youthful Individuals

The proposed amendment would, among other things, add language specifically providing for a downward departure for cases in which the defendant was youthful at the time of the offense or prior offenses, and set forth considerations for the court relating to youthful individuals. Because departures are given at the court’s discretion, the Commission cannot estimate how many individuals may be impacted by this amendment each year.

¹ *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022).

3) Acquitted Conduct

The proposed amendment would, among other things, amend the *Guidelines Manual* to address the use of acquitted conduct for purposes of determining a sentence. It would provide that relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.

The Commission estimates that in fiscal year 2022 there were 286 cases in which the defendant was acquitted of one or more of the charges against them. These cases represent 17.7 percent of the cases in which a defendant was convicted after a trial in fiscal year 2022, but just 0.4 percent of the 62,529 cases in which an individual was sentenced that year. The Commission is unable to determine whether and to what extent the court may have relied upon any of the offense conduct related to the count or counts for which the individual was acquitted in determining the guideline range; therefore, the Commission is unable to estimate the impact on the sentences in those cases had the proposed amendment been in effect when those individuals were sentenced. However, given the small number of cases that would be affected each year, the impact on the Bureau of Prisons population would be negligible.

4) Circuit Conflicts

This proposed amendment addresses certain circuit conflicts involving §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). The proposed amendment contains two parts (Part A and Part B).

Part A would amend §2K2.1 to address a circuit conflict concerning whether a serial number must be illegible in order to apply the 4-level increase in §2K2.1(b)(4)(B)(i) for a firearm that “had an altered or obliterated serial number.” Between fiscal years 2018 and 2022, courts sentenced 38,422 individuals under §2K2.1. Of those, 2,304 (6.0%) received a 4-level increase under §2K2.1(b)(4)(B) for an altered or obliterated serial number. Of these, 703 individuals were sentenced in circuits (Fourth, Fifth, and Eleventh) that issued opinions² on this provision that would be affected by this amendment.

The Commission does not collect information on why the enhancement at §2K2.1(b)(4)(B) was applied and, therefore, cannot determine the extent to which any individual case might be affected by the amendment. For that reason, the Commission cannot provide an estimate of the impact on sentencing or on the Bureau of Prisons population from Part A of the amendment.

Part B would amend the Commentary to §2K2.4 to address a circuit conflict concerning whether subsection (c) of §3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. § 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. § 924(c) based on the drug trafficking count.

² United States v. Millender, 791 F. App’x 782 (11th Cir. 2019); United States v. Harris, 720 F.3d 499 (4th Cir. 2013); United States v. Perez, 585 F.3d 880 (5th Cir. 2009).

Between fiscal years 2018 and 2022, 933 individuals sentenced for drug trafficking offenses under §2D1.1 also had a conviction under 18 U.S.C. § 922(g), as well as 18 U.S.C. § 924(c). Of those 933 cases, 852 (91.32%) only have one guideline computation recorded, meaning that multiple counts likely grouped. The remaining 81 cases have multiple guideline computations, and pursuant to §3D1.4, assigned units to counts that did not otherwise group. Of the 81 cases, about one-quarter (27.2%) are in the Seventh Circuit, which has held that felon-in-possession and drug trafficking counts cannot be grouped.³

Because of the fact-specific nature of the grouping rules, the Commission cannot estimate the impact of the amendment on the sentences imposed in cases where the grouping rules might have been applied in a manner inconsistent with the amendment. However, due to the small number of cases that appear to be affected by the proposed amendment annually, the impact on the size of the Bureau of Prisons population would be negligible.

5) Miscellaneous

This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues. The proposed amendment contains five parts (Parts A through E).

Part A of the proposed amendment responds to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115–232 (Aug. 13, 2018). Part A of the proposed amendment would amend Appendix A and the Commentary to §2M5.1 to reflect the new United States Code section numbers relating to export controls for national security and foreign policy.

Three individuals have been sentenced under §2M5.1 for violations of 50 U.S.C. § 4819 between the date of passage of the ECRA in 2019 and fiscal year 2022. Due to this small number of cases that would be affected by the proposed amendment, the impact on sentences cannot be estimated. The impact on the Bureau of Prisons population would be negligible.

Part B of the proposed amendment would amend the specific offense characteristic at §2S1.3(b)(2)(B) to reflect the additional enhanced penalty factor under 31 U.S.C. §§ 5322(b), 5324(d), and 5336. Specifically, it would revise the 2-level enhancement at §2S1.3(b)(2)(B) to also apply if the defendant committed the offense “while violating another law of the United States.”

From fiscal year 2018 to fiscal year 2022, 127 individuals with a conviction under a relevant subchapter II statute also violated another law of the United States and, therefore, appear to qualify for the enhancement under the amendment. Of these 127 individuals, 12 received a two-level increase at §2S1.3(b)(2). Therefore, the Commission estimates that 115 individuals may qualify for a two-level enhancement under the amendment. Due to the small number of individuals (an average of approximately 25 each fiscal year) that would potentially be affected by the proposed amendment, the impact on sentencing would be negligible. Consequently, any increase in the sentences imposed in these cases also would have a negligible impact on the BOP population.

³ United States v. Sinclair, 770 F.3d 1148, 1157–58 (7th Cir. 2014).

Part C of the proposed amendment would amend Appendix A and the Commentary to §2R1.1 to replace the reference to 15 U.S.C. § 3(b) with a reference to 15 U.S.C. § 3(a). From fiscal year 2018 to fiscal year 2022, only one individual was convicted under 15 U.S.C. § 3, with conduct that corresponds to the conduct proscribed at subsection 3(a). Therefore, the amendment would have a negligible impact on the Bureau of Prisons population.

Part D of the proposed amendment would amend §2D1.1(a)(1)–(4) to provide that the base offense levels in those provisions apply if the defendant was convicted of an offense under 21 U.S.C. § 841 or 21 U.S.C. § 960 to which the applicable enhanced penalty applies, or if the parties stipulate to the applicable offense described in those provisions for purposes of calculating the guideline range under §1B1.2 (Applicable Guidelines) or stipulate to any such base offense level.

Between fiscal years 2018 and 2022, 92 individuals were sentenced under one of the alternative base offense levels at §§2D1.1(a)(1) or (a)(3). Of those, 90 were sentenced under §2D1.1(a)(1) and two were sentenced under §2D1.1(a)(3). An additional 478 individuals were sentenced under the alternative base offense levels at §2D1.1(a)(2) (n=476) and §2D1.1(a)(4) (n=2). In total, these 570 death or serious bodily injury cases accounted for less than one percent of the 89,250 individuals sentenced for drug trafficking during those years.

The Commission has no data upon which to estimate how charging practices may change in response to the amendment. Therefore, the Commission cannot estimate the sentencing impact of the amendment or its effect on the Bureau of Prisons population.

Part E of the proposed amendment would amend §4C1.2(b)(2) to expand the definition of “sex offense” at §4C1.1(b)(2) to cover all offenses described in the listed provisions instead of only offenses perpetrated against minors.

In fiscal year 2021, 19 individuals were sentenced who would be excluded under the more expansive definition of “sex offense” in the amendment. However, eight of those individuals were excluded by another part of §4C1.1; therefore, the net increase in the number of individuals excluded by the amendment is 11. Due to the small number of individuals who would be affected by the amendment annually the impact on sentences cannot be estimated. The impact on the BOP population would be negligible.

6) Technical

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