

# PRIMER



# SUPERVISED RELEASE

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*Prepared by the Office of General Counsel, U.S. Sentencing Commission*

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This primer provides a general overview of the imposition and revocation of supervised release.<sup>1</sup> A variety of statutes, guidelines and policies govern different aspects of the supervised release framework, and this primer is not a substitute for independent research and primary authority. To the extent this primer and its appendices identify case law, it is not intended to be a comprehensive compilation of cases addressing these issues.

## I. INTRODUCTION

If a sentencing court orders a term of incarceration, the court may also impose a term of supervised release to follow the incarceration. The *Guidelines Manual* in Part D of Chapter Five addresses the length and conditions of the supervised release term. The court also has authority to modify a supervised release term, including terminating or extending the term. Once a defendant is serving a term of supervised release, if the defendant violates one or more of the conditions, the court may decide whether to continue or revoke the supervised release and whether to modify the conditions of supervision or impose a term of incarceration for the violation. Chapter Seven of the *Guidelines Manual* addresses violations of the conditions of supervised release.<sup>2</sup>

The length of a term of supervised release and the conditions of the supervised release are covered by guidelines in Chapter Five of the *Guidelines Manual*. Specifically, §5D1.2 (Term of Supervised Release) addresses the length, and §5D1.3 (Conditions of Supervised Release) addresses the mandatory and discretionary conditions of supervised release.

Chapter Seven of the *Guidelines Manual* addresses violations of the conditions of supervised release. In particular, §§7B1.1-1.4 cover the classification and reporting of violations and possible responses to a violation, including revocation and imprisonment.

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<sup>1</sup> Portions of this primer are adapted from the United States Sentencing Commission publication [FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE](#) (2010) [hereinafter Supervised Release Report], which contains additional information, including legislative history of the supervised release statutes and data.

<sup>2</sup> Under 28 U.S.C. § 994(a)(3), Congress directed the Commission to promulgate “guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.” To date, the Commission has promulgated policy statements only.

## A. IMPOSITION OF SUPERVISED RELEASE

A term of supervised release may be imposed by the court at the time of initial sentencing.<sup>3</sup> A court must impose a term of supervised release if it is required by the statute of conviction. For example, supervised release is mandated by statute for certain offenses involving domestic violence,<sup>4</sup> kidnapping of a minor,<sup>5</sup> drug trafficking<sup>6</sup> and sex offenses.<sup>7</sup> A term of supervised release is not required by statute for other cases.<sup>8</sup> Under the guidelines, a term of supervised release also should follow any sentence of incarceration exceeding one year,<sup>9</sup> unless a term is not required by statute and the defendant is a “deportable alien” who is likely to be removed after imprisonment.<sup>10</sup> According to data compiled in 2010 by the U.S. Sentencing Commission, federal courts almost always imposed supervised release following incarceration, whether or not it was required by statute.<sup>11</sup>

In determining whether to impose a term of supervised release not mandated by statute, section 3583 of Title 18 U.S.C., requires a court to consider most of the same factors it considers when imposing a term of imprisonment. However, according to the relevant statute and guideline, the court is *not* directed to consider whether the supervised release term is necessary “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”<sup>12</sup> In addition to considering the statutory

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<sup>3</sup> 18 U.S.C. § 3583(a).

<sup>4</sup> 18 U.S.C. § 3583(a) (for a domestic violence crime as defined by 18 U.S.C. § 3561(b)) (In 2014, the Commission amended the commentary to §5D1.4, providing that supervised release is highly recommended in cases involving domestic violence or stalking offenses that are not subject to the mandatory imposition of supervised release.).

<sup>5</sup> 18 U.S.C. § 3583(k) (any offense under section 1201 involving a minor victim).

<sup>6</sup> See 21 U.S.C. §§ 841, 846, 960 and 963.

<sup>7</sup> 18 U.S.C. § 3583(k).

<sup>8</sup> 18 U.S.C. § 3583(a). See also *Johnson v. United States*, 529 U.S. 694, 709 (2000) (supervised release departed from the parole system it replaced by giving district courts the “freedom to provide post-release supervision for those, and only those, who needed it”); *United States v. Parker*, 508 F.3d 434, 442 (7th Cir. 2007) (“*Booker* is applicable in this context; supervised release is discretionary absent a separate statutory provision making it mandatory.”).

<sup>9</sup> USSG §5D1.1(a)(2).

<sup>10</sup> USSG §5D1.1(c).

<sup>11</sup> See Supervised Release Report, *supra* note 1, at 4, 52.

