UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice and request for public comment and hearing.

SUMMARY: The United States Sentencing Commission is considering promulgating amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth several issues for comment, some of which are set forth together with the proposed amendments, and one of which (regarding retroactive application of proposed amendments) is set forth in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES:

Written Public Comment. Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 14, 2023. Any public comment received after the close of the comment period may not be considered.

Public Hearing. The Commission may hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding any public hearing that may be scheduled, including requirements for testifying and providing written testimony, as well as the date, time, location, and scope of the hearing, will be provided by the Commission on its website at *www.ussc.gov.*

ADDRESSES: There are two methods for submitting public comment.

Electronic Submission of Comments. Comments may be submitted electronically via the Commission's Public Comment Submission Portal at *https://comment.ussc.gov.* Follow the online instructions for submitting comments.

Submission of Comments by Mail. Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle NE, Suite 2–500, Washington, DC 200002–8002, Attention: Public Affairs—Proposed Amendments.

FOR FURTHER INFORMATION CONTACT: Jennifer Dukes, Senior Public Affairs Specialist, (202) 502–4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. *See* USSC Rules of Practice and Procedure 2.2, 4.4. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. *See id.* 2.2; 28 U.S.C. 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline, policy statement, or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In summary, the proposed amendments and issues for comment set forth in this notice are as follows:

(1) A proposed amendment to § 1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. 3582(c)(1)(A) (Policy Statement)) to implement the First Step Act of 2018 (Pub. L. 115–391) and revise the list of circumstances that should be considered extraordinary and compelling reasons for sentence reductions under 18 U.S.C. 3582(c)(1)(A), and related issues for comment;

(2) A two-part proposed amendment to implement the First Step Act of 2018 (Pub. L. 115–391) including (A) (i) amendments to § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) to reflect the broader class of defendants who are eligible for safety valve relief under the First Step Act and to provide additional conforming changes; (ii) amendments to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to make conforming changes; (iii) two options for amending §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) in light of the proposed revisions to § 5C1.2; and (iv) related issues for comment; and (B) amendments to § 2D1.1 to make the guideline's base offense levels consistent with the First Step Act's changes to the type of prior offenses that trigger enhanced mandatory minimum penalties;

(3) A multi-part proposed amendment to § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to implement the Bipartisan Safer Communities Act (Pub. L. 117–159) and make other changes that may be warranted to appropriately address firearms offenses, including (A) amendments to Appendix A (Statutory Index) and two options for amending § 2K2.1 to address (i) the new offenses established by the Bipartisan Safer Communities Act and to increase penalties for offenses involving straw purchases and firearms trafficking as required by the directive contained in the Act; (ii) the part of the directive in the Bipartisan Safer Communities Act that requires the Commission to ''consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors''; (iii) the part of the directive in the Bipartisan Safer Communities Act that requires the Commission to ''review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under

section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual''; and (iv) related issues for comment; (B) amendments to § 2K2.1 in response to concerns expressed by some commenters that the guideline does not adequately address firearms that are not marked by a serial number (*i.e.,* ''ghost guns''), and a related issue for comment; and (C) a series of issues for comment on possible further revisions to § 2K2.1 that may be warranted to appropriately address firearms offenses;

(4) A two-part proposed amendment addressing certain circuit conflicts involving § 3E1.1 (Acceptance of Responsibility) and § 4B1.2 (Definitions of Terms Used in Section 4B1.1), including (A) amendments to § 3E1.1 to address circuit conflicts regarding the permissible bases for withholding a reduction under § 3E1.1(b), and a related issue for comment; and (B) two options for amending § 4B1.2 to address a circuit conflict concerning whether the definition of ''controlled substance offense'' in § 4B1.2(b) only covers offenses involving substances controlled by federal law, and a related issue for comment;

(5) A multi-part proposed amendment in response to recently enacted legislation, including (A) amendments to Appendix A (Statutory Index) and the Commentary to § 2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product) in response to the FDA Reauthorization Act of 2017 (Pub. L. 115–52), and to the Commentary to § 2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury) to make a technical correction, and a related issue for comment; (B) amendments to Appendix A, § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), and § 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), as well as bracketing the possibility of amending the Commentary to §§ 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and 5D1.2 (Term of Supervised Release), in response to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (Pub. L. 115–164), and related issues for comment; (C) amendments to Appendix A and § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle), as well as the Commentary to §§ 2A2.4 (Obstructing or Impeding Officers) and 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)), in response to the FAA Reauthorization Act of 2018 (Pub. L. 115–254), and a related issue for comment; (D) amendments to Appendix A and the Commentary to §§ 2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) in response to the SUPPORT for Patients and Communities Act (Pub. L. 115–271), and a related issue for comment; (E) amendments to Appendix A and the Commentary to § 2X5.2 in response to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 (Pub. L. 115–299), and a related issue for comment; (F) amendments to Appendix A and the Commentary to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information) in response to the Foundations for Evidence-Based Policymaking Act of 2018 (Pub. L. 115–435), and a related issue for comment; (G) amendments to Appendix A and the Commentary to § 2X5.2 in response to the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92), and a related issue for comment; (H) amendments to Appendix A and the Commentary to § 2B1.1 in response to the Representative Payee Fraud Prevention Act of 2019 (Pub. L. 116–126), and a related issue for comment; (I) amendments to Appendix A and the Commentary to § 2B1.1 in response to the Stop Student Debt Relief Scams Act of 2019 (Pub. L. 116–251), and a related issue for comment; (J) amendments to Appendix A in response to the Protecting Lawful Streaming Act of 2020, part of the Consolidation Appropriation Act, 2021 (Pub. L. 116–260), and related issues for comment; and (K) amendments to Appendix A and the Commentary to § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts) in response to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283), and a related issue for comment;

(6) A multi-part proposed amendment relating to § 4B1.2 (Definitions of Terms Used in Section 4B1.1), including (A) (i) amendments § 4B1.2 to eliminate the categorical approach from the guidelines by defining ''crime of violence'' and ''controlled substance offense'' based upon a list of guidelines, rather than offenses or elements of an offense; (ii) conforming changes to the guidelines that use the terms ''crime of violence'' and ''controlled substance offense'' and define these terms by making specific reference to § 4B1.2; and (iii) related issues for comment; (B) amendments to § 4B1.2 and the Commentary to § 2L1.2 (Unlawfully Entering or Remaining in the United States) to address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a ''crime of violence'' under § 4B1.2, as amended in 2016, because these offenses do not meet either the generic definition of ''robbery'' or the new guidelines definition of ''extortion,'' and related issues for comment; (C) two options for amending § 4B1.2 to address two circuit conflicts regarding the commentary provision stating that the terms ''crime of violence'' and ''controlled substance offense'' include the offenses of aiding and abetting, conspiring to commit, and attempting to commit a ''crime of violence'' and a ''controlled substance offense,'' and related issues for comment; and (D) revisions to the definition of ''controlled substance offense'' in § 4B1.2(b) to include offenses involving an offer to sell a controlled substance and offenses described in 46 U.S.C. 70503(a) and 70506(b), and a related issue for comment;

(7) A multi-part proposed amendment relating to criminal history, including (A) three options for amending the *Guidelines Manual* to address the impact of ''status points'' under subsection (d) of section 4A1.1 (Criminal History Category), and related issues for comment; (B) (i) two options for establishing a new Chapter Four guideline, at § 4C1.1 (Adjustment for Certain Zero-Point Offenders), that would provide an offense level decrease for offenders with zero criminal history points who meet certain criteria; (ii) amendments to the Commentary to § 5C1.1 (Imposition of a Term of Imprisonment) to address the alternatives to incarceration available to offenders with zero criminal history points who receive an adjustment under the proposed § 4C1.1, and conforming changes to § 4A1.3 (Departures Based on

Inadequacy of Criminal History Category (Policy Statement)) and Chapter One, Part A, Subpart 1(4)(d) (Probation and Split Sentences); and (iii) related issues for comment; (C) amendments to the Commentary to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to include sentences resulting from possession of marihuana offenses as an example of when a downward departure from the defendant's criminal history may be warranted, and related issues for comment;

(8) A proposed amendment to § 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) and § 6A1.3 (Resolution of Disputed Factors (Policy Statement)) to generally limit the use of acquitted conduct for purposes of determining the guideline range, except when such conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, the instant offense of conviction, and related issues for comment;

(9) A two-part proposed amendment to certain guidelines applicable to sexual abuse offenses, including (A) amendments to Appendix A (Statutory Index), § 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), and the Commentary to § 2H1.1 (Offenses Involving Individual Rights) in response to the Violence Against Women Act Reauthorization Act of 2022, which was part of the Consolidated Appropriations Act, 2022 (Pub. L. 117–103), and related issues for comment; and (B) amendments to § 2A3.3 to address concerns regarding the increasing number of cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody, care, or supervision, and related issues for comment;

(10) Issues for comment regarding a potential study of federal alternative-to-incarceration court programs and possible amendments to the *Guidelines Manual* to address such programs;

(11) A proposed amendment to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to address offenses involving ''fake pills'' (*i.e.,* illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills) containing fentanyl or fentanyl analogue, and a related issue for comment;

(12) A two-part proposed amendment addressing miscellaneous guideline issues, including (A) amendments to § 3D1.2 (Grouping of Closely Related Counts) to address the interaction between § 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) and § 3D1.2(d); and (B) amendments to the Commentary to § 5F1.7 (Shock Incarceration Program (Policy Statement)) to reflect the fact that the Bureau of Prisons no longer operates a shock incarceration program; and

(13) A multi-part proposed amendment to make technical and other non-substantive changes to the *Guidelines Manual,* including (A) technical changes to provide updated references to certain sections in the United States Code that were redesignated in legislation; (B) technical changes to reflect the editorial reclassification of certain sections in the United States Code; (C) technical changes throughout the Commentary to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to, among other things, reorganize in alphabetical order the controlled substances contained in the tables therein to make them more user-friendly; (D) technical changes to the commentary of several guidelines to provide references to the specific applicable provisions of 18 U.S.C. 876; (E) technical changes to the commentary of several guidelines in Chapter Eight (Sentencing of Organizations); and (F) clerical changes to correct typographical errors in several guidelines, policy statements, and commentary.

In addition, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any proposed amendment published in this notice should be included in subsection (d) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in § 1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2). The Background Commentary to § 1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under § 1B1.10(b) as among the factors the Commission considers in selecting the amendments included in § 1B1.10(d). To the extent practicable, public comment should address each of these factors.

The text of the proposed amendments and related issues for comment are set forth below. Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission's website at *www.ussc.gov.*

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 2.2, 4.3, 4.4.

Carlton W. Reeves,

Chair.

Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary

1. First Step Act—Reduction in Term of Imprisonment Under 18 U.S.C. 3582(c)(1)(A)

Synopsis of Proposed Amendment: This proposed amendment responds to the First Step Act of 2018, Public Law 115–391 (Dec. 21, 2018) (''First Step Act'' or ''Act''), which contains numerous provisions related to sentencing, prison programming, recidivism reduction efforts, and reentry procedures. Specifically, the sentencing reform provisions of the Act (1) amended the sentencing modification procedures set forth in 18 U.S.C. 3582(c)(1)(A) to allow a defendant to file a motion seeking a reduction in the defendant's term of imprisonment under certain circumstances; (2) reduced certain enhanced penalties imposed pursuant to 21 U.S.C. 851 for some repeat offenders and changed the prior offenses that qualify for such enhanced penalties; (3) broadened the eligibility criteria of the ''safety valve'' provision at 18 U.S.C. 3553(f); (4) limited the ''stacking'' of certain mandatory minimum penalties imposed under 18 U.S.C. 924(c) for multiple offenses that involve using, carrying, possessing, brandishing, or discharging a firearm in furtherance of a crime of violence or drug trafficking offense; and (5) allowed for retroactive application of the Fair Sentencing Act of 2010. Revisions to the *Guidelines Manual* may be appropriate to implement the Act's changes to 18 U.S.C. 3582(c)(1)(A).

The Sentencing Reform Act of 1984 (''SRA'') established a system of determinate sentencing, prohibiting a court from modifying a term of imprisonment once it had been imposed

except in certain instances specified in section 3582(c) of title 18, United States Code. One of those instances is set forth in 18 U.S.C. 3582(c)(1)(A), which authorizes a court to reduce the term of imprisonment of a defendant, after considering the factors in 18 U.S.C. 3553(a) to the extent they are applicable, 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).

Prior to the First Step Act, a court was authorized to grant a reduction in a defendant's term of imprisonment under section 3582(c)(1)(A) only ''upon motion of the Director of the Bureau of Prisons.'' Section 603(b) of the First Step Act amended 18 U.S.C. 3582(c)(1)(A) to allow a defendant to file a motion seeking a sentence reduction after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons (''BOP'') to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier.

Section 3582(c)(1)(A) does not define the phrase ''extraordinary and compelling reasons.'' Instead, the SRA directs that ''[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, 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.'' 28 U.S.C. 994(t). Section 994(t) also directs that ''[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.'' *Id.* The SRA provides the Commission with the authority to set the policy regarding what reasons should qualify as ''extraordinary and compelling reasons'' for a sentence reduction under section 3582(c)(1)(A) and the courts with the authority to find that the ''extraordinary and compelling reasons warrant such a reduction . . . and that such reduction is consistent with applicable policy statements issued by the Sentencing Commission.'' *See* 28 U.S.C. 994(a)(2)(C), 994(t), & 995(b); 18 U.S.C. 3582(c)(1)(A).

The Commission implemented the section 994(t) directive by promulgating the policy statement at § 1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. 3582(c)(1)(A) (Policy Statement)). *See* U.S. Sent'g Comm'n, *Guidelines Manual,* § 1B1.13 (Nov. 2021). Currently, § 1B1.13 provides only for motions filed by the Director of the BOP and does not account for motions filed by a defendant under the amended statute. The policy statement describes the circumstances that constitute ''extraordinary and compelling reasons'' in the Commentary to § 1B1.13. Application Note 1(A) through (C) provides for three categories of extraordinary and compelling reasons, *i.e.,* ''Medical Condition of the Defendant,'' ''Age of the Defendant,'' and ''Family Circumstances.'' *See* USSG § 1B1.13, comment. (n.1(A)–(C)). Application Note 1(D) provides that the Director of the BOP may determine whether there exists in a defendant's case ''other reasons'' that are extraordinary and compelling ''other than, or in combination with,'' the reasons described in Application Note 1(A) through (C). USSG § 1B1.13, comment. (n.1(D)).

The proposed amendment would implement the First Step Act's relevant provisions by amending § 1B1.13 and its accompanying commentary. Specifically, the proposed amendment would revise the policy statement to reflect that 18 U.S.C. 3582(c)(1)(A), as amended by the First Step Act, authorizes a defendant to a file a motion seeking a sentence reduction.

The proposed amendment would also revise the list of ''extraordinary and compelling reasons'' in § 1B1.13 in several ways.

First, the proposed amendment would move the list of extraordinary and compelling reasons from the Commentary to the guideline itself as a new subsection (b). The new subsection (b) would set forth the same three categories of extraordinary and compelling reasons currently found in Application Note 1(A) through (C) (with the revisions described below), add two new categories, and revise the ''Other Reasons'' category currently found in Application Note 1(D). New subsection (b) would also provide that extraordinary and compelling reasons exist under any of the circumstances, or a combination thereof, described in such categories.

Second, the proposed amendment would add two new subcategories to the ''Medical Condition of the Defendant'' category at new subsection (b)(1). The first new subcategory is for a defendant suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner. The other new subcategory is for a defendant who presents the following circumstances: (1) the defendant is housed at a correctional facility affected or at risk of being affected by an ongoing outbreak of infectious disease or an ongoing public health emergency declared by the appropriate governmental authority; (2) the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or ongoing public health emergency; and (3) such risk cannot be mitigated in a timely or adequate manner.

Third, the proposed amendment would modify the ''Family Circumstances'' category at new subsection (b)(3) in three ways. First, the proposed amendment would revise the current subcategory relating to the death or incapacitation of the caregiver of a defendant's minor child by making it also applicable to a defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition. Second, the proposed amendment would add a new subcategory to the ''Family Circumstances'' category for cases where a defendant's parent is incapacitated and the defendant would be the only available caregiver for the parent. Third, the proposed amendment brackets the possibility of adding a more general subcategory applicable if the defendant presents circumstances similar to those listed in the other subcategories of ''Family Circumstances'' involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member.

Fourth, the proposed amendment brackets the possibility of adding two new categories: (1) Victim of Assault (''The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody.''); and (2) Changes in Law (''The defendant is serving a sentence that is inequitable in light of changes in the law.'').

Fifth, the proposed amendment would revise the provision currently found in Application Note 1(D) of § 1B1.13. Three options are provided. All three options would redesignate this category as ''Other Circumstances'' and expand the scope of the category to apply to all motions filed under 18 U.S.C. 3582(c)(1)(A), regardless of whether such motion is filed by the Director of the BOP or the defendant. Option 1 would provide that this

category of extraordinary and compelling reasons applies in cases where a defendant presents any other circumstance or a combination of circumstances *similar in nature and consequence* to any of the circumstances described in paragraphs (1) through [(3)][(4)][(5)] of § 1B1.13. Option 2 would provide that that this category applies if, as a result of changes in the defendant's circumstances [or intervening events that occurred after the defendant's sentence was imposed], it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence. Option 3 would track the language in current Application Note 1(D) of § 1B1.13 and apply if the defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)].

Finally, the proposed amendment would move current Application Note 3 (stating that, pursuant to 28 U.S.C. 994(t), rehabilitation of a defendant is not, by itself, an extraordinary and compelling reason for purposes of § 1B1.13) into the guideline as a new subsection (c). In addition, as conforming changes, the proposed amendment would delete application notes 2 (concerning the foreseeability of extraordinary and compelling reasons), 4 (concerning a motion by the Director of the Bureau of Prisons), and 5 (concerning application of subdivision 3), and make a minor technical change to the Background commentary.

Issues for comment are also provided.

Proposed Amendment

Section 1B1.13 is amended—

by inserting at the beginning the following new heading: ''(a) *In General.*—'';

by striking ''Bureau of Prisons under'' and inserting ''Bureau of Prisons or the defendant pursuant to'';

and inserting at the end the following:

''(b) *Extraordinary and Compelling Reasons.*—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

(1) *Medical Circumstances of the Defendant.*—

(A) 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.

(B) 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.

(C) The defendant is suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner.

(D) The defendant presents the following circumstances—

(i) the defendant is housed at a correctional facility affected or at risk of being affected by (I) an ongoing outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;

(ii) the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and

(iii) such risk cannot be mitigated in a timely or adequate manner.

(2) *Age of the Defendant.*—The defendant (A) is at least 65 years old; (B) is experiencing a serious deterioration in physical or mental health because of the aging process; and (C) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(3) *Family Circumstances of the Defendant.*—

(A) The death or incapacitation of the caregiver of the defendant's minor child or the defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.

(B) 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.

(C) The incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

[(D) The defendant presents circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member.]

[(4) *Victim of Assault.*—The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody.]

[(5) *Changes in Law.*—The defendant is serving a sentence that is inequitable in light of changes in the law.]

[*Option 1:*

(6) *Other Circumstances.*—The defendant presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described in paragraphs (1) through [(3)][(4)][(5)].]

[*Option 2:*

(6) *Other Circumstances.*—As a result of changes in the defendant's circumstances [or intervening events that occurred after the defendant's sentence was imposed], it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence.]

[*Option 3:*

(6) *Other Circumstances.*—The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)].]

(c) *Rehabilitation of the Defendant.*—Pursuant to 28 U.S.C. 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.''.

The Commentary to § 1B1.13 captioned ''Application Notes'' is amended by striking it as follows:

''*Application Notes:*

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.

3. *Rehabilitation of the Defendant.*—Pursuant to 28 U.S.C. 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.