<sup>12</sup> 18 U.S.C. § 3583(c); USSG §5D1.1 comment. (n.3(A)). See Supervised Release Report at 9 (“The legislative history indicates that section 3553(a)(2)(A) was not included for consideration under 18 U.S.C. § 3583(c) because the primary purpose of supervised release is to facilitate the integration of offenders back into the community rather than punish them.”).

factors, the guidelines recommend that the court also consider the defendant's criminal history<sup>13</sup> and whether he is a substance abuser.<sup>14</sup>

## B. LENGTH OF THE TERM

Where a term of supervised release is not otherwise provided by statute, a court may impose a maximum term of one, three, or five years, depending upon the class of the offense.<sup>15</sup>

<i>Offense of Conviction</i>	<i>Maximum Supervised Release Term</i>
Class A felony (punishable by life) Class B felony (punishable by 25 years or more)	Five years
Class C (punishable by 10-25 years) Class D felony (punishable by 5-10 years)	Three years
Class E felony (punishable by 1-5 years) Class A Misdemeanor (punishable by 6 months-1 year)	One year

Longer terms apply to many offenses involving child victims, terrorism, drug offenses, and sex offenses.<sup>16</sup> Where a case involves multiple counts of conviction, the court should impose separate terms of supervised release for each count, but run them concurrently.<sup>17</sup>

## II. CONDITIONS OF SUPERVISED RELEASE

If the court imposes a term of supervised release, it will consider an array of mandatory and discretionary conditions of supervision. Appendix A, attached to this primer, provides a list summarizing the various mandatory and discretionary conditions that are set forth in the supervised release guidelines and statutes. Following each condition summary, Appendix A provides a citation to the relevant guideline provision as well as any statutory references to the provision.<sup>18</sup>

<sup>13</sup> USSG §5D1.1 comment. (n.3(B)).

<sup>14</sup> USSG §5D1.1 comment. (n.3(C)); USSG §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

<sup>15</sup> 18 U.S.C. §§ 3583(b), 3559. *See also, e.g.*, United States v. Guzman-Bruno, 27 F.3d 420, 423 (9th Cir. 1994) (plain error to sentence defendant to term of supervised release exceeding statutory maximum.)

<sup>16</sup> 18 U.S.C. §§ 3583(j)-(k).

<sup>17</sup> 18 U.S.C. § 3624(e).

<sup>18</sup> Some conditions of supervised release are expressly provided by 18 U.S.C. § 3583, the statute concerning supervised release. In addition, Section 3583 states that the court has discretion to order any of

A number of supervised release conditions have been challenged on appeal. Although circuit courts often uphold the conditions imposed, there are a number of reported cases in which circuit courts have reversed conditions.<sup>19</sup> In those cases, circuit courts have provided a variety of reasons for reversing conditions imposed by sentencing courts. For example, circuit courts have reversed certain conditions, among other reasons, as vague and overbroad, insufficiently explained, not reasonably related to relevant statutory sentencing factors, and a greater deprivation of liberty than reasonably necessary.

In general, the probation office is responsible for implementing the conditions imposed by the court, and in doing so can exercise discretion. For example, one of the standard conditions is that “the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons [. . .].”<sup>20</sup>

## A. MANDATORY CONDITIONS OF SUPERVISED RELEASE

### 1. All Offenders

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Mandatory conditions of supervised release are set forth in 18 U.S.C. § 3583(d) and USSG §5D1.3(a). These mandatory conditions include that a defendant not commit another offense while on supervision; refrain from unlawful use of controlled substances and submit to drug testing; make restitution to the victim of the offense; and submit to the collection of a DNA sample, among others.

### 2. Sex Offenders

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Congress has enacted one mandatory condition of release pertaining specifically to sex offenders. That condition provides that, if the offender is required to register under the

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the discretionary conditions of probation set out in Section 3563(b), the statute that sets out conditions of probation. Accordingly, Appendix A references both the supervised release statute and the probation statute.

<sup>19</sup> For a recent discussion examining these issues, *see* *United States v. Siegel*, 753 F.3d 705 (7th Cir. 2014). *See also* *United States v. Ramos*, 763 F.3d 45 (1st Cir. 2014) (prohibition against access to internet without P.O.’s approval for ten year supervised release term was not reasonably related to his characteristics and history, and thus deprived him of more liberty than reasonably necessary to achieve goals of sentencing). *But see* *United States v. Gnrke*, 775 F.3d 1155 (9th Cir. 2015) (condition that prohibited defendant from possessing any depictions of “sexually explicit conduct” infringed on defendant’s First Amendment rights, but the Ninth Circuit narrowed the condition to make it constitutional instead of remanding to the district court).

<sup>20</sup> USSG §5D1.3(c)(5).

Sex Offender Registration and Notification Act (“SORNA”),<sup>21</sup> the court shall order, as a condition of supervised release, that the defendant comply with the requirements of that Act.<sup>22</sup>

## **B. DISCRETIONARY CONDITIONS OF SUPERVISED RELEASE**

In addition to the mandatory conditions of supervised release, a district court has statutory authority to impose additional conditions of supervised release at its discretion.<sup>23</sup> Many districts have set forth standard conditions of supervision in general orders, usually available on the court’s website. Sentencing courts have discretion to impose any of the conditions listed in §5D1.3 or to create and impose “any other condition it considers to be appropriate.”

A discretionary supervised release condition may be imposed if it:

- (1) is “reasonably related” to the statutory sentencing factors in 18 U.S.C. §§ 3553(a)(1) and 3553(a)(2)(B) - (D), which include the nature and circumstances of the offense, the history and characteristics of the defendant, the need to protect the public from further crimes of the defendant, and the need to provide needed educational or vocational training, medical care, or other correctional treatment;
- (2) involves “no greater deprivation of liberty than is reasonably necessary” to serve the purposes of deterrence, protection of the public, and training and treatment;<sup>24</sup> and
- (3) is consistent with any policy statements issued by the Sentencing Commission.

A number of appellate courts have addressed discretionary conditions imposed by sentencing courts, including the conditions listed in the guideline as well as conditions created by the courts.<sup>25</sup>

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<sup>21</sup> Title I of the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248); 18 U.S.C. §§ 3563(a)(8), 3583(d), 4209(a). *See also* 18 U.S.C. § 2250 (failure to register).

<sup>22</sup> 18 U.S.C. § 3583(d); USSG §§5D1.3(a)(7)(A) and (B).

<sup>23</sup> *See* 18 U.S.C. § 3563(b), enumerating discretionary conditions of probation.

<sup>24</sup> 18 U.S.C. § 3583(d); *United States v. Zinn*, 321 F.3d 1084, 1089 (11th Cir. 2003).

<sup>25</sup> *See, e.g., Siegel*, 753 F.3d 705 (7th Cir. 2014) (remanded for reconsideration of several vaguely worded and contradictory conditions of supervised release). *See also U.S. v. Kappes*, 782 F.3d 828 (7th Cir. 2015) (condition of supervised release must be appropriately tailored, adequately justified, and orally pronounced after proper notice).

## **1. “Standard” Conditions**

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The guidelines recommend that the court impose in every case the 15 “standard” conditions of supervised release set forth in §5D1.3(c). These standard conditions include requiring the defendant to obtain permission to leave the area, to report to the probation office as directed, to maintain or seek employment, to avoid excessive alcohol use and any use of a controlled substance without a prescription, and to report any contact with law enforcement to the probation office, among others.

## **2. “Special” Conditions**

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USSG Section 5D1.3(d) recommends that the court impose “special” conditions for particular kinds of cases. Generally, the special conditions are recommended if the offender committed a particular type of offense, or if the court finds certain facts about the offender’s personal characteristics. The guidelines also note that conditions such as residence in a halfway house, home detention, curfews, and intermittent confinement may be appropriate in some cases, although these conditions are more commonly imposed in response to a violation of supervised release.

### **a. Offense-specific special conditions**

*Weapons.* If the offense of conviction is a felony, or if the defendant used a weapon in the course of committing the offense, the guidelines recommend a condition prohibiting possession of a firearm or other dangerous weapon.

*Sex Offenses.* The guidelines recommend three special conditions if the offense of conviction is a sex offense. The guidelines define the term “sex offense” for this purpose by reference to specific statutes.<sup>26</sup> The conditions are: to require the defendant to participate in a treatment and monitoring program; to limit the use of a computer or access to the internet if the defendant used computers or the internet in committing the offense; and to require the defendant to permit law enforcement to search his person or property if law enforcement has a reasonable suspicion that the defendant violated the terms of supervised release or committed any other unlawful act.

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<sup>26</sup> The statutes are listed in USSG §5D1.2, cmt. n. 1 (In 2014, the Commission amended the commentary to § 5D1.2 to clarify that failure to register offenses under 18 U.S.C. § 2250 are not “sex offenses.”)



## b. Offender-Specific Special Conditions

*Substance Abuse.* The guidelines recommend that the court require a defendant to participate in a substance abuse program if the court finds that the defendant is an abuser of narcotics, other controlled substances or alcohol.

*Mental Health.* Similarly, the guidelines recommend that the court require a defendant to participate in a mental health treatment program if the court finds that the defendant is in need of such treatment.

*Financial Limitations.* If the defendant is ordered to pay restitution, forfeiture, or a fine, the guidelines recommend that the court require the defendant to disclose financial information to the probation office. If the court sets forth an installment schedule for the payment of restitution or a fine, the guidelines recommend that the court prohibit the defendant from taking on additional debt without prior approval.

## III. SERVICE OF SUPERVISED RELEASE

A term of supervised release commences following the defendant's release from his or her sentence of imprisonment, including any transitional community-based confinement.<sup>27</sup> Supervision begins when the defendant is actually released, and not when release should have occurred.<sup>28</sup> Unless the sentence is less than 30 days, incarceration during a term of supervised release does not count towards the supervised release term.<sup>29</sup> Time spent in a halfway house or other community facility *after* release generally does

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<sup>27</sup> 18 U.S.C. § 3624(e) ("A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer . . . . The term of supervised release commences on the day the person is released from imprisonment . . . ."); *see also* United States v. Miller, 547 F.3d 1207 (9th Cir. 2008) (inmate's term of supervised release did not commence when the Federal Bureau of Prisons transferred him to a custodial work-release program for the final portion of his federal prison sentence).