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 in 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.

5. *Application of Subdivision (3).*—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.''.

The Commentary to § 1B1.13 captioned ''Background'' is amended by striking ''the Commission is authorized'' and inserting ''the Commission is required''.

Issues for Comment

1. The proposed amendment would revise the list of ''extraordinary and compelling reasons'' in § 1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. 3582(c)(1)(A) (Policy Statement)) in several ways. The Commission invites comment on whether the proposed amendment—in particular proposed subsections (b)(5) and (6)—exceeds the Commission's authority under 28 U.S.C. 994(a) and (t), or any other provision of federal law.

2. The proposed amendment would make changes to § 1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. 3582(c)(1)(A) (Policy Statement)) and its corresponding commentary to implement the First Step Act of 2018, Public Law 115–391 (Dec. 21, 2018). The Commission seeks general comment on the proposed changes and whether the Commission should make any different or additional changes to implement the Act.

3. The proposed amendment would revise the categories of circumstances in which ''extraordinary and compelling reasons'' exist under the Commission's policy statement at § 1B1.13. The Commission adopted the policy statement at § 1B1.13 to implement the directive in 28 U.S.C. 994(t). As noted above, the directive requires the Commission 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.'' The Commission also has the authority to promulgate general policy statements regarding the 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 the appropriate use of the sentence modification provisions set forth in 18 U.S.C. 3582(c). *See* 28 U.S.C. 994(a)(2)(C).

The Commission seeks comment on whether the proposed categories of circumstances are appropriate and provide clear guidance to the courts and the Bureau of Prisons. Should the Commission further define and expand the categories? Should the Commission provide additional or different criteria or examples of circumstances that constitute ''extraordinary and compelling reasons''? If so, what specific criteria or examples should the Commission provide? Should the Commission consider an altogether different approach for describing ''what should be considered extraordinary and compelling reasons for sentence reduction''?

4. The proposed amendment brackets the possibility of adding a new category of ''extraordinary and compelling reasons'' to § 1B1.13 relating to defendants who are victims of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody. The Commission seeks comment on whether this provision should be expanded to include defendants who have been victims of sexual assault or physical abuse resulting in serious bodily injury committed by another inmate.

5. Section 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) sets forth the applicable policy statement for determining in what circumstances and to what extent a reduction in a term of imprisonment as a result of an amended guideline range may be granted. In *Dillon* v. *United States,* 560 U.S. 817 (2010), the Supreme Court held that proceedings under 18 U.S.C. 3582(c)(2) are not governed by *United States* v. *Booker,* 543 U.S. 220 (2005), and that § 1B1.10 remains binding on courts in such proceedings.

The Commission seeks comment on whether the proposed amendment—in particular proposed subsections (b)(5) and (6)—is in tension with the Commission's determinations regarding retroactivity of guideline amendments under § 1B1.10. If so, how should the Commission resolve this tension? Should the Commission clarify the interaction between § 1B1.10 and § 1B1.13? If so, how?

2. First Step Act—Drug Offenses

Synopsis of Proposed Amendment: This proposed amendment responds to the First Step Act of 2018, Public Law 115–391 (Dec. 21, 2018) (''First Step

Act'' or ''Act''), which contains numerous provisions related to sentencing, prison programming, recidivism reduction efforts, and reentry procedures. Although Commission action is not necessary to implement most of the First Step Act, revisions to the *Guidelines Manual* may be appropriate to implement the Act's changes to the eligibility criteria of the ''safety valve'' provision at 18 U.S.C. 3553(f), and the recidivist penalties for drug offenders at 21 U.S.C. 841(b) and 960(b). The proposed amendment contains two parts (Parts A and B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

(A) Safety Valve

Section 3553(f) of title 18, United States Code, allows a court to impose a sentence without regard to any statutory minimum penalty if it finds that a defendant meets certain criteria. As originally enacted, the safety valve applied only to offenses under 21 U.S.C. 841, 844, 846, 960, and 963 and to defendants who, among other things, had not more than one criminal history point, as determined under the guidelines. When it first enacted the safety valve, Congress directed the Commission to promulgate or amend guidelines and policy statements to ''carry out the purposes of [section 3553(f)].'' *See* Violent Crime Control and Law Enforcement Act of 1994, Public Law 103–322, 80001(b). The Commission implemented the directive by incorporating the statutory text of section 3553(f) into the guidelines at § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). Two other guidelines provisions, subsection (b)(18) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and subsection (b)(6) of § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), currently provide a 2-level reduction in a defendant's offense level if the defendant meets the criteria in paragraphs (1) through (5) of § 5C1.2(a).

Section 402 of the First Step Act expanded the safety valve provision at 18 U.S.C. 3553(f) in two ways. First, the Act extended the applicability of the safety valve to maritime offenses under 46 U.S.C. 70503 and 70506. Second, the Act amended section 3553(f)(1) to broaden the eligibility criteria of the safety valve to include defendants who do not have: (1) ''more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines''; (2) a ''prior 3-point offense, as determined under the sentencing guidelines''; and (3) a ''prior 2-point violent offense, as determined under the sentencing guidelines.'' The Act defines ''violent offense'' as a ''crime of violence,'' as defined in 18 U.S.C. 16, that is punishable by imprisonment. In addition, the First Step Act incorporated into section 3553(f) a provision instructing that ''[i]nformation disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.''

Following the enactment of the First Step Act, circuit courts have disagreed about how the word ''and'' connecting subsections (A) through (C) in section 3553(f)(1) operates. The Fifth, Sixth, Seventh, and Eighth Circuits have held that section 3553(f)(1) should be read to exclude a defendant who meets any single disqualifying condition listed in subsections (A) through (C). *See United States* v. *Palomares,* 52 F.4th 640, 642 (5th Cir. 2022) (''To be eligible for safety valve relief, a defendant must show that she does not have more than 4 criminal history points, does not have a 3-point offense, *and* does not have a 2-point violent offense.''); *United States* v. *Haynes,* 55 F.4th 1075 (6th Cir. 2022) (same); *United States* v. *Pace,* 48 F.4th 741, 756 (7th Cir. 2022) (''[A] defendant who meets any one of subsections (A), (B), or (C) does not qualify for safety-valve relief.''); *United States* v. *Pulsifer,* 39 F.4th 1018, 1022 (8th Cir. 2022) (''A court will find that § 3553(f)(1) is satisfied only when the defendant (A) does not have more than four criminal history points, (B) does not have a prior three-point offense, and (C) does not have a prior two-point violent offense.''). Specifically, the Eighth Circuit concluded that the word ''and'' is conjunctive in a ''distributive'' sense rather than in a ''joint'' sense. Thus, the phrase ''does not have'' is distributed across all three subsections (*i.e.,* should be read as repeated before each of the three conditions) such that a defendant is ineligible for safety valve relief if the defendant meets any one of the three conditions. *Pulsifer,* 39 F.4th at 1022 (''The distributive reading therefore gives meaning to each subsection in § 3553(f)(1), and we conclude that it is the better reading of the statute.''); *see also Palomares,* 52 F.4th at 642 (''We agree with the Eighth Circuit that Congress's use of an em-dash following 'does not have' is best interpreted to 'distribute' that phrase to each following subsection.''); *Haynes,* 55 F.4th at 1080 (''We agree with the Eighth Circuit that, of the interpretations on offer here, '[o]nly the distributive interpretation avoids surplusage.' '').

The Ninth and Eleventh Circuits, in contrast, have held that the ''and'' connecting subparagraphs (A), (B), and (C) of section 3553(f)(1) is ''conjunctive'' and joins together the enumerated characteristics in those provisions. *United States* v. *Lopez,* 998 F.3d 431 (9th Cir. 2021); *United States* v. *Garcon,* 54 F.4th 1274 (11th Cir. 2022) (en banc). Accordingly, a defendant ''must have (A) more than four criminal-history points, (B) a prior three-point offense, *and* (C) a prior two-point violent offense, cumulatively,'' to be disqualified from safety valve relief under section 3553(f). *Lopez,* 998 F.3d at 433. Unlike the Fifth, Sixth, and Eighth Circuits, the Ninth and Eleventh Circuits interpret the word ''and'' to be conjunctive in a ''joint,'' rather than ''distributive,'' sense.

Using fiscal year 2021 data, Commission analysis estimated that of 17,520 drug trafficking offenders, 11,866 offenders meet the non-criminal history requirements of the safety valve (18 U.S.C. 3553(f)(2)–(5)). Of those 11,866 offenders, 5,768 offenders have no more than one criminal history point and would be eligible under the unamended pre-First Step Act criminal history requirement. Under a disjunctive interpretation of the expanded criminal history provision, 1,987 offenders would become eligible. The remaining 4,111 offenders would be ineligible. In comparison, under the Ninth Circuit's conjunctive interpretation of the expanded criminal history provision, 5,778 offenders would become eligible. The remaining 320 offenders would be ineligible.

Part A of the proposed amendment would implement the provisions of the First Step Act expanding the applicability of the safety valve provision by amending § 5C1.2 and its corresponding commentary. Specifically, it would revise § 5C1.2(a) to reflect the broader class of defendants who are eligible for safety valve relief under the Act. Part A of the proposed amendment would also bracket a possible revision to the minimum offense level that § 5C1.2(b) requires for certain offenders. Revision of this provision, which implements a directive to the Commission in section 80001(b) of the Violent Crime Control and Law Enforcement Act of 1994, Public Law 103–222 (Sept. 13, 1994), may be appropriate given the expanded class of defendants who would qualify for safety

valve relief under the proposed revisions to § 5C1.2(a).

In addition, Part A of the proposed amendment would make changes to the Commentary to § 5C1.2. First, it would revise Application Note 1 by deleting the current language and adding the statutory definition for the term ''violent offense.'' Second, Part A of the proposed amendment brackets the possibility of adding a new application note stating that ''[i]n determining whether the defendant meets the criteria in subsection (a)(1), refer to § 4A1.1 (Criminal History Category) and § 4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category).'' Third, Part A of the proposed amendment would also revise Application Note 7, to implement the new statutory provision stating that information disclosed by a defendant pursuant to 18 U.S.C. 3553(f) may not be used to enhance the defendant's sentence unless the information relates to a violent offense. Finally, it would make additional technical changes to the rest of the Commentary by renumbering and inserting headings at the beginning of certain notes.

Part A of the proposed amendment would also make conforming changes to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)), which makes a specific reference to the number of criminal history points allowed by § 5C1.2(a)(1).

Finally, Part A of the proposed amendment would also make changes to § 2D1.1 and § 2D1.11, as the 2-level reductions in both guidelines are tethered to the eligibility criteria of paragraphs (1)–(5) of § 5C1.2(a). It provides two options for amending § 2D1.1(b)(18) and § 2D1.11(b)(6).

Option 1 would not make any substantive changes to § 2D1.1(b)(18) and § 2D1.11(b)(6), allowing their 2-level reductions to automatically apply to any defendant who meets the revised criteria of § 5C1.2. Because § 5C1.2(a)(1) would closely track the language in 18 U.S.C. 3553(f)(1), as amended by the First Step Act, the ''and'' used to set forth the criminal history criteria in § 5C1.2 might be read by some courts as *disjunctive* (*e.g.,* the courts in the Fifth, Sixth, Seventh, and Eighth Circuits) and by other courts as *conjunctive* (*e.g.,* the courts in the Ninth and Eleventh Circuits). Option 1 would not resolve the circuit conflict for purposes of § 2D1.1(b)(18) and § 2D1.11(b)(6).

Option 2 would amend § 2D1.1(b)(18) and § 2D1.11(b)(6) to provide that their 2-level reductions apply to all defendants who meet the criteria in § 5C1.2(a)(2)–(5). It would also incorporate into those provisions the same criminal history criteria from revised § 5C1.2(a)(1) but set forth the criteria *disjunctively,* consistent with the approach of the Fifth, Sixth, Seventh, and Eighth Circuits. As a result, a defendant would not be eligible for the 2-level reduction in § 2D1.1(b)(18) or § 2D1.11(b)(6) if the defendant presents *any* of the disqualifying conditions relating to criminal history.

Both options also would make changes to the Commentary to §§ 2D1.1 and 2D1.11 that correspond to the applicable provisions of the revised Commentary to § 5C1.2.

Part A of the proposed amendment also includes issues for comment.

(B) Recidivist Penalties for Drug Offenders

The most common drug offenses that carry mandatory minimum penalties are set forth in 21 U.S.C. 841 and 960. Under both provisions, the mandatory minimum penalties are tied to the quantity and type of controlled substance involved in an offense. Enhanced mandatory minimum penalties are set forth in 21 U.S.C. 841(b) and 960(b) for defendants whose instant offense resulted in death or serious bodily injury, *or* who have prior convictions for certain specified offenses. Greater enhanced mandatory minimum penalties are provided for those defendants whose instant offense resulted in death or serious bodily injury *and* who have a qualifying prior conviction.

Prior to the First Step Act, all of the recidivist penalty provisions within sections 841(b) and 960(b) provided for an enhanced mandatory minimum penalty if a defendant had one or more convictions for a prior ''felony drug offense,'' which is defined in 21 U.S.C. 802(44) as ''an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.'' Section 401 of the Act both narrowed and expanded the type of prior offenses that trigger enhanced mandatory minimum penalties under 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), and 960(b)(2). The Act narrowed the triggering prior offenses for these statutory provisions by replacing the term ''felony drug offense'' with ''serious drug felony.'' The term ''serious drug felony'' is defined in 21 U.S.C. 802(57) as ''an offense described in [18 U.S.C. 924(e)(2)] for which—(A) the offender served a term of imprisonment of more than 12 months; and (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.'' The Act also expanded the class of triggering offenses for the same statutory provisions by adding ''serious violent felony.'' The term ''serious violent felony'' is defined in 21 U.S.C. 802(58) as ''(A) an offense described in [18 U.S.C. 3559(c)(2)] for which the offender served a term of imprisonment of more than 12 months; and (B) any offense that would be a felony violation of [18 U.S.C. 113], if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months.'' The First Step Act did not amend 21 U.S.C. 841(b)(1)(C), 841(b)(1)(E), 960(b)(3), or 960(b)(5), which still provide for enhanced mandatory minimum penalties if a defendant was convicted of a prior ''felony drug offense.''

Part B of the proposed amendment would revise subsection (a) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to make the guideline's base offense levels consistent with the First Step Act's changes to the type of prior offenses that trigger enhanced mandatory minimum penalties. Specifically, the proposed amendment would revise subsections (a)(1) and (a)(3) to replace the term ''similar offense'' used in these guideline provisions with the appropriate terms set forth in the relevant statutory provisions, as amended by the First Step Act.

First, Part B of the proposed amendment would amend § 2D1.1(a)(1) and split it into two subparagraphs. Subparagraph (A) would provide for a base offense level of 43 for a defendant convicted under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. 960(b)(1) or (b)(2), where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a ''serious drug felony or serious violent felony.'' Subparagraph (B) would provide for a base offense level of 43 for a defendant convicted under 21 U.S.C. 841(b)(1)(C) or 21 U.S.C. 960(b)(3) where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a ''felony drug offense.''

Second, Part B of the proposed amendment would amend § 2D1.1(a)(3), which provides for a base offense level of 30 for a defendant convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5) where death or serious bodily injury resulted from the use of the substance and the defendant committed the offense after one or more prior convictions for a ''similar offense.'' Specifically, it would replace the term ''similar offense'' with ''felony drug offense,'' as provided in the relevant statutory provisions.

(A) Safety Valve

Proposed Amendment

Section 5C1.2(a) is amended—

by inserting after ''§ 963,'' the following: ''or 46 U.S.C. 70503 or § 70506,'';

by striking ''set forth below'' and inserting ''as follows'';

by striking paragraph (1) as follows:

''(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category);'';

and by inserting the following new paragraph (1):

''(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;''.

[Section 5C1.2(b) is amended by striking ''the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall not be less than 17'' and inserting ''the applicable guideline range shall not be less than 24 to 30 months of imprisonment''.]

The Commentary to § 5C1.2 captioned ''Application Notes'' is amended—

by striking Notes 1, 2, and 3 as follows:

''1. 'More than 1 criminal history point, as determined under the sentencing guidelines,' as used in subsection (a)(1), means more than one criminal history point as determined under § 4A1.1 (Criminal History Category) before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category).

2. 'Dangerous weapon' and 'firearm,' as used in subsection (a)(2), and 'serious bodily injury,' as used in subsection (a)(3), are defined in the Commentary to § 1B1.1 (Application Instructions).

3. 'Offense,' as used in subsection (a)(2)–(4), and 'offense or offenses that were part of the same course of conduct or of a common scheme or plan,' as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.'';

and inserting the following new Note 1 [and Note 2]:

''1. *Definitions.*—

(A) The term 'violent offense' means a 'crime of violence,' as defined in 18 U.S.C. 16, that is punishable by imprisonment.

(B) 'Dangerous weapon' and 'firearm,' as used in subsection (a)(2), and 'serious bodily injury,' as used in subsection (a)(3), are defined in the Commentary to § 1B1.1 (Application Instructions).

(C) 'Offense,' as used in subsection (a)(2)–(4), and 'offense or offenses that were part of the same course of conduct or of a common scheme or plan,' as used in subsection (a)(5), mean the offense of conviction and all relevant conduct.

[2. *Application of subsection (a)(1).*—In determining whether the defendant meets the criteria in subsection (a)(1), refer to § 4A1.1 (Criminal History Category) and § 4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category).]'';

by redesignating Note 4 as Note 3;

in Note 3 (as so redesignated) by inserting at the beginning the following new heading: ''*Application of subsection (a)(2).*—'';

by striking Notes 5, 6, and 7 as follows:

''5. 'Organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines,' as used in subsection (a)(4), means a defendant who receives an adjustment for an aggravating role under § 3B1.1 (Aggravating Role).

6. 'Engaged in a continuing criminal enterprise,' as used in subsection (a)(4), is defined in 21 U.S.C. 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. 848, and (ii) any defendant who 'engaged in a continuing criminal enterprise' but is convicted of an offense to which this section applies will be an 'organizer, leader, manager, or supervisor of others in the offense.'

7. Information disclosed by the defendant with respect to subsection (a)(5) may be considered in determining the applicable guideline range, except where the use of such information is restricted under the provisions of § 1B1.8 (Use of Certain Information). That is, subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant.'';

by inserting the following new Notes 4 and 5:

''4. *Application of Subsection (a)(4).*—

(A) *'Organizer, leader, manager, or supervisor of others in the offense'.*—The first prong of subsection (a)(4) requires that the defendant was not subject to an adjustment for an aggravating role under § 3B1.1 (Aggravating Role).

(B) *'Engaged in a continuing criminal enterprise'.*—'Engaged in a continuing criminal enterprise,' as used in subsection (a)(4), is defined in 21 U.S.C. 848(c). As a practical matter, it should not be necessary to apply this prong of subsection (a)(4) because (i) this section does not apply to a conviction under 21 U.S.C. 848, and (ii) any defendant who 'engaged in a continuing criminal enterprise' but is convicted of an offense to which this section applies will be an 'organizer, leader, manager, or supervisor of others in the offense.'

5. *Use of Information Disclosed under Subsection (a).*—Information disclosed by a defendant under subsection (a) may not be used to enhance the sentence of the defendant unless the information relates to a violent offense, as defined in Application Note 1(A).'';

by redesignating Notes 8 and 9 as Notes 6 and 7, respectively;

in Note 6 (as so redesignated) by inserting at the beginning the following new heading: ''*Government's Opportunity to Make Recommendation.*—'';

and in Note 7 (as so redesignated) by inserting at the beginning the following new heading: ''*Exemption from Otherwise Applicable Statutory Minimum Sentences.*—''.

The Commentary to § 5C1.2 captioned ''Background'' is amended by inserting after ''Violent Crime Control and Law Enforcement Act of 1994'' the following: ''and subsequently amended''.