<sup>28</sup> United States v. Johnson, 529 U.S. 53, 57 (2000) (where some convictions were overturned on appeal, and therefore the defendant was imprisoned longer than authorized, the terms of supervised release on the remaining convictions did not begin until he was released).

<sup>29</sup> 18 U.S.C. § 3624(e). This included home detention if it was part of the custodial portion of the defendant's sentence. United States v. Earl, 729 F.3d 1064, 1068 (9th Cir. 2013).

count towards the term of supervision,<sup>30</sup> as does release on bond for another offense committed after release.<sup>31</sup>

#### IV. EARLY TERMINATION OF SUPERVISED RELEASE

A court may terminate supervised release “at any time after the expiration of one year of supervised release . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interests of justice.”<sup>32</sup> The guidelines “encourage . . . [courts] to exercise this authority in appropriate cases,” particularly noting that a court may impose a longer term of supervised release on a defendant with a drug, alcohol or other addiction, but may then terminate the supervised release term early when a defendant “successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.”<sup>33</sup> A court may terminate supervised release early even if the statute of conviction originally required a particular term of supervised release.<sup>34</sup>

#### V. VIOLATIONS OF SUPERVISED RELEASE

If a defendant violates one of the conditions of supervised release, the court may modify the conditions, terminate the supervised release before the original expiration date, or revoke supervised release and impose a term of imprisonment.<sup>35</sup> Chapter Seven of the *Guidelines Manual* contains policy statements that classify violations, recommend when probation officers should report violations to the court, recommend when courts should revoke supervised release, and recommend terms of imprisonment for classes of violations. A court must consider the same factors from 18 U.S.C. § 3553(a) that the court initially considered in imposing the term of supervised release.<sup>36</sup>

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<sup>30</sup> See, e.g., *United States v. Sullivan*, 504 F.3d 969 (9th Cir. 2007) (an offender’s time in custody at a state pre-release center, which was similar to a half-way house, was not imprisonment that tolled the offender’s federal supervised release).

<sup>31</sup> See, e.g., *United States v. House*, 501 F.3d 928 (8th Cir. 2007) (supervised release term ran when defendant was released on bond on state charges, but supervised release was tolled when defendant began serving state prison sentence).

<sup>32</sup> 18 U.S.C. § 3583(e)(1).

<sup>33</sup> USSG §5D1.2, cmt. n. 5.

<sup>34</sup> See, e.g., *United States v. Spinelle*, 41 F.3d 1056, 1069 (6th Cir. 1994); *United States v. Gainer*, 936 F.Supp. 785, 786 (D. Kan. 1996); *United States v. Scott*, 362 F. Supp. 2d 982, 984 (N.D. Ill. 2005); *United States v. McClister*, 2008 WL 153771, \*2 (D. Utah 2008); but see *United States v. Hernandez-Flores*, 2012 WL 119609, \*4 (D. N.M. 2012) (expressing reservations, but declining to reach the issue because the defendant’s conduct did not merit early termination even if the court had the authority to grant it).

<sup>35</sup> 18 U.S.C. § 3583(e).

<sup>36</sup> *Id.*

## **A. MODIFICATION OF SUPERVISED RELEASE**

A court may modify the term or conditions of supervised release following a contested hearing,<sup>37</sup> through a voluntary consent to the modification and waiver of hearing, or if “the relief sought is favorable to the [offender] and does not extend the term of . . . supervised release” and the attorney for the government is given notice and a reasonable opportunity to object but does not do so.<sup>38</sup> A court may extend the term of supervision (after a hearing or by consent of the defendant) only “if less than the maximum authorized term was previously imposed.”<sup>39</sup>

## **B. REVOCATION OF SUPERVISED RELEASE**

### ***1. Statutory Provisions***

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A court is required to revoke supervised release and impose some amount of imprisonment when:

- (1) an offender possesses a controlled substance under some circumstances (discussed below);
- (2) an offender unlawfully possesses a firearm;
- (3) an offender refuses to comply with drug testing imposed as a condition of supervised release; or
- (4) an offender has four positive drug tests over the course of one year.<sup>40</sup>

In the case of a federal sex offender who is required to register under SORNA, revocation of the offender’s supervised release is mandatory if the court finds that the offender “commit[ted]” a specified offense while on supervised release.<sup>41</sup> In such a case, the

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<sup>37</sup> Fed. R. Crim. P. 32.1(c)(1).

<sup>38</sup> Fed. R. Crim. P. 32.1(c)(2). *See also* United States v. Johnson, 446 F.3d 272 (2nd Cir. 2006) (after probation officer’s petition requesting additional conditions, district court modified certain conditions without a hearing and modified other conditions only after a hearing).

<sup>39</sup> 18 U.S.C. § 3583(e)(2).

<sup>40</sup> 18 U.S.C. § 3583(g).

<sup>41</sup> 18 U.S.C. § 3583(k). These predicate crimes include child pornography offenses, sexual abuse of minors, and kidnaping.

court must sentence the offender to a term of imprisonment of “not less than 5 years” and is not limited by the provisions in 18 U.S.C. § 3583(e)(3) governing revocation proceedings.

The statute provides a limited exception to the requirement that a court incarcerate an offender for possessing drugs: if a failed drug test constitutes the sole evidence of drug possession, and if the court finds that an offender would benefit from “an appropriate substance abuse treatment program,” the court may substitute drug abuse treatment for imprisonment.<sup>42</sup> This exception is not available if a court finds that a defendant had been in actual *knowing* possession of illegal drugs (as opposed to merely failing a drug test).<sup>43</sup>

## ***2. Guideline Policy Statements***

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Sections 7B1.1 through 7B1.3 of the guidelines set forth three grades of violations of supervised release conditions — Grades A through C. Violations resulting in revocation are grouped into three broad “grades” of conduct ranging from the commission of certain serious felonies, other felonious conduct, to misdemeanors and technical violations. Recommended ranges of imprisonment are determined by a sentencing table based on the grade of the violation and the defendant’s Criminal History Category, as determined at the defendant’s initial sentencing.

Section 7B1.2 recommends when the probation officer should report the violation to the court, and section 7B1.3 recommends when the court should revoke the term of supervised release. The following table summarizes these recommendations:

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<sup>42</sup> 18 U.S.C. § 3583(d).

<sup>43</sup> See *United States v. Hammonds*, 370 F.3d 1032, 1035-36 (10th Cir. 2004). Cf. *United States v. Robles*, 447 Fed. Appx. 892 (10th Cir. 2012), *United States v. Pierce*, 132 F.3d 1207, 1208 (8th Cir. 1997).

Grade	Conduct	Reporting	Revocation
<b>A</b>	constitutes a federal, state or local offense punishable by more than one year of imprisonment that either: <ul style="list-style-type: none"> <li>• is a crime of violence or a drug trafficking offense; or</li> <li>• involves possession of a firearm or destructive device; <b>or</b> constitutes any other federal, state or local offense punishable by <i>more than twenty years</i> of imprisonment</li> </ul>	probation officer shall promptly report to the court	court shall revoke
<b>B</b>	constitutes any other federal, state or local offense punishable by <i>more than one year</i> of imprisonment	probation officer shall promptly report to the court	court shall revoke
<b>C</b>	constitutes a federal, state or local offense punishable by <i>one year or less</i> of imprisonment; <b>or</b> is a violation of any other condition of supervised release	probation officer shall promptly report to the court <i>unless</i> <ul style="list-style-type: none"> <li>• minor, not part of a pattern, and</li> <li>• no risk to the public</li> </ul>	court may revoke, extend term or modify conditions

Notably, a conviction for a new offense is not necessary for a finding of a violation, and proof of culpable conduct by a preponderance of the evidence is sufficient for revocation.<sup>44</sup>

Although part of USSG §7B1.3 is written in mandatory terms (“the court shall revoke”) for Grade A and B violations, as previously noted, Chapter Seven of the Guidelines Manual contains only non-binding policy statements. The only truly mandatory grounds for revocation are the four grounds set forth in 18 U.S.C. § 3583(g), which are discussed above. In all other cases in which a violation is found, the court may opt not to revoke supervised release and incarcerate the offender and, instead, continue him or her on supervision (under the same terms or with modified terms), extend the term of supervision, or sentence the offender to a term of home detention in lieu of incarceration.<sup>45</sup> Before doing

<sup>44</sup> USSG §7B1.1, comment. (n.1) (“The grade of violation does not depend on conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant’s actual conduct.”).

<sup>45</sup> 18 U.S.C. § 3583(e)(1)-(4).

so, however, the court must first consider the pertinent provisions in Chapter Seven of the guidelines.<sup>46</sup>

## C. SENTENCING FOLLOWING REVOCATION

### 1. Statutory Provisions

The statutory maximum term of imprisonment that may be imposed upon revocation is governed by 18 U.S.C. § 3583(e)(3). There are two limits on the term of imprisonment. It may not be longer than the term of supervised release the court could have originally imposed, and it may not be longer than a specified number of years, depending on the class of the original offense: for class A felonies, 5 years; for class B felonies, 3 years; for class C or D felonies, 2 years; for any other offense, 1 year. The supervised release statute that was in effect at the time of the original offense controls.<sup>47</sup>

### 2. Policy Statements

The revocation table at §7B1.4 provides ranges of imprisonment for each violation grade with increasing severity based on an offender’s criminal history category at the time of the original sentencing. An offender’s criminal history category at the time of the revocation hearing — even if it would be greater or lesser than the original criminal history category — is not factored into the guidelines’ revocation table. This revocation table is entirely separate from the Sentencing Table in Chapter 5, Part A of the *Guidelines Manual*, which applies at original sentencing hearings.