Section 4A1.3(b)(3)(B) is amended—

in the heading by striking ''*to Category I*'';

by striking ''whose criminal history category is Category I after receipt of'' and inserting ''who receives'';

by striking ''criterion'' and inserting ''criminal history requirement'';

and by striking ''if, before receipt of the downward departure, the defendant had more than one criminal history point under § 4A1.1 (Criminal History Category)'' and inserting ''if the defendant did not otherwise meet such

requirement before receipt of the downward departure''.

[Option 1:

Section 2D1.1(b)(18) is amended by striking ''subdivisions'' and inserting ''paragraphs''.

[The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 21 by striking ''a minimum offense level of level 17'' and inserting ''that the applicable guideline range shall not be less than 24 to 30 months of imprisonment''.]

Section 2D1.11(b)(6) is amended by striking ''subdivisions'' and inserting ''paragraphs''.

[The Commentary to § 2D1.11 captioned ''Application Notes'' is amended in Note 7 by striking ''a minimum offense level of level 17'' and inserting ''an applicable guideline range of not less than 24 to 30 months of imprisonment''.]]

[Option 2:

Section 2D1.1(b)(18) is amended by striking the following:

''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.'',

and inserting the following:

''If the defendant—

(A) meets the criteria set forth in paragraphs (2)–(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases); and

(B) does not have any of the following:

(i) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense;

(ii) a prior 3-point offense; or

(iii) a prior 2-point violent offense;

as determined under § 4A1.1 (Criminal History Category) and § 4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category);

decrease by 2 levels.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 21 by striking the following:

''*Applicability of Subsection (b)(18).*—The applicability of subsection (b)(18) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section § 5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(18) applies.'',

and inserting the following:

''*Application of Subsection (b)(18).*—

(A) *General Applicability.*—The applicability of subsection (b)(18) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section § 5C1.2(b), which provides [a minimum offense level of level 17][that the applicable guideline range shall not be less than 24 to 30 months of imprisonment], is not pertinent to the determination of whether subsection (b)(18) applies.

(B) *Definition of Violent Offense.*—The term 'violent offense' means a 'crime of violence,' as defined in 18 U.S.C. 16, that is punishable by imprisonment.''.

Section 2D1.11(b)(6) is amended by striking the following:

''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.'',

and inserting the following:

''If the defendant—

(A) meets the criteria set forth in paragraphs (2)–(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases); and

(B) does not have any of the following:

(i) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense;

(ii) a prior 3-point offense; or

(iii) a prior 2-point violent offense;

as determined under § 4A1.1 (Criminal History Category) and § 4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category);

decrease by 2 levels.''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended in Note 7 by striking the following:

''*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').'',

and inserting the following:

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

(A) *General Applicability.*—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][an applicable guideline range of not less than 24 to 30 months of imprisonment] if the 'statutorily required minimum sentence is at least five years').

(B) *Definition of Violent Offense.*—The term 'violent offense' means a 'crime of violence,' as defined in 18 U.S.C. 16, that is punishable by imprisonment.''.]

Issues for Comment

1. As described above, Part A of the proposed amendment would make changes to § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and its corresponding commentary to implement the First Step Act of 2018, Public Law 115–391 (Dec. 21, 2018). The Commission seeks general comment on whether the Commission should make any different or additional changes to implement the Act.

2. Section 3553(f)(1) of title 18, United States Code, sets forth the criminal history criteria for the safety valve in subparagraphs (A) through (C). Each subparagraph sets forth the specific criminal history condition followed by the phrase ''as determined under the sentencing guidelines.'' Circuit courts have reached different conclusions about what constitutes a ''1-point,'' ''2-point,'' or ''3-point'' offense, and also seem to disagree on whether such interpretation arises from the statute itself or from proper guideline operation. *Compare, e.g., United States* v. *Garcon,* 54 F.4th 1274, 1280–84 (11th Cir. 2022) (en banc) (concluding that criminal history events are considered differently for purposes of subsections 3553(f)(1)(B) and (C) than subsection (A), and articulating that interpretation as primarily stemming from the statute), *with United States* v. *Haynes,* 55 F.4th 1075, 1080 (6th Cir. 2022) (''[Section] 3553(f)(1) refers only to 'prior 3-point' and 'prior 2-point violent' offenses 'as determined under the sentencing guidelines'—which means *all* the Guidelines, including § 4A1.2(e).''). The Commission seeks comment on whether it should provide guidance on what constitutes a ''1-point,'' ''2-point,'' or ''3-point'' offense, ''as determined under the sentencing guidelines,'' for purposes of § 5C1.2.

3. Part A of the proposed amendment provides two options for amending subsection (b)(18) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and subsection

(b)(6) of § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) in light of the proposed revisions to § 5C1.2(a), which reflect the changes to 18 U.S.C. 3553(f) enacted by the First Step Act.

Option 1 would leave the text of § 2D1.1(b)(18) and § 2D1.11(b)(6) unchanged, so that their offense-level reductions would apply to all defendants who meet the criteria in revised § 5C1.2(a)(1)–(5). As discussed above, a circuit conflict has arisen as to whether the ''and'' connecting the subparagraphs that set forth the criminal history criteria in 18 U.S.C. 3553(f)(1) operates *disjunctively* or *conjunctively.*

Option 2 of the proposed amendment would amend § 2D1.1(b)(18) and § 2D1.11(b)(6) to provide that their 2-level reductions would apply to all defendants who meet the criteria in § 5C1.2(a)(2)–(5). It would also incorporate into those provisions the same criminal history criteria from revised § 5C1.2(a)(1) but set forth the criteria *disjunctively,* so that the reductions would be available only to defendants who do not present any of the listed disqualifying conditions.

The Commission seeks comment on each of these options. Which option, if any, is appropriate? In the alternative, should the Commission incorporate into § 2D1.1(b)(18) and § 2D1.11(b)(6) the same criminal history criteria from revised § 5C1.2(a)(1) but set forth the criteria *conjunctively,* so that defendants must present all of the listed disqualifying conditions to be ineligible for their reductions? Should the Commission consider an altogether different approach? If so, what approach should the Commission provide and why?

(B) Recidivist Penalties for Drug Offenders

Proposed Amendment

Section 2D1.1(a)(1) is amended by striking the following:

''43, if the defendant is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant com-mitted the offense after one or more prior convictions for a similar offense; or'',

and inserting the following:

''43, if—

(A) the defendant is convicted under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. 960(b)(1) or (b)(2), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony; or

(B) the defendant is convicted under 21 U.S.C. 841(b)(1)(C) or 21 U.S.C. 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or''.

Section 2D1.1(a)(3) is amended by striking ''similar offense'' and inserting ''felony drug offense''.

The Commentary to § 2D1.1 caption ''Application Notes'' is amended—

by striking Note 2 as follows:

''2. *'Plant'.*—For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (*e.g.,* a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).'';

by redesignating Note 1 as Note 2;

and by inserting at the beginning the following new Note 1:

''1. *Definitions.*—

For purposes of the guidelines, a 'plant' is an organism having leaves and a readily observable root formation (*e.g.,* a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).

For purposes of subsection (a), 'serious drug felony,' 'serious violent felony,' and 'felony drug offense' have the meaning given those terms in 21 U.S.C. 802.''.

3. Firearms Offenses

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of possible amendments to § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to (A) implement the Bipartisan Safer Communities Act (Pub. L. 117–159); and (B) make any other changes that may be warranted to appropriately address firearms offenses. *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 87 FR 67756 (Nov. 9, 2022). The proposed amendment contains three parts (Parts A through C). The Commission is considering whether to promulgate any or all these parts, as they are not mutually exclusive.

Part A of the proposed amendment would amend § 2K2.1 to respond to the Bipartisan Safer Communities Act. Two options are presented. Issues for comment are also provided.

Part B of the proposed amendment addresses concerns expressed by some commenters about firearms that are not marked by a serial number (*i.e.,* ''ghost guns''). An issue for comment is also provided.

Part C of the proposed amendment provides issues for comment on possible further revisions to § 2K2.1.

(A) Bipartisan Safer Communities Act

Synopsis of Proposed Amendment: The Bipartisan Safer Communities Act (the ''Act''), among other things, created two new firearms offenses, amended definitions, increased penalties for certain firearms offenses, and contained a directive to the Commission relating to straw purchases and trafficking of firearms offenses.

Specifically, the Act created two new offenses at 18 U.S.C. 932 and 933. Section 932 prohibits knowingly purchasing, or conspiring to purchase, any firearm on behalf of, or at the request or demand of, another person with knowledge or reasonable cause to believe that such other person: (1) meets at least one of the criteria set forth in 18 U.S.C. 922(d); (2) intends to use, carry, possess, sell, or otherwise dispose of the firearm in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking crime; or (3) intends to sell or otherwise dispose of the firearm to a person who meets either of the previous criteria. *See* 18 U.S.C. 932(b). Section 933 prohibits: (1) shipping, transporting, transferring, causing to be transported, or otherwise disposing of, any firearm to another person with knowledge or reasonable cause to believe that the use, carrying, or possession of a firearm by the recipient would constitute a felony; (2) receiving from another person any firearm with knowledge or reasonable cause to believe that such receipt would constitute a felony; or (3) attempt or conspiracy to commit either of the acts described before. *See* 18 U.S.C. 933(a).

Both new offenses carry a statutory maximum term of imprisonment of 15 years. The statutory maximum term of imprisonment for offenses under section 932 increases to 25 years if the offense was committed with knowledge or reasonable cause to believe that any firearm involved will be used to commit a felony, a Federal crime of terrorism, or a drug trafficking crime. *See* 18 U.S.C. 932(c)(2).

In addition, the Act increased the statutory maximum term of imprisonment for the offenses under 18 U.S.C. 922(d), 922(g), 924(h), and 924(k) from ten to 15 years. The Act also made changes to the elements of some of these offenses. First, the Act expanded the scope of section 922(d) by adding two

additional categories of persons to whom it is unlawful to sell or otherwise dispose of any firearm or ammunition: (1) persons who intend to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, a Federal crime of terrorism, or a drug trafficking offense; and (2) persons who intend to sell or otherwise dispose of the firearm or ammunition to a person to whom sale or disposition is prohibited under the other categories in section 922(d). *See* 18 U.S.C. 922(d)(10)–(11).

Second, the Act amended section 924(h). Prior to the Act, section 924(h) prohibited knowingly transferring a firearm with knowledge that such firearm will be used to commit a crime of violence or drug trafficking crime. As amended by the Act, section 924(h) prohibits knowingly receiving or transferring a firearm or ammunition, or attempting or conspiring to do so, with knowledge or reasonable cause to believe that such firearm or ammunition will be used to commit a felony, a Federal crime of terrorism, a drug trafficking crime, or a crime under the Arms Export Control Act (22 U.S.C. 2751 *et seq.*), the Export Control Reform Act of 2018 (50 U.S.C. 4801 *et seq.*), the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), or the Foreign Narcotics Kingpin Designation Act (21 U.S.C. 1901 *et seq.*). *See* 18 U.S.C. 924(h).

Third, the Act also amended section 924(k). Prior to the Act, section 924(k) prohibited smuggling or knowingly bringing into the United States a firearm, or attempting to do so, with intent to engage in or to promote conduct that: (1) is punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or chapter 705 of title 46, United States Code; (2) violates any law of a State relating to any controlled substance; or (3) constitutes a crime of violence. Section 924(k), as amended by the Act, prohibits smuggling or knowingly bringing into or out of the United States a firearm or ammunition, or attempting or conspiring to do so, with intent to engage in or to promote conduct that: (1) is punishable under the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or chapter 705 of title 46, United States Code; or (2) constitutes a felony, a Federal crime of terrorism, or a drug trafficking crime. *See* 18 U.S.C. 924(k).

The Act also expanded the definition of ''misdemeanor crime of domestic violence'' at 18 U.S.C. 921(a)(33) to include offenses against a person in ''a current or recent former dating relationship.'' *See* 18 U.S.C. 921(a)(33)(A). In addition, the Act added a new provision to section 921(a)(33) indicating that a person is not disqualified from shipping, transporting, possessing, receiving, or purchasing a firearm under chapter 44 of title 18, United States Code, by reason of a conviction for a misdemeanor crime of domestic violence against an individual in a dating relationship if certain criteria are met. *See* 18 U.S.C. 921(a)(33)(C).

Finally, the Act includes a directive requiring the Commission, pursuant to its authority under 28 U.S.C. 994, to review and amend its guidelines and policy statements to ensure that persons convicted of an offense under section 932 or 933 of title 18, United States Code, and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines and policy statements for such straw purchasing and trafficking of firearms offenses. In its review, the Commission shall consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors. The Commission shall also review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.

Public Law 117–159, 12004(a)(5) (2022).

New Offenses and Increased Penalties for Straw Purchasing and Firearms Trafficking Offenses

Part A of the proposed amendment implements part of the directive of the Bipartisan Safer Communities Act by addressing the new offenses at 18 U.S.C. 932 and 933 and increasing penalties for other offenses applicable to straw purchases and trafficking of firearms. First, Part A of the proposed amendment would amend Appendix A (Statutory Index) to reference the new offenses at 18 U.S.C. 932 and 933 to § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). Offenses involving firearms trafficking and straw purchases are generally referenced to this guideline.

Second, Part A of the proposed amendment would amend § 2K2.1 to address the new offenses and increase penalties for offenses applicable to straw purchases and trafficking of firearms, as required by the directive. Two options are presented.

Option 1 addresses the new offenses at 18 U.S.C. 932 and 933 and increases penalties for offenses applicable to straw purchases and trafficking of firearms. It would accomplish this by adding references to the new offenses in § 2K2.1(a) and revising the firearms trafficking enhancement at § 2K2.1(b)(5) to apply to straw purchase and other trafficking offenses.

Specifically, Option 1 would add references to 18 U.S.C. 932 and 933 in subsections (a)(4)(B)(ii)(II) and (a)(6)(B). In addition, Option 1 would revise the 4-level enhancement for firearms trafficking at § 2K2.1(b)(5) to make it a tiered-enhancement applicable to defendants who transferred or intended to transfer firearms or ammunition to certain individuals, which would provide the requisite increase for a defendant convicted of violating 18 U.S.C. 922(d), 932, or 933(a)(1), as well as other offenses, including violations of 18 U.S.C. 922(a)(6) or 924(a)(1)(A) committed with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. The revised enhancement would also apply to defendants convicted under 18 U.S.C. 933(a)(2) or (a)(3). Specifically, a [1][2]-level enhancement would apply if the defendant was convicted under 18 U.S.C. 933(a)(2) or (a)(3). A [1][2]-level increase would apply if the defendant (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i). A [5][6]-level enhancement would apply if the defendant (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt

of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence; or (III) intended to use or dispose of the firearms unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i).

In addition, Option 1 would amend Application Note 13 to conform its content with the revised version of § 2K2.1(b)(5). It would also include a new provision in response to the changes that the Act made to section 921(a)(33). Specifically, the new provision states that new subsection (b)(5)(C) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual [had no prior conviction for a crime of violence or controlled substance offense and had not more than one conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, but 5 years had elapsed from the later of the judgment of conviction or the completion of the individual's custodial or supervisory sentence for such an offense and the individual had not subsequently been convicted of another such offense; a misdemeanor under federal, state, tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; or any other offense covered 18 U.S.C. 922(g)][met the criteria set forth in the proviso of 18 U.S.C. 921(a)(33)(C)]. In addition, Option 1 would amend the departure provision in Application Note 13 to provide that if the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms [or an unusually large amount of ammunition], an upward departure may be warranted.

Option 2 would restructure the base offense level provisions at § 2K2.1(a) by providing references to specific statutes with statutory maximum terms of imprisonment of 15 years or more. Option 2 identifies the ''other offenses applicable'' to trafficking and straw purchasing as those for which Congress increased penalties in the Act. As mentioned, the Act increased the maximum term of imprisonment from ten to 15 years for four offenses: 18 U.S.C. 922(d) (transferring a firearm or ammunition to a prohibited person); 922(g) (possession, receipt, or transfer of a firearm or ammunition by a prohibited person); 924(h) (transferring a firearm or ammunition to commit a felony); and 924(k) (smuggling a firearm or ammunition to commit a felony). The 15-year statutory maximum for these four offenses is the same as the new section 932 (without aggravating circumstances) and section 933 offenses. Three of the offenses with the amended statutory penalties (sections 922(g), 922(d), and 924(h)) share core elements with the new straw purchase (section 932) and trafficking (section 933) statutes: the transfer of a firearm to a felon or knowing it would be used to commit a felony; and the receipt of a firearm by a felon or knowing it would be used to commit a felony. The third (section 924(k)) similarly concerns itself with the intent to engage in or promote a further felony (after smuggling a firearm or ammunition into or out of the United States). Because the penalties and elements of these four offenses are similar to those of the new offenses, and they were modified by the same Act, Option 2 applies the increase to defendants convicted of those four offenses in addition to defendants convicted under 18 U.S.C. 932 and 933.

First, Option 2 would increase by [1][2] levels the base offense levels at subsections (a)(1) through (a)(3). Second, Option 2 would add a new provision at subsection (a)(4) that sets forth a base offense level of [21][22] if (A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or (B) (i) the defendant is convicted under 18 U.S.C. 922(d), 922(g), 924(h), 924(k), 932, or 933; and (ii) the offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. 5845(a). Third, Option 2 would delete current subsection (a)(4)(A) and make conforming changes to current subsection (a)(4)(B). Fourth, Option 2 would add a new provision at § 2K2.1(a)(7) that would set forth a new base offense level of [15][16] if the defendant was convicted under 18 U.S.C. 922(d), 922(g), 924(h), 924(k), 932, or 933. Fifth, Option 2 would delete current subsection (a)(6)(B). Sixth, Option 2 would amend the provision that follows § 2K2.1(b)(4) containing a cumulative impact ''cap,'' to increase such limit from level 29 to level [30][31]. Finally, Option 2 would add a new [1][2]-level reduction at § 2K1.1(b)(9) applicable if (A) the base offense level is determined under new subsection (a)(7); (B) none of the enhancements in subsection (b) apply; and (C) the offense of conviction established only the possession or receipt of firearms or ammunition.

Option 2 would also amend current Application Note 13(B) in response to the changes that the Act made to section 921(a)(33). The note currently provides that ''misdemeanor crime of violence'' has the meaning given that term in 18 U.S.C. 921(a)(33)(A). Option 2 would amend Application Note 13(B) to expressly provide that an individual shall not be considered an ''individual whose possession or receipt of the firearm would be unlawful'' [if, at the time of the instant offense, the individual was not otherwise covered by such definition and has not more than one conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, but 5 years had elapsed from the later of the judgment of conviction or the completion of the individual's custodial or supervisory sentence for such an offense and the individual had not subsequently been convicted of: another such offense; a misdemeanor under federal, state, tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; or any other offense covered by the definition of ''individual whose possession or receipt of the firearm would be unlawful''][based upon a conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, if the individual met the criteria set forth in the proviso of 18 U.S.C. 921(a)(33)(C) at the time of the instant offense].

''Straw Purchasers'' With Mitigating Factors

Part A of the proposed amendment also addresses the part of the directive that requires the Commission to ''consider, in particular, an appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors.'' *See* Public Law 117–159, § 12004(a)(5) (2022).

In response to the directive, Options 1 and 2 of Part A of the proposed amendment would add a new [1][2]-level reduction based on certain mitigating factors.

Option 1 would set forth the new [1][2]-level reduction at subsection (b)(9). The reduction would be applicable if the defendant (A) [receives

an enhancement under subsection (b)(5)][is convicted under (i) 18 U.S.C. 922(d), 932, or 933; or (ii) 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person]; (B) does not have more than 1 criminal history point, as determined under § 4A1.1 (Criminal History Category) and § 4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category); and (C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity].