Grade of Violation	Criminal History Category						
	I	II	III	IV	V	VI	
A	Class A felony	24-30	27-33	30-37	37-46	46-57	51-63
		12-18	15-21	18-24	24-30	30-37	33-41
B		4-10	6-12	8-14	12-18	18-24	21-27
C		3-9	4-10	5-11	6-12	7-13	8-14

<sup>46</sup> 18 U.S.C. §§ 3553(a), 3583(e).

<sup>47</sup> See, e.g., *United States v. Smith*, 354 F.3d 171 (2d Cir. 2003); *United States v. Fareed*, 296 F.3d 243 (4th Cir. 2002).

Note that the revocation table divides Grade A violations into two categories, depending on the seriousness of the defendant's original offense of conviction – in other words, not the conduct that led to the violation, but the offense that led to the original terms of imprisonment and supervised release. If the original offense of conviction was itself a Class A felony, and the violation is a Grade A, the table contains higher ranges.

### **3. Concurrent and Consecutive Sentences**

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Under 18 U.S.C. § 3584, district courts have discretion whether to impose consecutive or concurrent sentences of imprisonment; this statute applies to prison terms for violations of supervised release as well.<sup>48</sup> Likewise, in the case of a new federal offense resulting in both a new sentence and a revocation of an existing term of supervised release, a court may decide whether to impose a sentence of imprisonment for the new offense to run concurrently with or consecutively to the revocation sentence (unless the new offense carries a mandatory consecutive prison sentence).<sup>49</sup> Such discretion exists notwithstanding provisions in the advisory guidelines that call for a consecutive sentence in such cases.<sup>50</sup>

## **VI. APPELLATE ISSUES**

A term of supervised release will be reviewed for reasonableness in light of the court's stated reasons, as with a sentence of imprisonment.<sup>51</sup>

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<sup>48</sup> See, e.g., *United States v. Xinidakis*, 598 F.3d 1213 (9th Cir. 2010); *United States v. Gonzalez*, 250 F.3d 923 (5th Cir. 2001).

<sup>49</sup> *United States v. Rodriguez-Quintanilla*, 442 F.3d 1254, 1256 (10th Cir. 2006).

<sup>50</sup> See USSG §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment), comment. (n.3(C)) (“[I]n cases in which the defendant was on . . . supervised release at the time of the instant offense and has had such . . . supervised release revoked[,] . . . the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.”); *id.*, USSG §7B1.3(f) (“Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.”).

<sup>51</sup> See, e.g., *United States v. Presto*, 498 F.3d 415, 418 (6th Cir. 2007) (discussing procedural and substantive reasonableness of lifetime term of supervised release); *United States v. Hayes*, 445 F.3d 536, 527 (2nd Cir. 2006). *But see* *United States v. O’Georgia*, 569 F.3d. 281, 289 (6th Cir. 2009) (where a district court has articulated § 3553(a) factors in imposing its sentence, a repetition of those factors in support of a term of supervised release would serve no useful purpose in the ordinary case).

## A. APPEAL OF CHALLENGED CONDITIONS

Challenges to conditions of supervised release are ordinarily reviewed on appeal for abuse of discretion,<sup>52</sup> although the issue of “whether a supervised release condition illegally exceeds the [district court’s statutory authority] or violates the Constitution is reviewed *de novo*.”<sup>53</sup> Unpreserved claims that a district court imposed an invalid condition raised for the first time on appeal are reviewed only for “plain error” under Federal Rule of Criminal Procedure 52(b).<sup>54</sup>

## B. APPEAL OF REVOCATION DECISIONS

The issue of whether a district court had jurisdiction to revoke supervised release is reviewed *de novo*.<sup>55</sup> The district court’s factual findings that a defendant violated the conditions of release are reviewed for clear error; legal conclusions are reviewed *de novo*.<sup>56</sup> If the government proved by a preponderance of the evidence that the defendant violated a valid condition of supervised release, the district court’s decision to revoke supervised release is reviewed for abuse of discretion.<sup>57</sup> With respect to appellate review of the type and length of the sentence imposed upon revocation, the federal courts of appeals are divided over whether sentences are reviewed under a *Booker*-type “reasonableness” standard or, instead, under the “plainly unreasonable” standard that uniformly was followed in supervised release appeals before *Booker*.<sup>58</sup>

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<sup>52</sup> See, e.g., *United States v. Watson*, 582 F.3d 974, 981 (9th Cir. 2009); *United States v. Stults*, 575 F.3d 834 (8th Cir. 2009); *United States v. Theilemann*, 575 F.3d 265 (3d Cir. 2009).