Option 2 would set forth the new [1][2]-level reduction at subsection (b)(10). The reduction would be applicable if subsection (b)(9) does not apply and the defendant (A) is convicted under 18 U.S.C. 922(d), 924(h), 924(k), 932, or 933; (B) does not have more than 1 criminal history point, as determined under § 4A1.1 (Criminal History Category) and § 4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category); and (C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity].

In relation to this part of the directive, both options in Part A of the proposed amendment bracket the deletion of the departure provision at Application Note 15 of § 2K2.1.

Enhancement for Defendants With Criminal Affiliations

Finally, Part A of the proposed amendment addresses the part of the directive that requires the Commission to ''review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.'' *See* Public Law 117–159, § 12004(a)(5) (2022). Options 1 and 2 of Part A of the proposed amendment would provide a new [2][3][4]-level enhancement in response to this part of the directive.

Option 1 would set forth the new [2][3][4]-level enhancement at subsection (b)(8). The enhancement would be applicable if the defendant (A) [receives an enhancement under subsection (b)(5)][is convicted under (i) 18 U.S.C. 922(d), 932, or 933; or (ii) 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person]; (B) participated, at the time of the offense, in a group, club, organization, or association of five or more persons that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage in or have engaged in criminal activity; and (C) committed the offense with the intent to promote or further the felonious activities of, or with the intent to maintain or increase his or her position in, such group, club, organization, or association.

Option 2 would set forth the new [2][3][4]-level enhancement at subsection (b)(8). The enhancement would be applicable if the defendant (A) is convicted under (i) 18 U.S.C. 922(d), 932, or 933; or (ii) 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person; (B) participated, at the time of the offense, in a group, club, organization, or association of five or more persons that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage in or have engaged in criminal activity; and (C) committed the offense with the intent to promote or further the felonious activities of, or with the intent to maintain or increase his or her position in, such group, club, organization, or association.

Issues for Comment

Part A of the proposed amendment also provides issues for comment.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. 956 the following new line references:

''18 U.S.C. 932 2K2.1
18 U.S.C. 933 2K2.1''.

[Option 1 (Revised SOC Enhancement for Straw Purchase and Trafficking Offenses):

Section 2K2.1(a)(4)(B) is amended by inserting after ''18 U.S.C. 922(d)'' the following: '', § 932, or § 933''.

Section 2K2.1(a)(6)(B) is amended by inserting after ''18 U.S.C. 922(d)'' the following: '', § 932, or § 933''.

Section 2K2.1(b) is amended—

in paragraph (5) by striking ''If the defendant engaged in the trafficking of firearms, increase by 4 levels.'' and inserting the following:

''(Apply the Greatest) If the defendant—

(A) was convicted under 18 U.S.C. 933(a)(2) or (a)(3), increase by [1][2] levels;

(B) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, a firearm or any ammunition knowing or having reason to believe that such conduct would result in the receipt of the firearm or ammunition by an individual who (I) was a prohibited person; or (II) intended to use or dispose of the firearm or ammunition unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i), increase by [1][2] levels; or

(C) (i) transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, two or more firearms knowing or having reason to believe that such conduct would result in the receipt of the firearms by an individual who (I) had a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (II) was under a criminal justice sentence; or (III) intended to use or dispose of the firearms unlawfully; or (ii) attempted or conspired to commit the conduct described in clause (i), increase by [5][6] levels.'';

and by inserting at the end the following new paragraphs (8) and (9):

''(8) If the defendant—

(A) [receives an enhancement under subsection (b)(5)][is convicted under (i) 18 U.S.C. 922(d), 932, or 933; or (ii) 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person];

(B) participated, at the time of the offense, in a group, club, organization, or association of five or more persons that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage

in or have engaged in criminal activity; and

(C) committed the offense with the intent to promote or further the felonious activities of, or with the intent to maintain or increase his or her position in, such group, club, organization, or association;

increase by [2][3][4] levels.

(9) If the defendant—

(A) [receives an enhancement under subsection (b)(5)][is convicted under (i) 18 U.S.C. 922(d), 932, or 933; or (ii) 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person];

(B) does not have more than 1 criminal history point, as determined under § 4A1.1 (Criminal History Category) and § 4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category); and

(C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity];

decrease by [1][2] levels.''.

The Commentary to § 2K2.1 captioned ''Statutory Provisions'' is amended by inserting after ''(k)–(o),'' the following: ''932, 933,''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended—

in Note 3 by striking ''subsections (a)(4)(B) and (a)(6)'' and inserting ''subsections (a)(4)(B), (a)(6), (b)(5), [(b)(8), and (b)(9)]'';

in Note 10 by striking ''subsection (a)(1) and (a)(2)'' and inserting ''subsections (a)(1) and (a)(2)'';

in Note 13—

by striking paragraph (A) as follows:

''(A) *In General.*—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—

(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and

(ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—

(I) whose possession or receipt of the firearm would be unlawful; or

(II) who intended to use or dispose of the firearm unlawfully.'';

by redesignating paragraph (B) as paragraph (A);

in paragraph (A) (as so redesignated) by striking the first paragraph as follows:

'' 'Individual whose possession or receipt of the firearm would be unlawful' means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. 'Crime of violence' and 'controlled substance offense' have the meaning given those terms in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). 'Misdemeanor crime of domestic violence' has the meaning given that term in 18 U.S.C. 921(a)(33)(A).'',

and inserting the following:

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

'Misdemeanor crime of domestic violence' has the meaning given that term in 18 U.S.C. 921(a)(33)(A).

The term 'criminal justice sentence' includes probation, parole, supervised release, imprisonment, work release, or escape status.'';

by inserting the following new paragraph (B):

''(B) *Application of Subsection (b)(5)(C).*—Subsection (b)(5)(C) shall not apply based upon the receipt or intended receipt of the firearms by an individual with a prior conviction for a misdemeanor crime of domestic violence against a person in a dating relationship if, at the time of the instant offense, such individual [had no prior conviction for a crime of violence or controlled substance offense and had not more than one conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, but 5 years had elapsed from the later of the judgment of conviction or the completion of the individual's custodial or supervisory sentence for such an offense and the individual had not subsequently been convicted of another such offense; a misdemeanor under federal, state, tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; or any other offense covered in 18 U.S.C. 922(g)][met the criteria set forth in the proviso of 18 U.S.C. 921(a)(33)(C)].'';

and in paragraph (C) by striking ''If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted'' and inserting ''If the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms [or an unusually large amount of ammunition], an upward departure may be warranted''[;]

[and by striking Note 15 as follows:

''15. *Certain Convictions Under 18 U.S.C. 922(a)(6), 922(d), and 924(a)(1)(A).*—In a case in which the defendant is convicted under 18 U.S.C. 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.''].

[*Option 2 (Increase Penalties for Offenses with Statutory Maximum of 15 years or more):*

Section 2K2.1(a) is amended—

in paragraph (1) by striking ''26,'' and inserting ''[26][27][28],'';

in paragraph (2) by striking ''24,'' and inserting ''[24][25][26],'';

in paragraph (3) by striking ''22,'' and inserting ''[22][23][24],'';

by striking paragraph (4) as follows:

''(4) 20, if—

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

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. 922(d); or (III) is convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;'';

by redesignating paragraphs (5), (6), (7), and (8) as paragraphs (6), (8), (9), and (10), respectively;

by inserting the following new paragraphs (4) and (5):

''(4) [21][22], if—

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

(B) (i) the defendant is convicted under 18 U.S.C. 922(d), 922(g), 924(h),

924(k), 932, or 933; and (ii) the offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. 5845(a);

(5) 20, if the (A) offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. 5845(a); and (B) defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;'';

by inserting the following new paragraph (7):

''(7) [15][16], if the defendant is convicted under 18 U.S.C. 922(d), 922(g), 924(h), 924(k), 932, or 933;'';

and in paragraph (8) (as so redesignated) by striking ''(B) is convicted under 18 U.S.C. 922(d); or (C)'' and inserting ''or (B)''.

Section 2K2.1(b) is amended—

in paragraph (2) by striking ''(a)(4), or (a)(5)'' and inserting ''(a)(4), (a)(5), or (a)(6)'';

in the paragraph after paragraph (4) by striking ''level 29'' and inserting ''level [29][30][31]'';

and by adding at the end the following new paragraphs (8), (9), and (10):

''(8) If the defendant—

(A) is convicted under (i) 18 U.S.C. 922(d), 932, or 933; or (ii) 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(B) participated, at the time of the offense, in a group, club, organization, or association of five or more persons that had as one of its primary purposes the commission of criminal offenses, with knowledge that its members engage in or have engaged in criminal activity; and

(C) committed the offense with the intent to promote or further the felonious activities of, or with the intent to maintain or increase his or her position in, such group, club, organization, or association;

increase by [2][3][4] levels.

(9) If (A) the base offense level is determined under subsection (a)(7); (B) none of the enhancements in subsection (b) apply; and (C) the offense of conviction established only the possession or receipt of firearms or ammunition, decrease by [1 level][2 levels].

(10) If subsection (b)(9) does not apply and the defendant—

(A) is convicted under 18 U.S.C. 922(d), 924(h), 924(k), 932, or 933;

(B) does not have more than 1 criminal history point, as determined under § 4A1.1 (Criminal History Category) and § 4A1.2 (Definitions and Instructions for Computing Criminal History), read together, before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category); and

(C) (i) was motivated by an intimate or familial relationship or by threats or fear to commit the offense; [or][and] (ii) received little or no compensation from the offense; [or][and] (iii) had minimal knowledge [of the scope and structure of the enterprise][that the firearm would be used or possessed in connection with further criminal activity];

decrease by [1][2] levels.''.

The Commentary to § 2K2.1 captioned ''Statutory Provisions'' is amended by inserting after ''(k)–(o),'' the following: ''932, 933,''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended—

in Note 2 by striking ''and (a)(4)'' and inserting ''(a)(4), and (a)(5)'';

in Note 3 by striking ''(a)(4)(B) and (a)(6)'' and inserting ''(a)(5), (a)(8), and (b)(8)'';

in Note 4 by striking ''Subsection (a)(7)'' both places such term appears and inserting ''Subsection (a)(9)'';

in Note 6 by striking ''subsections (a)(1)–(a)(5)'' and inserting ''subsections (a)(1)–(a)(6)'';

in Note 7 by striking ''(a)(4)(B), or (a)(5)'' and inserting ''(a)(4)(B), (a)(5), or (a)(6)'';

in Note 8(A)—

in the heading by striking ''Subsection (a)(7)'' and inserting ''Subsection (a)(9)'';

and by striking ''under subsection (a)(7)'' both places such phrase appears and inserting ''under subsection (a)(9)'';

in Note 9 by striking ''prohibited person'' both places such term appears and inserting ''person described in 18 U.S.C. 922(g) or 922(n)'';

in Note 10 by striking ''subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6)'' and inserting ''subsection (a)(1), (a)(2), (a)(3), (a)(4), (a)(5), or (a)(8)'';

in Note 13(B) by inserting after ''18 U.S.C. 921(a)(33)(A).'' the following: ''However, an individual shall not be considered an 'individual whose possession or receipt of the firearm would be unlawful' [if, at the time of the instant offense, the individual was not otherwise covered by such definition and had not more than one conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, but 5 years had elapsed from the later of the judgment of conviction or the completion of the individual's custodial or supervisory sentence for such an offense and the individual had not subsequently been convicted of: another such offense; a misdemeanor under federal, state, tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon; or any other offense covered by the definition of 'individual whose possession or receipt of the firearm would be unlawful.'] [based upon a conviction of a misdemeanor crime of domestic violence against a person in a dating relationship, if the individual met the criteria set forth in the proviso of 18 U.S.C. 921(a)(33)(C) at the time of the instant offense.]''[;]

[and by striking Note 15 as follows:

''15. *Certain Convictions Under 18 U.S.C. 922(a)(6), 922(d), and 924(a)(1)(A).*—In a case in which the defendant is convicted under 18 U.S.C. 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.''].

Issues for Comment

1. The directive in the Bipartisan Safer Communities Act requires the Commission to ensure that defendants convicted of the new offenses at 18 U.S.C. 932 and 933 and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines for such straw purchasing and trafficking of firearms offenses. The two options presented in Part A of the proposed amendment would amend § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to increase penalties in response to the Act. The Commission seeks comment on whether either of the options presented in Part A of the proposed amendment would provide appropriate penalties for cases involving straw purchases and trafficking of firearms. Should the Commission adopt either of these options or neither? Are there particular changes to the penalty levels in either of these options that should be made?

In addition, the Commission seeks comment on whether additional changes should be made to § 2K2.1 in response to the part of the directive that

requires the Commission to increase penalties for offenses involving straw purchases and trafficking of firearms. If so, what additional changes would be appropriate?

2. As described above, the Bipartisan Safer Communities Act also amended the definition of ''misdemeanor crime of domestic violence'' at 18 U.S.C. 921(a)(33) to include misdemeanor offenses against a person in ''a current or recent former dating relationship.'' The Act also added a new provision at section 921(a)(33)(C) stating as follows:

A person shall not be considered to have been convicted of a misdemeanor crime of domestic violence against an individual in a dating relationship for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had firearm rights restored unless the expungement, pardon, or restoration of rights expressly provides that the person may not ship, transport, possess, or receive firearms: *Provided,* That, in the case of a person who has not more than 1 conviction of a misdemeanor crime of domestic violence against an individual in a dating relationship, and is not otherwise prohibited under this chapter, the person shall not be disqualified from shipping, transport, possession, receipt, or purchase of a firearm under this chapter if 5 years have elapsed from the later of the judgment of conviction or the completion of the person's custodial or supervisory sentence, if any, and the person has not subsequently been convicted of another such offense, a misdemeanor under Federal, State, Tribal, or local law which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, or any other offense that would disqualify the person under [18 U.S.C. §] 922(g). The national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act (34 U.S.C. 40901) shall be updated to reflect the status of the person. Restoration under this subparagraph is not available for a current or former spouse, parent, or guardian of the victim, a person with whom the victim shares a child in common, a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or a person similarly situated to a spouse, parent, or guardian of the victim.

In light of this new provision, a person with a conviction for a misdemeanor crime of domestic violence against an individual in a dating relationship is not disqualified from shipping, transporting, possessing, receiving, or purchasing a firearm under chapter 44 of title 18, United States Code, if the criteria described above are met. Are the changes to the Commentary to § 2K2.1 set forth in Options 1 and 2 adequate to address this new provision? If not, how should the Commission address it?

3. In response to the directive in the Bipartisan Safer Communities Act, Part A of the proposed amendment includes an Option 1 that would amend § 2K2.1 to, among other things, revise the firearms trafficking enhancement at § 2K2.1(b)(5) to apply to straw purchases and trafficking offenses. The revised enhancement would result in higher penalties for straw purchasers and firearms traffickers. The Commission seeks comment on whether having higher penalties for straw purchasers than prohibited persons raises proportionality concerns the Commission should address. If so, how should the Commission address those concerns?

4. Part A of the proposed amendment includes an Option 2 that would revise § 2K2.1(a) in several ways. Among other things, it would keep current § 2K2.1(a)(4)(B) with a base offense level of 20 applicable if the (A) offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. 5845(a); and (B) defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. In addition, Option 2 would delete current § 2K2.1(a)(6)(B) but keep the base offense level of 14 applicable to any defendant who (A) was a prohibited person at the time the defendant committed the instant offense; or (B) is convicted under 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. The Commission seeks comment on whether it should change the current base offense levels of 14 and 20 applicable to the defendants described above. If so, what offense level would be appropriate to any such defendant, and why?

5. Options 1 and 2 of Part A of the proposed amendment would add to § 2K2.1 a new [1][2]-level reduction based on certain mitigating factors. Option 1 provides that the reduction applies if the defendant [received an enhancement under the new subsection (b)(5) proposed in Option 1][was convicted under (i) 18 U.S.C. 922(d), 932, or 933; or (ii) 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person] and meets other certain criteria. Option 2 provides that the reduction applies if subsection (b)(9) does not apply and the defendant is convicted under 18 U.S.C. 922(d), 924(h), 924(k), 932, or 933, and meets the same other criteria provided in Option 1. The Commission seeks comment on whether this new adjustment should apply more broadly. Instead of providing a [1][2]-level reduction, should the Commission provide a departure provision applicable to defendants who meet the criteria?

The Commission also seeks comment on whether the criteria provided in Options 1 and 2 for this new reduction are appropriate. Should any criterion be deleted or changed? Should the Commission provide additional or different criteria?

The Commission further seeks comment on the criminal history requirement provided in Options 1 and 2. Is the proposed requirement appropriate to respond to Congress's intent to address ''straw purchasers without significant criminal histories''? Should the Commission instead use a different criminal history requirement than the one proposed in Options 1 and 2?

6. Application Note 15 of § 2K2.1 contains a downward departure provision for cases in which the defendant is convicted under 18 U.S.C. 922(a)(6), 922(d), or 924(a)(1)(A) and meets certain criteria, similar to some of the criteria included in the new proposed reduction provided in Option 1 at subsection (b)(9) and in Option 2 at subsection (b)(10). Hence, both options bracket the possibility of deleting the current departure provision. If the Commission were to promulgate any of the options in Part A of the proposed amendment, either as an adjustment or a downward departure provision, should the Commission delete the current departure provision at Application Note 15? If not, how should the new reduction interact with the current departure provision? Should the current departure provision be modified in any way?

7. In response to the directive contained in the Bipartisan Safer Communities Act, Options 1 and 2 of Part A of the proposed amendment would provide a new [2][3][4]-level

enhancement in § 2K2.1 based on the criminal affiliations of the defendant. Option 1 provides that the new enhancement would be applicable if the defendant [received an enhancement under the new subsection (b)(5) proposed in Option 1][was convicted under (i) 18 U.S.C. 922(d), 932, or 933; or (ii) 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person] and meets other criteria. Option 2 provides that the new enhancement would be applicable if the defendant is convicted under (i) 18 U.S.C. 922(d), 932, or 933; or (ii) 18 U.S.C. 922(a)(6) or 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person; and meets the same other criteria provided in Option 1. The Commission seeks comment on whether the new enhancement should apply more broadly. Should the Commission provide additional or different criteria for purposes of applying this enhancement? In addition, how should this new enhancement interact with the existing enhancements at § 2K2.1? Should the new enhancement be cumulative with other enhancements, or should it interact with other enhancements in some other way (*e.g.,* by establishing a ''cap'' on its cumulative impact with other enhancements)? Should the Commission instead provide an altogether different approach to respond to this part of the congressional directive?

(B) Firearms Not Marked With Serial Number (''Ghost Guns'')

Synopsis of Proposed Amendment: Subsection (b)(4) of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an alternative enhancement for a firearm that was stolen or that has an altered or obliterated serial number. Specifically, subsection (b)(4)(A) provides for a 2-level increase where a firearm is stolen, while subsection (b)(4)(B) provides for a 4-level increase where a firearm has an altered or obliterated serial number. The Commentary to § 2K2.1 provides that the enhancement applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number. USSG § 2K2.1, comment. (n.8(B)).

The enhancement at § 2K2.1 currently does not apply to ''ghost guns.'' ''Ghost guns'' is the term commonly used to refer to firearms that are not marked by a serial number by which they can be identified and traced, and that are typically made by an unlicensed individual from purchased components (such as standalone parts or weapon parts kits) or homemade components. Because of their lack of identifying markings, it is difficult to trace ghost guns and determine where and who manufactured them, and to whom they were sold or otherwise disposed. The Commission has heard from commenters that the very purpose of ''ghost guns'' is to avoid the tracking and tracing systems associated with a firearm's serial number and that they increasingly are associated with violent crime. Commenters have also indicated that § 2K2.1 does not adequately address ''ghost guns,'' as the enhancement at § 2K2.1(b)(4)(B) only covers firearms that were marked with a serial number when manufactured but where such identifier was later altered or obliterated.