<sup>53</sup> See, e.g., *Watson*, 582 F.3d at 981.

<sup>54</sup> See, e.g., *United States v. Weatheron*, 567 F.3d 149, 152 (5th Cir. 2009).

<sup>55</sup> See, e.g., *United States v. Johnson*, 581 F.3d 1310 (11th Cir. 2009).

<sup>56</sup> See, e.g., *United States v. Farmer*, 567 F.3d 343 (8th Cir. 2009); *United States v. Kontrol*, 554 F.3d 1089 (6th Cir. 2009).

<sup>57</sup> See, e.g., *United States v. Black Bear*, 542 F.3d 249 (8th Cir. 2008). See also *United States v. Disney*, 253 F.3d 1211 (10th Cir. 2001) (district court abused its discretion when it revoked defendant’s supervised release for inquiring into address of DEA case agents because inquiry did not violate statute proscribing threats or intimidation of law enforcement officers); *United States v. Turner*, 312 F.3d 1137 (9th Cir. 2002) (district court abused its discretion in revoking defendant’s supervised release where record did not support court’s finding that defendant had incurred new debt).

<sup>58</sup> Compare, e.g., *United States v. Bungar*, 478 F.3d 540 (3d Cir. 2007) (“reasonableness” standard), with *United States v. Crudup*, 461 F.3d 433 (4th Cir. 2006) (“plainly unreasonable” standard). See also *United States v. Sweeting*, 437 F.3d 1105 (11th Cir. 2006) (holding that “unreasonable” and “plainly unreasonable” have essentially the same meaning).



### C. RIPENESS AND MOOTNESS ISSUES ON APPEAL

On a regular basis, appellate courts must decide whether a defendant's challenge to a condition of supervised release is ripe when raised on direct appeal of the original sentence (as opposed to being raised on appeal of a judgment revoking supervised release for a violation of the challenged condition). The courts of appeals have issued inconsistent decisions regarding ripeness of challenges to conditions raised on direct appeal.<sup>59</sup> Similarly, the courts are divided as to whether an appeal from a judgment of revocation is the appropriate point at which to challenge a condition when the challenge was not originally made on direct appeal.<sup>60</sup> Finally, courts have held that a defendant's challenge to the district court's revocation of supervised release on appeal is moot if the defendant has been unconditionally released from all types of custody (including any recommended term of supervised release) at the time that the appellate court hears the appeal.<sup>61</sup>

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<sup>59</sup> Compare, e.g., *United States v. Lee*, 502 F.3d 447 (6th Cir. 2007) (on direct appeal of his original sentence, defendant's challenge to a condition requiring penile plethysmograph testing was deemed not ripe for review; court held that his challenge could not be brought until after he was released from prison because there was no guarantee he would ever be subject to the test; if a probation officer sought to implement that condition, the defendant could move to modify the condition under 18 U.S.C. § 3583(e)(2) and appeal if he were to lose), with *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006) (defendant's challenge to plethysmograph testing as supervised release condition was ripe for review on direct appeal and prior to the defendant's release from prison). See also *United States v. Myers*, 426 F.3d 117 (2d Cir. 2005) (challenge to constitutionality of condition that defendant convicted of possessing child pornography could not visit with his son unless supervised was ripe prior to release from imprisonment because a motion to modify the condition after release under 18 U.S.C. § 3583(e)(2) cannot challenge the lawfulness of the condition).

<sup>60</sup> See, e.g., *United States v. Brimm*, 302 F. App'x 588, 589 (9th Cir. 2008) ("We also reject the government's contention that Brimm waived the right to appeal the conditions of his supervised release because he waited until after he violated the conditions before he challenged them. Compare *United States v. Jeremiah*, 493 F.3d 1042, 1044, 1046 (9th Cir. 2007) (finding jurisdiction to hear the appellant's challenges to the conditions of his supervised release during an appeal of the revocation of supervised release)", with *United States v. Ofchinick*, 937 F.2d 892, 897 (3d Cir. 1991) ("We deem an order to be ripe for appeal in the present context when a . . . condition of probation . . . is imposed, and failure to timely appeal will result in a waiver. The imposition of such a condition or sanction, if opposed, creates a controversy worthy of adjudication and is of sufficient immediacy to establish ripeness.").

<sup>61</sup> See, e.g., *United States v. Hardy*, 545 F.3d 280, 284 (4th Cir. 2008) ("courts considering challenges to revocations of supervised release have universally concluded that such challenges also become moot when the term of imprisonment for that revocation ends").