Part B of the proposed amendment would respond to these concerns by revising § 2K2.1(b)(4)(B) to provide that the 4-level enhancement applies if any firearm had an altered or obliterated serial number or was not otherwise marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. 921(a)(16))].

An issue for comment is provided.

Proposed Amendment

Section 2K2.1(b)(4)(B) is amended by striking ''had an altered or obliterated serial number'' and inserting ''(i) had an altered or obliterated serial number; or (ii) was not otherwise marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. 921(a)(16))]''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended—

in Note 8(A)—

in the first paragraph by striking ''However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B)'' and inserting ''However, if the offense involved a firearm with an altered or obliterated serial number, or that was not otherwise marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. 921(a)(16))], apply subsection (b)(4)(B)(i) or (ii)'';

and by striking the second paragraph as follows:

''Similarly, if the offense to which § 2K2.1 applies is 18 U.S.C. 922(k) or 26 U.S.C. 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, it the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(A).'',

and inserting the following:

''Similarly, if the offense to which § 2K2.1 applies is 18 U.S.C. 922(k) or 26 U.S.C. 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B)(i). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, it the offense involved a stolen firearm or stolen ammunition, or a firearm that was not otherwise marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. 921(a)(16))], apply subsection (b)(4)(A) or (B)(ii).'';

and in Note 8(B) by striking ''Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number'' and inserting ''Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen, had an altered or obliterated serial number, or was not otherwise marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. 921(a)(16))]''.

Issue for Comment

1. Part B of the proposed amendment would expand the scope of subsection (b)(4) of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to address firearms that are not marked with a serial number [(other than an antique firearm, as defined in 18 U.S.C. 921(a)(16))], in addition to firearms that were stolen or had an altered or obliterated serial number. The Commission seeks comment on whether it should further revise the enhancement at § 2K2.1(b)(4). For example, should the Commission insert into § 2K2.1(b)(4) a mental state (*mens rea*) requirement that the defendant knew, or had reason to believe, that the firearm was stolen, had an altered or obliterated serial number, or was not otherwise marked with a serial number (other than an antique

firearm, as defined in 18 U.S.C. 921(a)(16))?

(C) Issues for Comment on Further Revisions to § 2K2.1

1. Parts A of the proposed amendment would amend § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to respond to the Bipartisan Safer Communities Act. Part B of the proposed amendment would amend § 2K2.1 to address concerns expressed by some commenters about firearms that are not marked by a serial number (*i.e.,* ''ghost guns''). The Commission seeks comment on whether it should further revise § 2K2.1 to appropriately address firearms offenses.

2. Offenses under 18 U.S.C. 922(u) are referenced to § 2K2.1. Section 922(u) prohibits stealing or unlawfully taking or carrying away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce. The Department of Justice has expressed concerns that all offenses under 18 U.S.C. 922(u), which covers conduct of varying severity (including simple theft, burglary, and robbery), are treated the same in § 2K2.1. According to the Department of Justice, burglaries and robberies of federal firearms licensees are particularly dangerous crimes that often involve multiple weapons. Currently, § 2K2.1 provides at subsection (b)(4)(A) a 2-level enhancement if any firearm was stolen. Application Note 8(A) of § 2K2.1 provides that this 2-level enhancement should not apply if the base offense level is set at level 12 under § 2K2.1(a)(7) (*e.g.,* a defendant convicted under 18 U.S.C. 922(u)) because the base offense level takes into account that the firearm or ammunition was stolen. The Commission seeks comment on whether it should amend § 2K2.1 to specifically address offenses where the offense involved the burglary or robbery of a federal firearms licensee. For example, should the Commission add an enhancement to § 2K2.1 that would be applicable if the offense involved the burglary or robbery of a federal firearms licensee? If so, what level of enhancement should the Commission set forth for such conduct? How should this enhancement interact with the stolen firearms enhancement at § 2K2.1(b)(4)(A)? Should the Commission provide that both enhancements are to be applied cumulatively or in the alternative?

3. The base offense levels at § 2K2.1(a) include as factors that form the basis for their application certain recidivism requirements, such as whether the defendant committed the instant offense subsequent to sustaining one or more felony convictions of either a crime of violence or controlled substance offense. The Commission seeks comment on whether it should add other types of prior convictions as the basis for applying base offense levels or specific offense characteristics, and what base offense level or offense level increase should the Commission provide for any such prior conviction. For example, should the Commission provide for increased penalties if the defendant committed the instant offense subsequent to sustaining a conviction or multiple convictions for a misdemeanor crime of domestic violence or an offense that involved a firearm? If so, should the Commission treat prior convictions for a misdemeanor crime of domestic violence or an offense that involved a firearm the same as prior convictions for a crime of violence or a controlled substance offense and provide the same level of enhancement? If not, what base offense level or offense level increase should the Commission set forth for prior convictions for a misdemeanor crime of domestic violence or an offense that involved a firearm?

4. The general definition of ''firearm'' in § 2K2.1 at Application Note 1 is drawn from 18 U.S.C. 921(a)(3). However, § 2K2.1 applies a higher base offense level to offenses involving firearms described in 26 U.S.C. 5845(a). Although section 5845(a) generally defines a more limited class of firearms than section 921(a)(3), there are a limited number of devices—such as those ''designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun'' which are ''firearms'' under section 5845(a) but not section 921(a)(3). Thus, such devices are ''firearms'' for purposes of the increased base offenses levels in § 2K2.1(a)(1), (a)(3), (a)(4)(B)(i)(II), and (a)(5), but not for purposes of specific offense characteristics referring to ''firearms,'' such as § 2K2.1(b)(1). The Commission seeks comment on whether it should amend the definition of ''firearms'' in Application Note 1 of § 2K2.1 to include devices which are ''firearms'' under section 5845(a) but not section 921(a)(3).

5. The Commission seeks general comment on whether it should amend § 2K2.1 to increase penalties for defendants who transfer a firearm to a minor. If so, how?

4. Circuit Conflicts

Synopsis of Proposed Amendment: This proposed amendment addresses certain circuit conflicts involving § 3E1.1 (Acceptance of Responsibility) and § 4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 87 FR 67756 (Nov. 9, 2022) (identifying resolution of circuit conflicts as a priority, including the circuit conflicts concerning (A) whether the government may withhold a motion pursuant to § 3E1.1(b) because a defendant moved to suppress evidence; and (B) whether an offense must involve a substance controlled by the Controlled Substances Act (21 U.S.C. 801 *et seq.*) to qualify as a ''controlled substance offense'' under § 4B1.2(b)). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

Part A of the proposed amendment would amend § 3E1.1 and its accompanying commentary to address circuit conflicts regarding the permissible bases for withholding a reduction under § 3E1.1(b). It would set forth a definition of the term ''preparing for trial'' that provides more clarity on what actions typically constitute preparing for trial for the purposes of § 3E1.1(b). An issue for comment is also provided.

Part B of the proposed amendment would amend § 4B1.2 by adding a definition of the term ''controlled substance'' to address a circuit conflict concerning whether the definition of ''controlled substance offense'' in § 4B1.2(b) only covers offenses involving substances controlled by federal law. Two options are presented. An issue for comment is also included.

(A) Circuit Conflicts Concerning § 3E1.1(b)

Synopsis of Proposed Amendment: Subsection (a) of § 3E1.1 (Acceptance of Responsibility) provides for a 2-level reduction for a defendant who clearly demonstrates acceptance of responsibility for the offense. *See* USSG § 3E1.1(a). Subsection (b) of § 3E1.1 sets forth the circumstances under which a defendant is eligible for an additional 1-level reduction by providing:

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. USSG § 3E1.1(b).

Section 401(g) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (''PROTECT Act''), among other things, directly amended § 3E1.1(b) to include the language requiring a government motion and consideration of government resources. *See* Public Law 108–21, 401(g)(1), 117 Stat. 650 (2003). The PROTECT Act also added the following sentence to Application Note 6 of the Commentary to § 3E1.1: ''Because 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.'' *Id.* § 401(g)(2).

In 2013, the Commission promulgated Amendment 775 to address two circuit conflicts over the § 3E1.1(b) motion requirement. *See* USSG App. C, amend. 775 (effective Nov. 1, 2013). Among other things, the amendment added the following sentence to Application Note 6: ''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.'' *Id.*

Two circuit conflicts have arisen relating to § 3E1.1(b). The first conflict concerns whether a § 3E1.1(b) reduction may be withheld or denied because a defendant moved to suppress evidence. Justice Sotomayor, joined by Justice Gorsuch, recently ''emphasize[d] the need for clarification from the Commission'' on this ''important and longstanding split.'' *Longoria* v. *United States,* 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., with whom Gorsuch, J. joins, respecting the denial of certiorari). The second conflict concerns whether the government may withhold a § 3E1.1(b) motion where the defendant has raised sentencing challenges.

These conflicts largely turn on how much discretion the government has to withhold a motion under § 3E1.1(b). Some circuits use the analytical framework from *Wade* v. *United States,* 504 U.S. 181, 185–86 (1992), applicable to substantial assistance motions under § 5K1.1 (Substantial Assistance to Authorities) (Policy Statement) and 18 U.S.C. 3553(e)—that the government's discretion is broad, but refusal to file a motion cannot be based on ''an unconstitutional motive'' or a reason ''not rationally related to any legitimate Government end.'' Other circuits specify that withholding is permissible if based on an interest identified in § 3E1.1. Courts also have grappled with whether the government's discretion is limited to situations involving trial preparation, and whether suppression motions or sentencing disputes are enough like trial preparation to withhold a motion.

In relation to the first circuit conflict, the Third, Fifth, and Sixth Circuits have permitted the government to withhold a § 3E1.1(b) motion based on a suppression motion. *See, e.g., United States* v. *Longoria,* 958 F.3d 372, 376–78 (5th Cir. 2020) (Amendment 775 did not clearly overrule its caselaw ''allowing the government to withhold the third point when it must litigate a suppression motion''; suppression hearing was largely the ''substantive equivalent of a full trial'' (quoting *United States* v. *Gonzales,* 19 F.3d 982, 984 (5th Cir. 1994))), *cert. denied,* 141 S. Ct. 978 (2021); *United States* v. *Collins,* 683 F.3d 697, 707 (6th Cir. 2012) (suppression motion required the government ''to undertake trial-like preparations''; ''Avoiding litigation on a motion to suppress is rationally related to the legitimate government interest in the efficient allocation of its resources. Accordingly . . . the government's decision to withhold the § 3E1.1(b) motion was not arbitrary or unconstitutionally motivated.''); *United States* v. *Drennon,* 516 F.3d 160, 161, 163 (3d Cir. 2008) (suppression hearing involved ''the large majority of the work to prepare for trial''; motion withheld due to ''concern for the efficient allocation of the government's litigating resources,'' not an unconstitutional motive).

The First, Second, Ninth, Tenth, and D.C. Circuits have held that a reduction may not be denied based on a suppression motion. *See, e.g., United States* v. *Vargas,* 961 F.3d 566, 582–84 (2d Cir. 2020) (district court erred in denying government's § 3E1.1(b) motion because of suppression hearing; any ''experienced criminal lawyer knows that preparing for a jury trial involves more work than preparing for a suppression hearing''); *United States* v. *Price,* 409 F.3d 436, 443–44 (D.C. Cir. 2005) (district court erred in denying additional reduction based on suppression motion; while government had to prepare for a suppression hearing, ''it never had to prepare for trial''); *United States* v. *Marquez,* 337 F.3d 1203, 1212 (10th Cir. 2003) (''district court may not rely on the fact that the defendant filed a motion to suppress requiring a 'lengthy suppression hearing' to justify a denial of the third level reduction''; even where issues substantially overlap, ''preparation for a motion to suppress would not require the preparation of voir dire questions, opening statements, closing arguments, and proposed jury instructions, to name just a few examples''); *United States* v. *Marroquin,* 136 F.3d 220, 225 (1st Cir. 1998) (''[g]uidelines do not force a defendant to forgo the filing of routine pre-trial motions as the price of receiving a one-step decrease''); *United States* v. *Kimple,* 27 F.3d 1409, 1415 (9th Cir. 1994) (district court erred in denying the additional reduction where ''resources were expended not in conducting trial preparation, but in considering pretrial motions [including suppression motion] necessary to protect [the defendant's] rights'').

With respect to the second circuit conflict, the First, Third, Seventh, and Eighth Circuits have held that the government may withhold a § 3E1.1(b) motion where the defendant has raised sentencing challenges. *See, e.g., United States* v. *Adair,* 38 F.4th 341, 361 (3d Cir. 2022) (government properly withheld motion where defendant ''caused [the government] to have to prepare for a two-day sentencing hearing''; government did not act with an unconstitutional motive); *United States* v. *Jordan,* 877 F.3d 391, 395 (8th Cir. 2017) (defendant's denial of conduct relevant to sentencing did not ''permit[ ] the government and the court to allocate their resources efficiently'' (citation omitted)); *United States* v. *Sainz-Preciado,* 566 F.3d 708, 716 (7th Cir. 2009) (government had ''good reason'' to withhold motion where it had to prepare ''testimony and other evidence to prove the full scope of [defendant's] criminal conduct at the sentencing hearing''); *United States* v. *Beatty,* 538 F.3d 8, 16–17 (1st Cir. 2008) (within the government's broad discretion to withhold motion where government reasonably determined that the defendant frivolously contested issues related to sentencing). The Second and Fifth Circuits have held that the government may not withhold a motion on this basis. *See, e.g., United States* v. *Castillo,* 779 F.3d 318, 324–26 (5th Cir. 2015) (''we disagree that the government may withhold a § 3E1.1(b) motion simply because it has had to use its resources to litigate a sentencing issue''; however, dispute must be in good faith); *United States* v. *Lee,* 653 F.3d 170, 174 (2d Cir. 2011) (''As long as the defendant disputes the accuracy of a factual assertion in the PSR in good

faith, the government abuses its authority by refusing to move for a third-point reduction because the defendant has invoked his right to a *Fatico* hearing.'').

Part A of the proposed amendment would amend § 3E1.1(b) to provide a definition of the term ''preparing for trial.'' It would also delete the following sentence in Application Note 6 of the Commentary to § 3E1.1: ''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.''

An issue for comment is provided.

Proposed Amendment

Section 3E1.1(b) is amended by inserting after ''1 additional level.'' the following:

''For the purposes of this guideline, the term 'preparing for trial' means substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial. 'Preparing for trial' is ordinarily indicated by actions taken close to trial, such as drafting in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparation for early pretrial proceedings (such as litigation related to a charging document, early discovery motions, and early suppression motions) ordinarily are not considered 'preparing for trial' under this subsection. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered 'preparing for trial.' ''.

The Commentary to § 3E1.1 captioned ''Application Notes'' is amended in Note 6 by striking ''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.''.

Issue for Comment

1. Part A of the proposed amendment would amend § 3E1.1 (Acceptance of Responsibility) to address the circuit conflicts described in the synopsis above. The proposed amendment would amend subsection (b) of § 3E1.1 to provide a definition for the term ''preparing for trial.'' The Commission seeks comment on whether the proposed definition of ''preparing for trial'' is appropriate for purposes of § 3E1.1(b). If not, what definition should the Commission provide?

In the alternative, should the Commission address the circuit conflicts in a manner other than the one provided in Part A of the proposed amendment? For example, should the Commission address the breadth of the government's discretion to withhold a § 3E1.1(b) motion, either by incorporating the framework outlined in *Wade* v. *United States,* 504 U.S. 181, 185–86 (1992) (*i.e.,* an ''unconstitutional motive'' or a reason ''not rationally related to any legitimate Government end'') (*see, e.g., United States* v. *Adair,* 38 F.4th 341, 361 (3d Cir. 2022)), or by specifying a different standard?

(B) Circuit Conflicts Concerning § 4B1.2(b)

Synopsis of Proposed Amendment: Subsection (b) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1) defines a ''controlled substance offense'' as ''an offense under federal or state law . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.'' USSG § 4B1.2(b). The definition in § 4B1.2(b) principally applies to the career offender guideline at § 4B1.1 (Career Offender). However, several other guidelines incorporate this definition by reference, often providing for higher base offense levels if the defendant committed the instant offense after sustaining a conviction for a ''controlled substance offense.'' *See* USSG §§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 4B1.4 (Armed Career Criminal), 5K2.17 (Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)), and 7B1.1 (Classification of Violations (Policy Statement)).

The circuits are split regarding whether the definition of a ''controlled substance offense'' in § 4B1.2(b) only covers offenses involving substances controlled by the federal Controlled Substances Act (''CSA'') (21 U.S.C. 801 *et seq.*), or whether the definition also applies to offenses involving substances controlled by applicable state law. This circuit conflict prompted Justice Sotomayor, joined by Justice Barrett, to call for the Commission to ''address this division to ensure fair and uniform application of the [g]uidelines.'' *Guerrant* v. *United States,* 142 S. Ct. 640, 640–41 (2022) (statement of Sotomayor, J., with whom Barrett, J. joins, respecting the denial of certiorari).

The Second and Ninth Circuits have held that a ''controlled substance offense'' only includes offenses involving substances controlled by federal law (the CSA), not offenses involving substances that a state's schedule lists as a controlled substance, but the CSA does not. *See United States* v. *Bautista,* 989 F.3d 698, 705 (9th Cir. 2021) (conviction under Arizona statute criminalizing hemp as well as marijuana is not a ''controlled substance offense'' because hemp is not listed in the CSA); *United States* v. *Townsend,* 897 F.3d 66, 74 (2d Cir. 2018) (conviction under New York statute prohibiting the sale of Human Chorionic Gonadotropin (''HCG'') is not a ''controlled substance offense'' because HCG is not controlled under the CSA).

By contrast, the Fourth, Seventh, Eighth, and Tenth Circuits have held that a state conviction involving a controlled substance that is not identified in the CSA can qualify as a ''controlled substance offense'' under the guidelines. *See United States* v. *Jones,* 15 F.4th 1288, 1295 (10th Cir. 2021) (definition of ''controlled substance offense'' includes ''state-law controlled substance offenses, involving substances not found on the CSA''), *cert. denied,* 143 S. Ct. 268 (2022); *United States* v. *Henderson,* 11 F.4th 713, 718 (8th Cir. 2021) (''There is no requirement that the particular substance underlying the state offense is also controlled under a distinct federal law.''), *cert. denied,* 142 S. Ct. 1696 (2022); *United States* v. *Ward,* 972 F.3d 364, 374 (4th Cir. 2020) (''the Commission has specified that we look to *either* the federal or state law of conviction to define whether an offense will qualify [as a controlled substance offense].''), *cert denied,* 141 S. Ct. 2864 (2021); *United States* v. *Ruth,* 966 F.3d 642, 654 (7th Cir. 2020) (''The career-offender guideline defines the term controlled substance offense broadly, and the definition is most plainly read to 'include state-law offenses[.]' '' (citation quotation omitted)), *cert. denied,* 141 S. Ct. 1239 (2021).

Part B of the proposed amendment would amend § 4B1.2(b) to include a definition for ''controlled substance'' to address the circuit conflict. Two options are provided.

Option 1 would set forth a definition of ''controlled substance'' that adopts the approach of the Second and Ninth Circuits. It would limit the definition of the term to substances that are specifically included in the CSA.

Option 2 would set forth a definition of ''controlled substance'' that adopts

the approach of the Fourth, Seventh, Eighth, and Tenth Circuits. It would provide that the term ''controlled substance'' refers to substances either included in the CSA or otherwise controlled under applicable state law.

An issue for comment is also provided.

Proposed Amendment

Section 4B1.2(b) is amended by adding at the end the following new paragraph:

[*Option 1 (Controlled Substances under Federal Law):*

'' 'Controlled substance' refers to a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. 801 *et seq.*).''.]

[*Option 2 (Controlled Substances under Federal or State Law):*

'' 'Controlled substance' refers to a drug or other substance, or immediate precursor, either included in schedule I, II, III, IV, or V of the Controlled Substances Act (21 U.S.C. 801 *et seq.*) or otherwise controlled under applicable state law.''.]

Issue for Comment

1. Part B of the proposed amendment would amend subsection (b) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to set forth a definition of ''controlled substance.'' Two options are provided for such definition.

The Commentary to § 2L1.2 (Unlawfully Entering or Remaining in the United States) contains a definition for the term ''drug trafficking offense'' that closely tracks the definition of ''controlled substance offense'' in § 4B1.2(b). *See* USSG § 2L1.2, comment. (n.2). If the Commission were to amend § 4B1.2(b) to include a definition of ''controlled substance,'' should the Commission also amend Application Note 2 to § 2L1.2 to include the same definition of ''controlled substance'' for purposes of the ''drug trafficking offense'' definition?

5. Crime Legislation

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation. *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 87 FR 67756 (Nov. 9, 2022) (identifying as a priority ''[i]mplementation of any legislation warranting Commission action'').

The proposed amendment contains eleven parts (Parts A through K). The Commission is considering whether to promulgate any or all these parts, as they are not mutually exclusive.

Part A responds to the FDA Reauthorization Act of 2017, Public Law 115–52 (2017), by amending Appendix A (Statutory Index) and the Commentary to § 2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product). It also makes a technical correction to the Commentary to § 2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury). An issue for comment is also provided.

Part B responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Public Law 115–164 (2018), by amending Appendix A, § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor), and § 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). In addition, Part B brackets the possibility of amending the Commentary to §§ 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and 5D1.2 (Term of Supervised Release) to exclude offenses under 18 U.S.C. 2421A from the definitions of ''covered sex offense'' and ''sex offense.'' Issues for comment are also provided.

Part C responds to the FAA Reauthorization Act of 2018, Public Law 115–254 (2018), by amending Appendix A and § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle), as well as the Commentary to §§ 2A2.4 (Obstructing or Impeding Officers) and 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). An issue for comment is also provided.

Part D responds to the SUPPORT for Patients and Communities Act, Public Law 115–271 (2018), by amending Appendix A and the Commentary to §§ 2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). An issue for comment is also provided.

Part E responds to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Public Law 115–299 (2018), by amending Appendix A and the Commentary to § 2X5.2. An issue for comment is also provided.

Part F responds to the Foundations for Evidence-Based Policymaking Act of 2018, Public Law 115–435 (2019), by amending Appendix A and the Commentary to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). An issue for comment is also provided.

Part G responds to the National Defense Authorization Act for Fiscal Year 2020, Public Law 116–92 (2019), by amending Appendix A and the Commentary to § 2X5.2. An issue for comment is also provided.

Part H responds to the Representative Payee Fraud Prevention Act of 2019, Public Law 116–126 (2020), by amending Appendix A and the Commentary to § 2B1.1. An issue for comment is also provided.

Part I responds to the Stop Student Debt Relief Scams Act of 2019, Public Law 116–251 (2020), by amending Appendix A and the Commentary to § 2B1.1. An issue for comment is also provided.

Part J responds to the Protecting Lawful Streaming Act of 2020, part of the Consolidation Appropriation Act, 2021, Public Law 116–260 (2020), by amending Appendix A. Issues for comment are also provided.

Part K responds to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (2021), by amending Appendix A and the Commentary to § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). An issue for comment is also provided.

(A) FDA Reauthorization Act of 2017

Synopsis of Proposed Amendment: Part A of the proposed amendment responds to the FDA Reauthorization Act of 2017, Public Law 115–52 (2017).

That act amended 21 U.S.C. 333 (Penalties [for certain violations of the Federal Food, Drug, and Cosmetic Act]) to add a new criminal offense for the manufacture or distribution of a counterfeit drug. The new offense states that

any person who violates [21 U.S.C. 331(i)(3)] by knowingly making, selling, or dispensing, or holding for sale or dispensing, a counterfeit drug shall be imprisoned for not more than 10 years or fined in accordance with title 18, [United States Code,] or both.

21 U.S.C. 333(b)(8). Section 331(i)(3) prohibits any action which causes a drug to be a counterfeit drug, or the sale or dispensing, or the holding for sale or dispensing, of a counterfeit drug.

Currently, subsections (b)(1) through (b)(6) of 21 U.S.C. 333 are referenced in Appendix A (Statutory Index) to § 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product). Subsection (b)(7) is referenced to § 2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury). New subsection (b)(8) is not referenced to any guideline.

Part A of the proposed amendment would amend Appendix A to reference 21 U.S.C. 333(b)(8) to § 2N2.1. Part A would also amend the Commentary to § 2N2.1 to reflect that subsection (b)(8), as well as subsections (b)(1) through (b)(6), of 21 U.S.C. 333 are all referenced to § 2N2.1. Finally, Part A also makes a technical change to the Commentary to § 2N1.1, adding 21 U.S.C. 333(b)(7) to the list of statutory provisions referenced to that guideline.

An issue for comment is also provided.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 21 U.S.C. 458 the following new line reference:

''21 U.S.C. 333(b)(8) 2N2.1''.

The Commentary to § 2N2.1 captioned ''Statutory Provisions'' is amended by striking ''333(a)(1), (a)(2), (b)'' and inserting ''333(a)(1), (a)(2), (b)(1)–(6), (b)(8)''.

The Commentary to § 2N1.1 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. 1365(a), (e)'' and inserting ''18 U.S.C. 1365(a), (e); 21 U.S.C. 333(b)(7). For additional statutory provision(s), *see* Appendix A (Statutory Index)''.

Issue for Comment

1. In response to the FDA Reauthorization Act of 2017, Public Law 115–52 (2017), Part A of the proposed amendment would reference 21 U.S.C. 333(b)(8) to § 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product). The Commission seeks comment on whether any additional changes to the guidelines are required to account for section 333(b)(8)'s offense conduct. Specifically, should the Commission amend § 2N2.1 to provide a higher or lower base offense level if 21 U.S.C. 333(b)(8) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to § 2N2.1 in response to section 333(b)(8)? If so, what should that specific offense characteristic provide and why?

(B) Allow States and Victims To Fight Online Sex Trafficking Act of 2017

Synopsis of Proposed Amendment: Part B of the proposed amendment responds to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Public Law 115–164 (2018).

That act created two new criminal offenses codified at 18 U.S.C. 2421A (Promotion or facilitation of prostitution and reckless disregard of sex trafficking). The first new offense, codified at 18 U.S.C. 2421A(a), provides that

[w]hoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service . . . , or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

The second new offense, codified at 18 U.S.C. 2421A(b), is an aggravated form of the first. It provides an enhanced statutory maximum penalty of 25 years for anyone who commits the first offense and either ''(1) promotes or facilitates the prostitution of 5 or more persons'' or ''(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of [18 U.S.C.] 1591(a).'' Section 1591(a) criminalizes sex trafficking of a minor or sex trafficking of anyone by force, threats of force, fraud, or coercion.

Part B of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. 2421A to § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and § 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). Offenses involving the promotion or facilitation of commercial sex acts are generally referenced to these guidelines.

If the offense did not involve a minor, § 2G1.1 would be the applicable guideline. For a defendant convicted under 18 U.S.C. 2421A, subsection (a)(2) would apply, and the defendant's base offense level would be level 14. Part B of the proposed amendment would amend § 2G1.1(b)(1) so that the four-level increase in the defendant's offense level provided by that specific offense characteristic would also apply if subsection (a)(2) applies and [the offense of conviction is][the offense involved conduct described in] 18 U.S.C. 2421A(b)(2). Section 2421A(b)(2) is the version of the new aggravated offense under which the defendant has acted in reckless disregard of the fact that their conduct contributed to sex trafficking in violation of 18 U.S.C. 1591(a).

If the offense involved a minor, § 2G1.3 would be the applicable guideline. For a defendant convicted under 18 U.S.C. 2421A, subsection (a)(4) would apply, and the defendant's base offense level would be level 24. Part B of the proposed amendment would amend § 2G1.3(b)(4) to renumber the existing specific offense characteristic as § 2G1.3(b)(4)(A) and to add a new § 2G1.3(b)(4)(B), which provides for a [4]-level increase in the defendant's offense level if (i) subsection (a)(4) applies; and (ii) [the offense of conviction is][the offense involved conduct described in] 18 U.S.C. 2421A(b)(2). Only the greater of § 2G1.3(b)(4)(A) or § 2G1.3(b)(4)(B) would apply.

Part B of the proposed amendment also would amend the Commentary to § 2G1.3 to add a new application note instructing that if 18 U.S.C. 2421A(a) or § 2421A(b)(1) is the offense of conviction, the specific offense characteristic at § 2G1.3(b)(3)(B) does not apply. That special offense characteristic provides for a two-level increase in the defendant's offense level if the offense involved the use of a computer or an interactive computer service to entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor.

Part B of the proposed amendment would make conforming changes to §§ 2G1.1 and 2G1.3 and their accompanying commentary.

Finally, 18 U.S.C. 2421A is codified in chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) of title 18 of the United States Code, which contains statutes that generally prohibit conduct intended to promote or facilitate prostitution. Various guidelines refer to chapter 117 overall, including § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and § 5D1.2 (Term of Supervised Release). Specifically, § 4B1.5 provides for increases in the defendant's offense level if the offense of conviction is a ''covered sex crime.'' The Commentary to § 4B1.5 states that a ''covered sex crime'' generally includes offenses under chapter 117 but excludes from coverage the offenses of ''transmitting information about a minor

or filing a factual statement about an alien individual.'' Section 5D1.2 includes a policy statement recommending that the court impose the statutory maximum term of supervised release if the instant offense of conviction is a ''sex offense.'' The Commentary to § 5D1.2 defines ''sex offense'' to mean, among other things, an offense, perpetrated against a minor, under chapter 117, ''not including transmitting information about a minor or filing a factual statement about an alien individual.'' Part B of the proposed amendment brackets the possibility of amending the Commentary to §§ 4B1.5 and 5D1.2 to exclude offenses under 18 U.S.C. 2421A from the definitions of ''covered sex offense'' and ''sex offense.''

Issues for comment are also provided.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. 2422 the following new line reference:

''18 U.S.C. 2421A 2G1.1, 2G1.3''.

Section 2G1.1(b)(1)(B) is amended by striking ''the offense involved fraud or coercion'' and inserting ''(i) the offense involved fraud or coercion, or (ii) [the offense of conviction is][the offense involved conduct described in] 18 U.S.C. 2421(A)(b)(2)''.

The Commentary to § 2G1.1 captioned ''Statutory Provisions'' is amended by striking ''2422(a) (only if the offense involved a victim other than a minor)'' and inserting ''2421A (only if the offense involved a victim other than a minor), 2422(a) (only if the offense involved a victim other than a minor). For additional statutory provision(s), *see* Appendix A (Statutory Index)''.

Section 2G1.3(b) is amended in paragraph (4) by striking ''If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.'', and inserting the following:

''(Apply the greater):

(A) If (i) the offense involved the commission of a sex act or sexual contact; or (ii) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.

(B) If (i) subsection (a)(4) applies; and (ii) [the offense of conviction is][the offense involved conduct described in] 18 U.S.C. 2421A(b)(2), increase by [4] levels.''.

The Commentary to § 2G1.3 captioned ''Statutory Provisions'' is amended by striking ''2422 (only if the offense involved a minor), 2423, 2425'' and inserting ''2421A (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2423, 2425. For additional statutory provision(s), *see* Appendix A (Statutory Index)''.

The Commentary to § 2G1.3 captioned ''Application Notes'' is amended in Note 4 by striking the following:

''*Application of Subsection (b)(3)(A).*—Subsection (b)(3)(A) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's internet site.'',

and inserting the following:

''*Application of Subsection (b)(3).*—

(A) *Application of Subsection (b)(3)(A).*—Subsection (b)(3)(A) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's internet site.

(B) *Application of Subsection (b)(3)(B).*—If the offense of conviction is 18 U.S.C. 2421A(a) or § 2421A(b)(1), do not apply subsection (b)(3)(B).''.

[The Commentary to § 4B1.5 captioned ''Application Notes'' is amended in Note 2 by striking ''chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual'' and inserting ''chapter 117 of such title, not including transmitting information about a minor, filing a factual statement about an alien individual, or an offense under 18 U.S.C. 2421A''.]

[The Commentary to § 5D1.2 captioned ''Application Notes'' is amended in Note 1, in the paragraph that begins '' 'Sex offense' means'', by striking ''chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual'' and inserting ''chapter 117 of such title, not including transmitting information about a minor, filing a factual statement about an alien individual, or an offense under 18 U.S.C. 2421A''.]

Issues for Comment

1. In response to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Public Law 115–164 (2018), Part B of the proposed amendment would reference 18 U.S.C. 2421A to § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) and § 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), and would make various revisions to those guidelines to account for the new statute's offense conduct. The Commission seeks comment on whether the proposed revisions are appropriate and on whether the Commission should make other changes to the guidelines to account for section 2421A's offense conduct.

In particular, Part B of the proposed amendment would rely on the specific offense characteristics and special instructions in §§ 2G1.1 and 2G1.3 to produce the appropriate offense levels for the aggravated offense at 18 U.S.C. 2421A(b). Should the Commission account for the aggravated offense in a different way, for example, by providing a higher base offense level if a defendant is convicted of that offense? If so, should the Commission use one of the base offense levels currently provided for convictions under other offenses, such as level 28, provided by § 2G1.3 for a conviction under 18 U.S.C. 2422(b) or 2423(a), or level 34, provided by §§ 2G1.1 and 2G1.3 for a conviction under 18 U.S.C. 1591(b)(1)?

2. The new offenses codified at 18 U.S.C. 2421A are included in chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) of title 18 of the United States Code, which contains statutes that generally prohibit conduct intended to promote or facilitate prostitution. As indicated in the synopsis, §§ 4B1.5 and 5D1.2 provide definitions for the terms ''covered sex crime'' and ''sex offense,'' respectively, that generally include offenses in chapter 117 of title 18, with notable exceptions. The chapter 117 offenses that the Commission excluded from the definitions of ''covered sex crime'' and ''sex offense'' do not criminalize conduct involving the direct sexual exploitation of a minor by the defendant, but rather are primarily concerned with the transmission or filing of information about individuals.

Part B of the proposed amendment brackets the possibility of amending the Commentary to §§ 4B1.5 and 5D1.2 to

exclude offenses under 18 U.S.C. 2421A from the definitions of ''covered sex offense'' and ''sex offense.'' Section 2421A offenses generally involve the posting or sharing (*i.e.,* transmission) of information about an individual, which may not necessarily involve the direct exploitation of a minor victim by the defendant. The Commission seeks comment on whether excluding offenses under 18 U.S.C. 2421A from the definitions of ''covered sex crime'' and ''sex offense'' for purposes of §§ 4B1.5 and 5D1.2 is appropriate due to the nature of such offenses. Should the Commission, instead, include the aggravated form of the offense under 18 U.S.C. 2421A(b) in the definitions of ''covered sex crime'' and ''sex offense''?

(C) FAA Reauthorization Act of 2018

Synopsis of Proposed Amendment: Part C of the proposed amendment responds to the FAA Reauthorization Act of 2018, Public Law 115–254 (2018). That act created two new criminal offenses concerning the operation of unmanned aircraft, commonly known as ''drones,'' and added a new provision to an existing criminal statute that also concerns drones.

The first new criminal offense, codified at 18 U.S.C. 39B (Unsafe operation of unmanned aircraft), prohibits the unsafe operation of drones. Specifically, section 39B(a)(1) prohibits any person from operating an unmanned aircraft and knowingly interfering with the operation of an aircraft carrying one or more persons in a manner that poses an imminent safety hazard to the aircraft's occupants. Section 39B(a)(2) prohibits any person from operating an unmanned aircraft and recklessly interfering with the operation of an aircraft carrying one or more persons in a manner that poses an imminent safety hazard to the aircraft's occupants. Section 39B(b) prohibits any person from knowingly operating an unmanned aircraft near an airport runway without authorization. A violation of any of these prohibitions is punishable by a fine, not more than one year in prison, or both. A violation of subsection (a)(2) that causes serious bodily injury or death is punishable by a fine, not more than 10 years of imprisonment, or both. A violation of subsection (a)(1) or subsection (b) that causes serious bodily injury or death is punishable by a fine, imprisonment for any term of years or for life, or both.

The second new criminal offense, codified at 18 U.S.C. 40A (Operation of unauthorized unmanned aircraft over wildfires), generally prohibits any individual from operating an unmanned aircraft and knowingly or recklessly interfering with a wildfire suppression or with law enforcement or emergency response efforts related to a wildfire suppression. A violation of this offense is punishable by a fine, imprisonment for not more than two years, or both.

The act also adds a new subsection (a)(5) to 18 U.S.C. 1752 (Restricted building or grounds). The new subsection prohibits anyone from knowingly and willfully operating an unmanned aircraft system with the intent to knowingly and willfully direct or otherwise cause the system to enter or operate within or above a restricted building or grounds. A violation of section 1752 is punishable by a fine, imprisonment for not more than one year, or both. If the violator used or carried a deadly or dangerous weapon or firearm or if the offense results in significant bodily injury, the maximum term of imprisonment increases to ten years.

Part C of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. 39B to § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle) and § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). Accordingly, courts would use § 2A5.2 for felony violations of section 39B and § 2X5.2 for misdemeanor violations. Part C would also make conforming changes to § 2A5.2 and its commentary and to the Commentary to § 2X5.2. Part C of the proposed amendment would also amend the title of § 2A5.2 to add ''Unsafe Operation of Unmanned Aircraft.''

In addition, Part C of the proposed amendment would amend Appendix A to reference 18 U.S.C. 40A to § 2A2.4 (Obstructing or Impeding Officers). It would also make conforming changes to the Commentary to § 2A2.4.

Section 1752 is currently referenced in Appendix A to § 2A2.4 and § 2B2.3 (Trespass). Accordingly, courts would use those guidelines for violations of 18 U.S.C. 1752(a)(5). Part C of the proposed amendment would make no changes to the guidelines to account for that provision.

An issue for comment is also provided.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. 43 the following new line references:

''18 U.S.C. 39B 2A5.2, 2X5.2
18 U.S.C. 40A 2A2.4''.

Section 2A5.2 is amended in the heading by striking ''Vehicle'' and inserting ''Vehicle; Unsafe Operation of Unmanned Aircraft''.

The Commentary to § 2A5.2 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. 1992(a)(1)'' and inserting ''18 U.S.C. 39B, 1992(a)(1)''.

The Commentary to § 2X5.2 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. 1365(f), 1801; 34 U.S.C. 12593; 49 U.S.C. 31310.'' and inserting ''18 U.S.C. 39B, 1365(f), 1801; 34 U.S.C. 12593; 49 U.S.C. 31310. For additional statutory provision(s), *see* Appendix A (Statutory Index).''.

The Commentary to § 2A2.4 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. 111'' and inserting ''18 U.S.C. 40A, 111''.

Issue for Comment

1. In response to the FAA Reauthorization Act of 2018, Public Law 115–254 (2018), Part C of the proposed amendment would reference 18 U.S.C. 39B to § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle) and § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). Part C of the proposed amendment would also reference 18 U.S.C. 40A to § 2A2.4 (Obstructing or Impeding Officers). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for the new criminal offenses created by the FAA Reauthorization Act.

(D) SUPPORT for Patients and Communities Act

Synopsis of Proposed Amendment: Part D of the proposed amendment responds to the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (''the SUPPORT for Patients and Communities Act''), Public Law 115–271 (2018).