## APPENDIX A

### LIST OF CONDITIONS

This appendix provides a list summarizing the various mandatory and discretionary conditions that are set forth in the supervised release guidelines and statutes. Following each condition summary is a citation to the relevant guideline provision as well as any statutory references to the provision.<sup>62</sup>

#### I. MANDATORY CONDITIONS

- The defendant shall not commit another federal, state, or local offense. *See* USSG §5D1.3(a)(1), 18 U.S.C. § 3583(d).
- The defendant shall not unlawfully possess a controlled substance. *See* USSG §5D1.3(a)(2), U.S.C. § 3583(d).
- For a domestic violence crime as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a public, private, or non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant. *See* USSG §5D1.3(a)(3), 18 U.S.C. §§ 3583(d).
- The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant. *See* USSG §5D1.3(a)(4), 18 U.S.C. § 3583(d).
- If a fine imposed has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (*see* 18 U.S.C. § 3624(e)). *See* USSG §5D1.3(a)(5), 18 U.S.C. § 3624(e).

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<sup>62</sup> The statute referenced is primarily 18 U.S.C. § 3583, the statute that sets out the conditions of supervised release. The summaries also reference specific sections of 18 U.S.C. § 3563, the statute that sets out the conditions of probation, wherever the supervised release statute references conditions that are set forth in the probation statute.

- The defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. *See* USSG §5D1.3(a)(6).
- 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 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. *See* USSG §5D1.3(a)(7)(A) & (B), 18 U.S.C. § 3583(d).
- The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a). *See* USSG §5D1.3(a)(8), 18 U.S.C. § 3583(d).

## II. DISCRETIONARY CONDITIONS

### A. “STANDARD” DISCRETIONARY CONDITIONS

- The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer. *See* USSG §5D1.3(c)(1), 18 U.S.C. § 3563(b)(13)-(14);
- 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. *See* USSG §5D1.3(c)(2), 18 U.S.C. § 3563(b)(15).
- The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer. *See* USSG §5D1.3(c)(3), 18 U.S.C. § 3563(b)(17).
- 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). *See* USSG §5D1.3(c)(4), 18 U.S.C. § 3563(b)(1) & (b)(20).

- The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons. *See* USSG §5D1.3(c)(5), 18 U.S.C. § 3563(b)(4).
- The defendant shall notify the probation officer at least ten days prior to any change of residence or employment. *See* USSG §5D1.3(c)(6), 18 U.S.C. § 3563(b)(17).
- 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. *See* USSG §5D1.3(c)(7), 18 U.S.C. § 3563(b)(7);
- The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court. *See* USSG §5D1.3(c)(8), 18 U.S.C. § 3563(b)(6).
- 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. *See* USSG §5D1.3(c)(9), 18 U.S.C. § 3563(b)(6).
- 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. *See* USSG §5D1.3(c)(10), 18 U.S.C. § 3563(b)(16).
- The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer. *See* USSG §§5D1.3(c)(11), 18 U.S.C. § 3563(b)(18).
- 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. *See* USSG §5D1.3(c)(12).
- 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. *See* USSG §5D1.3(c)(13).

- The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment. *See* USSG §5D1.3(c)(14), 18 U.S.C. § 3563(a)(6)(B).
- The defendant must 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. *See* USSG §5D1.3(c)(15), 18 U.S.C. § 3563(a)(7).

## **B. "SPECIAL" DISCRETIONARY CONDITIONS**

- 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. *See* USSG §5D1.3(d)(1), 18 U.S.C. § 3563(b)(8).
- If an installment schedule of payment of restitution or a fine is imposed -- a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule. *See* USSG §5D1.3(d)(2).
- If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine -- a condition requiring the defendant to provide the probation officer access to any requested financial information. *See* USSG §5D1.3(d)(3).
- If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol -- a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol. *See* USSG §5D1.3(d)(4), 18 U.S.C. § 3563 (b)(9).
- If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment -- a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office. *See* USSG §5D1.3(d)(5), 18 U.S.C. § 3563(b)(9).
- If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228([d])(5)); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge. *See* USSG §5D1.3(d)(6), 18 U.S.C. § 3583(d).

- If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) -- (A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders. (B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items. (C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions. *See* USSG §5D1.3(d)(7)(A), (B) & (C), 18 U.S.C. § 3583(d).
- Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation, see §5F1.1 (Community Confinement). *See* USSG §5D1.3(e)(1), 18 U.S.C. § 3563(b)(11).
- Home detention may be imposed as a condition of probation but only as a substitute for imprisonment, see §5F1.2 (Home Detention). *See* USSG §5D1.3(e)(2).
- Community service may be imposed as a condition of probation, see §5F1.3 (Community Service). *See* USSG §5D1.3(e)(3), 18 U.S.C. § 3563(b)(12).
- Occupational restrictions may be imposed as a condition of probation, see §5F1.5 (Occupational Restrictions). *See* USSG §5D1.3(e)(4), 18 U.S.C. § 3563(b)(5).
- A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order. *See* USSG §5D1.3(e)(5), 18 U.S.C. § 3563(b)(19).
- Intermittent confinement (custody for intervals of time) may be ordered as a condition during the first year of supervision, see §5F1.8 (Intermittent Confinement). *See* USSG §5D1.3(e)(6), 18 U.S.C. § 3583(d).