This Act includes the Eliminating Kickbacks in Recovery Act of 2018, which added a new offense at 18 U.S.C. 220 (Illegal remunerations for referrals to recovery homes, clinical treatment facilities, and laboratories). Section 220(a) prohibits, with respect to services covered by a ''health care benefit program,'' knowing or willfully: (1) soliciting or receiving any remuneration (including kickbacks, bribes, or rebates), in cash or in kind, for referring a patient or patronage to a recovery home, clinical treatment facility, or laboratory; and (2) paying or offering any

remuneration (including kickbacks, bribes, or rebates), in cash or in kind, for inducing a referral of a patient to or in exchange for a patient using the services of a recovery home, clinical treatment facility, or laboratory. The new offense has a statutory maximum term of imprisonment of ten years.

A ''health care benefit program,'' for purposes of section 220, includes public and private plans and contracts affecting commerce. *See* 18 U.S.C. 220(e)(3) (referring to the definition of such term at 18 U.S.C. 24(b)). Section 220 also sets forth exemptions to the offense relating to certain discounts, payments, and waivers. *See* 18 U.S.C. 220(b).

Part D of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. 220 to §§ 2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). The conduct prohibited in 18 U.S.C. 220 is similar to the conduct prohibited in 42 U.S.C. 1320a–7b(b) (Criminal penalties for acts involving Federal health care programs). Currently, section 1320a–7b offenses are referenced in Appendix A to both §§ 2B1.1 and 2B4.1.

Part D of the proposed amendment would also amend the commentaries to §§ 2B1.1 and 2B4.1 to reflect that 18 U.S.C. 220 is referenced to these guidelines.

An issue for comment is also provided.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. 224 the following new line reference:

''18 U.S.C. 220 2B1.1, 2B4.1''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. 38'' and inserting ''18 U.S.C. 38, 220''.

The Commentary to § 2B4.1 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. 215'' and inserting ''18 U.S.C. 215, 220''.

Issue for Comment

1. In response to the SUPPORT for Patients and Communities Act, Part D of the proposed amendment would reference 18 U.S.C. 220 to §§ 2B1.1 (Theft, Property Destruction, and Fraud) and 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for section 220's offense conduct. Specifically, should the Commission amend § 2B1.1 or § 2B4.1 to provide a higher or lower base offense level if 18 U.S.C. 220 is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to any of these guidelines in response to section 220? If so, what should that specific offense characteristic provide and why?

(E) Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018

Synopsis of Proposed Amendment: Part E of the proposed amendment responds to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Public Law 115–299 (2018).

Among other things, the Act amended 18 U.S.C. 2259 (Mandatory restitution), with respect to victims of child pornography, by adding a new subsection (d). This new subsection permits any victim of child pornography trafficking to receive ''defined monetary assistance'' from the Child Pornography Victims Reserve when a defendant is convicted of trafficking in child pornography. It also sets forth rules for determining the amount of ''defined monetary assistance'' a victim may receive and certain limitations relating to the effect of restitution and on eligibility. In addition, new subsection (d)(4)(A) states that that any attorney representing a victim seeking ''defined monetary assistance'' may not charge, receive, or collect (nor may the court approve) the payment of fees and costs that in the aggregate exceeds 15 percent of any payment made under new subsection (d) in general. It also provides that an attorney who violates subsection (d)(4)(A) may be subject to a statutory maximum term of imprisonment of not more than one year. *See* 18 U.S.C. 2259(d)(4)(B).

Part E of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. 2259(d)(4) to § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). It would also amend the Commentary to § 2X5.2 to reflect that 18 U.S.C. 2259(d)(4) is referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. 2260(a) the following new line reference:

''18 U.S.C. 2259(d)(4) 2X5.2''.

The Commentary to § 2X5.2 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. 1365(f), 1801; 34 U.S.C. 12593; 49 U.S.C. 31310.'' and inserting ''18 U.S.C. 1365(f), 1801, 2259(d)(4); 34 U.S.C. 12593; 49 U.S.C. 31310. For additional statutory provision(s), *see* Appendix A (Statutory Index).''.

Issue for Comment

1. In response to the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Part E of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. 2259(d)(4) to § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The Commission seeks comment on whether this proposed reference is appropriate and whether any additional changes to the guidelines are required to account for the new offense conduct at 18 U.S.C. 2259(d)(4).

(F) Foundations for Evidence-Based Policymaking Act of 2018

Synopsis of Proposed Amendment: Part F of the proposed amendment responds to the Foundations for Evidence-Based Policymaking Act of 2018, Public Law 115–435 (2019).

This Act includes the Confidential Information Protection and Statistical Efficiency Act of 2018, which added a new offense at 44 U.S.C. 3572 (Confidential information protection). Section 3572 prohibits the unauthorized disclosure of information collected by an agency under a pledge of confidentiality and for exclusively statistical purposes, or the use of such information for other than statistical purposes. Any willful unauthorized disclosure of such information by an officer, employee, or agent of an agency acquiring information for exclusively statistical purposes is punishable by a statutory maximum term of imprisonment of five years. *See* 44 U.S.C. 3572(f).

Part F of the proposed amendment would amend Appendix A (Statutory Index) to reference 44 U.S.C. 3572 to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Similar confidential information disclosure offenses, such as 18 U.S.C. 1039 and 26 U.S.C. 7213(a), are referenced to this guideline. Part F of the proposed amendment would also amend the Commentary to § 2H3.1 to reflect that 44 U.S.C. 3572 is referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 45 U.S.C. 359(a) the following new line reference:

''44 U.S.C. 3572 2H3.1''.

The Commentary to § 2H3.1 captioned ''Statutory Provisions'' is amended by striking ''47 U.S.C. 605'' and inserting ''44 U.S.C. 3572; 47 U.S.C. 605''.

Issue for Comment

1. In response to the Foundations for Evidence-Based Policymaking Act of 2018, Part F of the proposed amendment would reference 44 U.S.C. 3572 to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). The Commission seeks comment on whether this proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 3572's offense conduct. Specifically, should the Commission amend § 2H3.1 to provide a higher or lower base offense level if 44 U.S.C. 3572 is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to § 2H3.1 in response to section 3572? If so, what should that specific offense characteristic provide and why?

(G) National Defense Authorization Act for Fiscal Year 2020

Synopsis of Proposed Amendment: Part G of the proposed amendment responds to the National Defense Authorization Act for Fiscal Year 2020, Public Law 116–92 (2019).

The Act added a new statute at 10 U.S.C. 2733a regarding medical malpractice claims by members of the uniformed services. The new statute authorizes the Secretary of Defense to allow, settle, and pay a claim against the United States for personal injury or death that occurred during the service of a member of the uniformed services and that was caused by the medical malpractice of a health care provider of the Department of Defense, if certain requirements are met. Under section 2733a(c)(2), the Department of Defense is not liable for the payment of attorney fees for a claim under the new statute. However, section 2733(g)(1) prohibits any attorney from charging, demanding, receiving, or collecting fees in excess of 20 percent of any claim paid pursuant to the new statute. Any attorney who charges, demands, receives, or collects a fee in excess of 20 percent faces a statutory maximum term of imprisonment of not more than one year. *See* 10 U.S.C. 2733a(g)(2).

Part G of the proposed amendment would amend Appendix A (Statutory Index) to reference 10 U.S.C. 2733a(g)(2) to § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). It would also amend the Commentary to § 2X5.2 to reflect that 10 U.S.C. 2733a(g)(2) is referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 12 U.S.C. 631 the following new line reference:

''10 U.S.C. 2733a(g)(2) 2X5.2''.

The Commentary to § 2X5.2 captioned ''Statutory Provisions'' is amended by striking ''18 U.S.C. 1365(f), 1801; 34 U.S.C. 12593; 49 U.S.C. 31310.'' and inserting ''10 U.S.C. 2733a(g)(2); 18 U.S.C. 1365(f), 1801; 34 U.S.C. 12593; 49 U.S.C. 31310. For additional statutory provision(s), *see* Appendix A (Statutory Index).''.

Issue for Comment

1. In response to the National Defense Authorization Act for Fiscal Year 2020, Part G of the proposed amendment would amend Appendix A (Statutory Index) to reference 10 U.S.C. 2733a(g)(2) to § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)). The Commission seeks comment on whether this proposed reference is appropriate and whether any additional changes to the guidelines are required to account for the new offense conduct at 10 U.S.C. 2733a(g)(2).

(H) Representative Payee Fraud Prevention Act of 2019

Synopsis of Proposed Amendment: Part H of the proposed amendment responds to the Representative Payee Fraud Prevention Act of 2019, Public Law 116–126 (2020).

The Act amended certain sections in chapters 83 (Retirement) and 84 (Federal Employees' Retirement System) of title 5 (Government Organization and Employees), United States, Code, relating to the Civil Services Retirement System (''CSRS'') and the Federal Employees Retirement System (''FERS''). Under both retirement programs, annuities that are due to a minor or an individual mentally incompetent or under other legal disability may be made to the guardian or other fiduciary of such individual. *See* 5 U.S.C. 8345(e), 8466(c).

The Act added two identical new offenses at 5 U.S.C. 8345a and 8466a, regarding embezzlement or conversion of payments due to a minor or an individual mentally incompetent or under other legal disability under CSRS and FERS. Both offenses apply to a ''representative payee.'' The Act added similar provisions to both chapters 83 and 84 of title 5 defining the term as ''a person (including an organization) designated under [section 8345(e)(1) or section 8466(c)(1)] to receive payments on behalf of a minor or an individual mentally incompetent or under other legal disability.'' 5 U.S.C. 8331(33), 8401(39).

The new offense at 5 U.S.C. 8345a prohibits a representative payee from embezzling or in any manner converting all or any part of the amounts received from payments under the CSRS retirement program for a use other than for the use and benefit of the minor or individual on whose behalf the payments were received. The new offense at 5 U.S.C. 8466a prohibits a representative payee from engaging in the same conduct prohibited under section 8345a for purposes of payments received under the FERS retirement program. Offenses under both sections 8345a and 8466a are punishable by a statutory maximum term of imprisonment of five years.

Part H of the proposed amendment would amend Appendix A (Statutory Index) to reference 5 U.S.C. 8345a and 8466a to § 2B1.1 (Theft, Property Destruction, and Fraud). Similar financial fraud and embezzlement offenses relating to social security, veterans' benefits, and welfare benefit and pension plans (such as 18 U.S.C. 664, 38 U.S.C. 6102, and 42 U.S.C. 408(a)(5), 1011(a)(4) and 1383a(a)(4)) are referenced to § 2B1.1. Part H of the proposed amendment would also amend the Commentary to § 2B1.1 to reflect that 5 U.S.C. 8345a and 8466a are referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 7 U.S.C. 6 the following new line references:

''5 U.S.C. 8345a 2B1.1
5 U.S.C. 8466a 2B1.1''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by striking ''7 U.S.C. 6, 6b, 6c, 6h, 6o, 13, 23'' and inserting ''5 U.S.C. 8345a, 8466a; 7 U.S.C. 6, 6b, 6c, 6h, 6o, 13, 23''.

Issue for Comment

1. In response to the Representative Payee Fraud Prevention Act of 2019,

Part H of the proposed amendment would reference 5 U.S.C. 8345a and 8466a to § 2B1.1 (Theft, Property Destruction, and Fraud). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for the offense conduct covered by sections 8345a and 8466a. Specifically, should the Commission amend § 2B1.1 to provide a higher or lower base offense level if 5 U.S.C. 8345a or § 8466a is the offense of conviction? If so, what should that base offense level be for each of these sections and why? Should the Commission add a specific offense characteristic to § 2B1.1 in response to 5 U.S.C. 8345a or § 8466a? If so, what should that specific offense characteristic provide and why?

(I) Stop Student Debt Relief Scams Act of 2019

Synopsis of Proposed Amendment: Part I of the proposed amendment responds to the Stop Student Debt Relief Scams Act of 2019, Public Law 116–251 (2020).

The Act created a new offense at 20 U.S.C. 1097(e). Current subsections (a) through (d) of section 1097 provide criminal penalties for crimes relating to student assistance programs, including embezzlement, theft, fraud, forgery, and making unlawful payments to a lender to acquire a loan. New subsection (e) of section 1097 prohibits knowingly using an access device (as defined in 18 U.S.C. 1029(e)(1)) issued to another person or obtained by fraud or false statement to access information technology systems of the Department of Education for purposes of obtaining commercial advantage or private financial gain, or in furtherance of any criminal or tortious act. The statutory maximum term of imprisonment for the offense is five years.

Part I of the proposed amendment would amend Appendix A (Statutory Index) to reference 20 U.S.C. 1097(e) to § 2B1.1 (Theft, Property Destruction, and Fraud). Section 1097(a), (b), and (d) offenses (theft, embezzlement, and fraud) are currently referenced to § 2B1.1, while section 1097(c) offenses (unlawful payments to acquire a loan) are referenced to § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery). Part I of the proposed amendment would also amend the Commentary to § 2B1.1 to reflect that 20 U.S.C. 1097(a), (b), (d), and (e) are referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 21 U.S.C. 101 the following new line reference:

''20 U.S.C. 1097(e) 2B1.1''.

The Commentary to § 2B1.1 captioned ''Statutory Provisions'' is amended by striking ''19 U.S.C. 2401f'' and inserting ''19 U.S.C. 2401f; 20 U.S.C. 1097(a), (b), (d), (e)''.

Issue for Comment

1. In response to the Stop Student Debt Relief Scams Act of 2019, Part I of the proposed amendment would reference 20 U.S.C. 1097(e) to § 2B1.1 (Theft, Property Destruction, and Fraud). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 1097(e) offenses. Specifically, should the Commission amend § 2B1.1 to provide a higher or lower base offense level if 20 U.S.C. 1097(e) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to § 2B1.1 in response to 20 U.S.C. 1097(e)? If so, what should that specific offense characteristic provide and why?

(J) Protecting Lawful Streaming Act of 2020

Synopsis of Proposed Amendment: Part J responds to title II of Division Q of the Consolidated Appropriations Act, 2021, referred to as the Protecting Lawful Streaming Act of 2020, Public Law 116–260 (2020).

The Act created a new commercial streaming piracy offense at 18 U.S.C. 2319C (Illicit digital transmission services). Section 2319C(b) makes it unlawful to willfully, and for purposes of commercial advantage or private financial gain, offer or provide to the public a digital transmission service that (1) is primarily designed or provided for the purpose of publicly performing works protected under copyright law by means of a digital transmission without the authority of the copyright owner or the law; (2) has no commercially significant purpose or use other than to publicly perform works protected under copyright law by means of a digital transmission without the authority of the copyright owner or the law; or (3) is intentionally marketed to promote its use in publicly performing works protected under copyright law by means of a digital transmission without the authority of the copyright owner or the law. Section 2319C(a) provides definitions for some of the terms used in the statute.

A violation of section 2319C has a statutory maximum term of imprisonment of three years. 18 U.S.C. 2319C(c)(1). However, the maximum penalty increases to five years if (1) the offense was committed in connection with one or more works being prepared for commercial public performance; and (2) the offender knew or should have known that the work was being prepared for commercial public performance. *Id.* § 2319C(c)(2). A ten-year maximum penalty applies if the offense is a second or subsequent offense under 18 U.S.C. 2319C or § 2319(a). *Id.* § 2319C(c)(3).

Part J of the proposed amendment would amend Appendix A (Statutory Index) to reference 18 U.S.C. 2319C to § 2B5.3 (Criminal Infringement of Copyright or Trademark). Similar offenses, such as 17 U.S.C. 506 (prohibiting infringing a copyright of a work being prepared for commercial distribution) and 18 U.S.C. 2319A and 2319B (prohibiting the unauthorized recording and trafficking of live musical performances for commercial advantage or private financial gain, and the unauthorized recording of motion pictures in movie theaters), are referenced to § 2B5.3.

Issues for comment are also provided.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 18 U.S.C. 2320 the following new line reference:

''18 U.S.C. 2319C 2B5.3''.

Issues for Comment

1. In response to the Protecting Lawful Streaming Act of 2020, Part J of the proposed amendment would reference 18 U.S.C. 2319C to § 2B5.3 (Criminal Infringement of Copyright or Trademark). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 2319C offenses. Specifically, should the Commission amend § 2B5.3 to provide a higher or lower base offense level if 18 U.S.C. 2319C is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to § 2B5.3 in response to 18 U.S.C. 2319C? If so, what should that specific offense characteristic provide and why?

The new statute at 18 U.S.C. 2319C provides enhanced penalties if (1) the offense was committed in connection with one or more works being prepared

for commercial public performance, and the offender knew or should have known that the work was being prepared for commercial public performance; or (2) if the offense is a second or subsequent offense under 18 U.S.C. 2319C or § 2319(a). Should the Commission amend § 2B5.3 to address these enhanced penalties? If so, how should the Commission address them and why?

2. Currently, § 2B5.3 includes a specific offense characteristic at subsection (b)(2) providing a 2-level enhancement ''[i]f the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution.'' The new offense at 18 U.S.C. 2319C mainly addresses the streaming (*i.e.,* offering or providing ''to the public a digital transmission service'') of works ''being prepared for commercial public performance.'' The Commission seeks comment on whether current § 2B5.3(b)(2) adequately accounts for section 2319C's offense conduct. If not, what revisions to § 2B5.3(b)(2) would be appropriate to account for this conduct? Should the Commission instead revise § 2B5.3 in general provide one or more specific offense characteristics or departure provisions to better account for this conduct? If so, what should the Commission provide?

(K) William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

Synopsis of Proposed Amendment: Part K of the proposed amendment responds to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (2021). The Act created several new offenses at 31 U.S.C. 5335 and 5336.

The Act included two regulatory offenses in a new section 5335 of title 31, United States Code. Section 5335(b) prohibits knowingly concealing, falsifying, or misrepresenting (or attempting to do so) from or to a financial institution, a material fact concerning the ownership or control of assets involved in a monetary transaction if (1) the person or entity who owns or controls the assets is a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure; and (2) the aggregate value of the assets involved in one or more monetary transactions is not less than $1,000,000. Section 5335(c) prohibits knowingly concealing, falsifying, or misrepresenting (or attempting to do so) from or to a financial institution, a material fact concerning the source of funds in a monetary transaction that (1) involves an entity found to be a primary money laundering concern under 31 U.S.C. 5318A or applicable regulations; and (2) violates the prohibitions or conditions prescribed under 31 U.S.C. 5318A(b)(5) or applicable regulations. Both new offenses cover conspiracies to commit the prohibited conduct and have a statutory maximum term of imprisonment of ten years. *See* 31 U.S.C. 5335(d).

The Act also added a new section 5336 to title 31, United States Code, concerning reporting requirements of beneficial ownership of certain entities. Specifically, section 5336(b) requires certain United States and foreign corporations, limited liability companies, and similar entities, to file annual reports with the Department of the Treasury's Financial Crimes Enforcement Network (''FinCEN''). The annual reports must identify an entity's beneficial owners (*i.e.,* those exercising substantial control or who own or control no less than 25% of the ownership interests), including names, dates of birth, street address, and unique identification numbers (such as passport numbers, driver's license numbers, or FinCEN identifiers). Section 5336(c) provides certain conditions under which FinCEN may disclose the beneficial ownership information to certain requesting agencies, including federal agencies, state, local and tribal law enforcement agencies, federal agencies on behalf of law enforcement, or a prosecutor or judge of a foreign country.

Section 5336 includes three new offenses relating to the provisions described above. First, section 5336(h)(1) prohibits (1) willfully providing, or attempting to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN; or (2) willfully failing to report complete or updated beneficial ownership information to FinCEN. The statutory maximum term of imprisonment for this offense is two years. Second, section 5336(c)(4) prohibits any employee or officer of a requesting agency from violating the protocols established by the regulations promulgated by the Secretary of the Treasury under section 5336, including unauthorized disclosure or use of the beneficial ownership information obtained from FinCEN. Third, section 5336(h)(2) prohibits the knowing disclosure or knowing use, without authorization, of beneficial ownership information obtained through a report submitted to FinCEN or a disclosure made by FinCEN. Both sections 5336(c)(4) and 5336(h)(2) offenses face a statutory maximum term of imprisonment of five years, with an enhanced penalty of up to ten years if the offense was committed while violating another law or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period.

Part K of the proposed amendment would amend Appendix A (Statutory Index) to reference 31 U.S.C. 5335 and 5336 to § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). Similar offenses, such as offenses under 31 U.S.C. 5313 and 5318(g)(2), are referenced to § 2S1.3. Part K of the proposed amendment would also amend the Commentary to § 2S1.3 to reflect that 31 U.S.C. 5335 and 5336 are referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment

Appendix A (Statutory Index) is amended by inserting before the line referenced to 31 U.S.C. 5363 the following new line references:

''31 U.S.C. 5335 2S1.3
31 U.S.C. 5336 2S1.3''.

The Commentary to § 2S1.3 captioned ''Statutory Provisions'' is amended by striking ''5332'' and inserting ''5332, 5335, 5336''.

Issue for Comment

1. In response to the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Part K of the proposed amendment would reference 31 U.S.C. 5335 and 5336 to § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts). The Commission seeks comment on whether these proposed references are appropriate and whether any additional changes to the guidelines are required to account for sections 5335 and 5336 offenses. Specifically, should the Commission amend § 2S1.3 to provide a higher or lower base offense level if 31 U.S.C. 5335 or § 5336 is the offense of conviction? If so, what should that base offense level be for each of these

sections and why? Should the Commission add a specific offense characteristic to § 2S1.3 in response to 31 U.S.C. 5335 and 5336? If so, what should that specific offense characteristic provide and why?

The new statute provides an enhanced penalty for offenses under 31 U.S.C. 5336(c)(4) and 5336(h)(2) offenses if the offense was committed while violating another law or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period. Should the Commission amend § 2S1.3 to address this enhanced penalty? If so, how should the Commission address it and why?

6. Career Offender

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's multiyear work on § 4B1.2 (Definitions of Terms Used in Section 4B1.1), including possible amendments to (A) provide an alternative approach to the ''categorical approach'' in determining whether an offense is a ''crime of violence'' or a ''controlled substance offense''; and (B) address various application issues, including the meaning of ''robbery'' and ''extortion,'' and the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance. *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 87 FR 67756 (Nov. 9, 2022). The proposed amendment contains four parts (Parts A through D). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A of the proposed amendment would amend § 4B1.2 to address recurrent criticism of the categorical approach and modified categorical approach, which courts have applied in the context of § 4B1.1 (Career Offender). It eliminates the categorical approach from the guidelines by defining ''crime of violence'' and ''controlled substance offense'' based upon a list of guidelines, rather than offenses or elements of an offense. Part A would also make conforming changes to the guidelines that use the terms ''crime of violence'' and ''controlled substance offense'' and define these terms by making specific reference to § 4B1.2. Issues for comment are also provided.

Part B of the proposed amendment would address the concern that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a ''crime of violence'' under § 4B1.2, as amended in 2016. It would amend § 4B1.2 to add a definition of ''robbery'' that mirrors the Hobbs Act robbery definition at 18 U.S.C. 1951(b)(1). Part B of the proposed amendment also brackets a provision defining the phrase ''actual or threatened force,'' for purposes of the new ''robbery'' definition, as ''force sufficient to overcome a victim's resistance,'' informed by the Supreme Court's holding in *Stokeling* v. *United States,* 139 S. Ct. 544, 550 (2019). Finally, Part B of the proposed amendment would make conforming changes to the definition of ''crime of violence'' in the Commentary to § 2L1.2 (Unlawfully Entering or Remaining in the United States), which includes robbery as an enumerated offense. Issues for comment are also provided.

Part C of the proposed amendment would amend § 4B1.2 to address two circuit conflicts regarding the commentary provision stating that the terms ''crime of violence'' and ''controlled substance offense'' include the offenses of aiding and abetting, conspiring to commit, and attempting to commit a ''crime of violence'' and a ''controlled substance offense.'' Two options are presented. Issues for comment are also provided.

Part D of the proposed amendment would amend the definition of ''controlled substance offense'' in § 4B1.2(b) to include offenses involving an offer to sell a controlled substance and offenses described in 46 U.S.C. 70503(a) and § 70506(b). An issue for comment is also provided.

(A) Listed Guidelines Approach

Synopsis of Proposed Amendment: Part A of the proposed amendment addresses recurrent criticism of the categorical approach and modified categorical approach, which courts have applied in the context of § 4B1.1 (Career Offender). It eliminates the categorical approach from the guidelines by defining ''crime of violence'' and ''controlled substance offense'' based upon a list of guidelines, rather than offenses or elements of an offense.

The Categorical Approach as Developed by Supreme Court Jurisprudence

A number of statutes and guidelines provide enhanced penalties for defendants convicted of offenses that meet the definition of a particular category of crimes. Courts typically determine whether a conviction fits within the definition of a particular category of crimes through the application of the ''categorical approach'' and ''modified categorical approach,'' as set forth by Supreme Court jurisprudence. The categorical approach requires courts to look only to the statute of conviction, rather than the particular facts underlying the conviction, to determine whether the offense meets the definition of a particular category of crimes. In applying the modified categorical approach, courts are allowed to look to certain additional sources of information, now commonly referred to as the ''*Shepard* documents,'' to determine the elements of the offense of conviction. *See Taylor* v. *United States,* 495 U.S. 575 (1990) (holding that, under the ''categorical approach,'' courts must compare the elements of the offense as described in the statute of conviction to the elements of the applicable definition of a particular category of crimes to determine if such offense criminalizes the same or a narrower range of conduct than the definition captures in order to serve as a predicate offense); *Shepard* v. *United States,* 544 U.S. 13 (2005) (holding that courts may use a ''modified categorical approach'' in cases where the statute of conviction is ''overbroad,'' that is, the statute defines both conduct that fits within the applicable definition and conduct that does not). However, the Supreme Court later held that a court may only apply the modified categorical approach if the court first conducts a threshold inquiry to determine whether a statute of conviction is ''divisible.'' *See Descamps* v. *United States,* 570 U.S. 254 (2013); *Mathis* v. *United States*, 579 U.S. 500 (2016). Thus, under *Descamps* and *Mathis,* if a statute of conviction is ''indivisible'' and criminalizes a broader range of conduct than the applicable definition, the entire statute is categorically disqualified from serving as a predicate offense, even if a defendant was convicted under a part of the statute that falls within the definition.

Application of the Categorical Approach in the Guidelines

Even though Supreme Court jurisprudence on this subject pertains only to statutory provisions (*e.g.,* 18 U.S.C. 924(e)), courts have applied the categorical approach and the modified categorical approach to guideline provisions. For example, courts have used these approaches to determine if a conviction is a ''crime of violence'' or a ''controlled substance offense'' for purposes of applying the career offender guideline at § 4B1.1. Additionally, several other guidelines, such as § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), also rely upon the career offender guideline's definitions of ''crime of violence'' and ''controlled substance offense.'' Therefore, courts have also used the categorical approach for purposes of these guidelines.

Commission data indicates that of the 53,779 offenders sentenced in fiscal year 2021, 1,246 offenders (2.3%) were sentenced under the career offender guideline. An additional 3,239 offenders (6.0% of the offenders sentenced in fiscal year 2021) sentenced under § 2K2.1 were assigned to a base offense level that requires a prior conviction for a ''crime of violence'' or ''controlled substance offense.''

While representing a relatively small portion of the federal caseload each year, the categorical approach continues to result in substantial litigation. Since 1990, the Supreme Court has issued dozens of opinions that have shaped the categorical approach and modified categorical approach. The Commission identified over 3,300 written opinions over the past five years in which federal courts have invoked, discussed, or applied the categorical approach. More than half of those opinions focused on categorical approach issues raised in applying guideline provisions while the remainder dealt with statutory provisions (*e.g.,* 18 U.S.C. 924(c)).

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

The Commission has received significant comment over the years regarding the complexity and limitations of the categorical approach, as developed by Supreme Court jurisprudence. Specifically, courts and stakeholders have criticized the requirement of a threshold inquiry of whether a statute of conviction is divisible or indivisible as resulting in an overly complex and time-consuming analysis that often leads to counterintuitive and arbitrary results. For example, dissenting justices in *Descamps* and *Mathis* expressed concern that the ''divisibility'' inquiry is confusing and ''will cause serious practical problems'' (*e.g., Descamps,* 570 U.S. at 284 (Alito, J., dissenting); *Mathis,* 579 U.S. at 523–33 (Breyer, J., joined by Ginsberg, J., dissenting)), and noted that ''lower court judges[,] who must regularly grapple with the modified categorical approach, struggle[ ] to understand *Descamps*'' (*Mathis,* 579 U.S. at 538 (Alito, J., dissenting)).

In the aftermath of *Descamps* and *Mathis,* commenters have stressed that the categorical approach has become increasingly difficult to apply, while simultaneously producing results less reflective of the types of conduct § 4B1.1 was intended to capture. *See, e.g.,* Public Comment on Proposed Amendments (Feb. 2019), *at https://www.ussc.gov/policymaking/public-comment/public-comment-february-19-2019.* Courts have further criticized the categorical approach as a ''legal fiction,'' in which an offense that a defendant commits violently is deemed to be a non-violent offense because other defendants at other times could have been convicted of violating the same statute without violence, often leading to ''odd'' and ''arbitrary'' results. *See, e.g., United States* v. *Davis*, 875 F.3d 592, 595 (11th Cir. 2017); *United States* v. *McCollum,* 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring); *id.* (Wilkinson, J., dissenting).

Proposed Approach for § 4B1.2

Part A of the proposed amendment eliminates the categorical approach from the guidelines by defining ''crime of violence'' and ''controlled substance offense'' based upon a list of guidelines, rather than offenses or elements of an offense. The list of Chapter Two guidelines included in the definition of ''crime of violence'' is informed by the guidelines that the Commission has identified as covering ''violent instant offenses'' for purposes of the study of recidivism of federal offenders. *See* Courtney R. Semisch, Cassandra Syckes & Landyn Rookard, U.S. Sent'g Comm'n, Recidivism of Federal Violent Offenders Released in 2010 (2022), *https://www.ussc.gov/research/research-reports/recidivism-federal-violent-offenders-released-2010.* The Chapter Two guidelines listed in the definition of ''controlled substance offense'' are the guidelines that cover the offenses expressly referenced in the career offender directive at 28 U.S.C. 994(h).

The focus of inquiry set forth in the proposed approach is whether the defendant was convicted of a federal offense for which the ''applicable Chapter Two guideline'' is listed in § 4B1.2 or a state offense for which the ''most appropriate'' offense guideline would have been one of the Chapter Two guidelines listed in § 4B1.2 had the defendant been sentenced under the guideline in federal court. The court would make this determination based on: (1) the elements, and any means of committing such an element, that formed the basis of the defendant's conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means.

The proposed approach is intended to remove the complexity inherent in determining whether a statute of conviction is ''divisible'' or ''indivisible'' based on a threshold ''elements-means'' inquiry. Thus, the court would not be required to determine whether an indivisible statute criminalizes conduct that does not meet the applicable definition; rather, the court would be required to determine only whether the Chapter Two guideline that covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted is listed in § 4B1.2. The proposed approach would also expand the use of additional sources of information by permitting courts to use the *Shepard* documents when necessary to make the career offender determination.

Conforming Changes to Other Guidelines

Finally, Part A of the proposed amendment would make conforming changes to the guidelines that use the terms ''crime of violence'' and ''controlled substance offense'' and define these terms by making specific reference to § 4B1.2. Accordingly, the proposed amendment would amend the Commentary to § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), § 4A1.2 (Definitions and Instructions for Computing Criminal History), § 4B1.4 (Armed Career Criminal), and § 7B1.1 (Classification of Violations (Policy Statement)).

Issues for comment are also provided.

Proposed Amendment

Section 4B1.2(a) is amended by striking the following:

''The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. 5845(a) or explosive material as defined in 18 U.S.C. 841(c).'',

and inserting the following:

''*Crime of Violence.*—

(1) *In General.*—The term 'crime of violence' means any of the following offenses:

(A) Any offense under federal law, punishable by imprisonment for a term exceeding one year—

(i) for which the applicable Chapter Two guideline (as determined under the provisions of § 1B1.2 (Applicable Guidelines)); or

(ii) to which § 2X1.1 (Attempt, Solicitation, or Conspiracy) or § 2X2.1 (Aiding and Abetting) applies and the appropriate guideline for the offense the defendant aided or abetted, or conspired, solicited, or attempted to commit;

is one of the guidelines listed in paragraph (2).

(B) Any offense under state law (or the offense of aiding or abetting, or conspiring, soliciting, or attempting to commit any such offense), punishable by imprisonment for a term exceeding one year, for which the most appropriate guideline would have been one of the Chapter Two guidelines listed in paragraph (2) had the defendant been sentenced under the guidelines in federal court (as determined under subsection (c)).

(2) *Guidelines Listed.*—For purposes of the 'crime of violence' definition, use the following Chapter Two guidelines:

• *Homicide.*—§§ 2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A1.3 (Voluntary Manslaughter), 2A1.5 (Conspiracy or Solicitation to Commit Murder);

• *Assault.*—§§ 2A2.1 (Attempted Murder), 2A2.2 (Aggravated Assault), 2A2.4 (Obstructing or Impeding Officers);

• *Criminal Sexual Abuse.*—§§ 2A3.1 (Sexual Abuse), 2A3.3 (Sexual Abuse of a Ward), 2A3.4 (Abusive Sexual Contact);

• *Kidnapping, Abduction, and Unlawful Restraint.*—§ 2A4.1 (Kidnapping, Abduction, Unlawful Restraint);

• *Air Piracy and Offenses Against Mass Transportation Systems.*—§§ 2A5.1 (Aircraft Piracy), 2A5.2 (Interference with Flight or Cabin Crew, or Mass Transportation);

• *Threatening or Harassing Communications, Hoaxes, Stalking, and Domestic Violence.*—§§ 2A6.1 (Threatening or Harassing Communications, Hoaxes, or False Liens) (only if the offense involve a threat to injure a person or property), 2A6.2 (Stalking or Domestic Violence);

• *Robbery and Extortion.*—§§ 2B3.1 (Robbery), 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage);

• *Racketeering.*—§§ 2E1.1 (Unlawful Conduct Relating to Racketeering), 2E1.2 (Travel or Transportation Aiding Racketeering), 2E1.3 (Violent Crimes Aiding Racketeering), 2E1.4 (Using Certain Facilities to Commit Murder-For-Hire);

• *Promoting a Commercial Sex Act or Prohibited Sexual Conduct with Minors.*—§ 2G1.3 (Promoting Commercial Sex Acts or Prohibited Sexual Conduct with Minors; Using Certain Facilities to Transport Information about Minors);

• *Sexual Exploitation of Minors.*—§§ 2G2.1 (Sexual Exploitation of Minors; Production of Child Pornography), 2G2.3 (Selling or Buying Children for Pornography Production), 2G2.6 (Child Exploitation Enterprises);

• *Peonage and Slavery.*—§ 2H4.1 (Peonage, Slavery, Child Soldiers);

• *Explosives and Arson.*—§§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials), 2K1.4 (Arson);

• *Firearms.*—§§ 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) (only if the offense involved possession of a firearm that is described in 26 U.S.C. 5845(a)), 2K2.4 (Using Certain Firearms, Ammunition, or Explosives During or in Relation to Certain Crimes);

• *Material Support to Terrorists.*—§ 2M5.3 (Providing Material Support to Certain Terrorists or for Terrorist Purposes);

• *Nuclear, Biological, and Chemical Weapons and Materials.*—§ 2M6.1 (Unlawful Activity Involving Nuclear, Biological, or Chemical Weapons or Materials, or Other Weapons of Mass Destruction);

• *Use of Minors in Crimes of Violence.*—§ 2X6.1 (Using Minors in Crimes of Violence).

(3) *Exclusion.*—For purposes of this guideline, a conviction under federal or state law based upon a finding of recklessness or negligence is not a 'crime of violence.' ''.

Section 4B1.2(b) is amended by striking the following:

''The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.'',

and inserting the following:

Controlled Substance Offense.—

(1) *In General.*—The term 'controlled substance offense' means any of the following offenses:

(A) Any offense under federal law, punishable by imprisonment for a term exceeding one year—

(i) for which the applicable Chapter Two guideline (as determined under the provisions of § 1B1.2 (Applicable Guidelines)); or

(ii) to which § 2X1.1 (Attempt, Solicitation, or Conspiracy) or § 2X2.1 (Aiding and Abetting) applies and the appropriate guideline for the offense the defendant aided or abetted, or conspired, solicited, or attempted to commit;

is one of the guidelines listed in paragraph (2).

(B) Any offense under state law (or the offense of aiding or abetting, or conspiring, soliciting, or attempting to commit any such offense), punishable by imprisonment for a term exceeding one year, for which the most appropriate guideline would have been one of the Chapter Two guidelines listed in paragraph (2) had the defendant been sentenced under the guidelines in federal court (as determined under subsection (c)).

(C) Any offense described in chapter 705 of title 46, United States Code.

(2) *Guidelines Listed.*—For purposes of the 'controlled substance offense' definition, use the following Chapter Two guidelines:

• §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking); 2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect Unlawful Production of Drugs); 2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing Listed Chemicals)[;]

[• §§ 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Certain Individuals); 2D1.6 (Use of Communication Facility in Committing Drug Offense), if the appropriate guideline for the underlying offense is also listed in this paragraph; 2D1.8 (Renting or Managing Drug Establishments); 2D1.10 (Life Endangerment While Manufacturing Drugs); 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Items)].

(3) *Exclusion.*—For purposes of this guideline, a conviction under federal or state law based upon a finding of recklessness or negligence is not a 'controlled substance offense.' ''.

Section 4B1.2 is amended—

by redesignating subsection (c) as subsection (d);

by adding the following new subsection (c):

''(c) *Determination of Whether a State Offense Is a 'Crime of Violence' or a 'Controlled Substance Offense'.*—For purposes of determining whether a state offense is a 'crime of violence' or a 'controlled substance offense' under

subsection (a)(1)(B) or (b)(1)(B), the 'most appropriate guideline' is the Chapter Two guideline that covers the type of conduct most similar to the offense charged in the count of which the defendant was convicted. The court shall make this determination based on: (1) the elements, and any means of committing such an element, that formed the basis of the defendant's conviction, and (2) the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any such elements or means.'';

and in subsection (d) (as so redesignated) by inserting at the beginning the following new heading ''*Two Prior Felony Convictions.*—'';

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended—

in Note 1 by striking the following:

''*Definitions.*—For purposes of this guideline—

'Crime of violence' and 'controlled substance offense, include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

'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.

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

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. 843(a)(6)) is a 'controlled substance offense.'

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. 856) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense facilitated) was a 'controlled substance offense.'

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. 843(b)) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a 'controlled substance offense.'

A violation of 18 U.S.C. 924(c) or § 929(a) is a 'crime of violence' or a 'controlled substance offense' if the offense of conviction established that the underlying offense was a 'crime of violence' or a 'controlled substance offense'. (Note that in the case of a prior 18 U.S.C. 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under § 4A1.2 (Definitions and Instructions for Computing Criminal History).)

'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.,* a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).'',

and inserting the following:

'' *'Prior Felony Conviction' Defined.*—'Prior felony conviction,' for purposes of this guideline, means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.,* a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).'';

in Note 2 by striking the following:

''*Offense of Conviction as Focus of Inquiry.*—Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of § 4B1.1 (Career Offender), the offense of conviction (*i.e.,* the conduct of which the defendant was convicted) is the focus of inquiry.'',

and inserting the following:

''*Determination of Whether a State Offense Is a 'Crime of Violence' or a 'Controlled Substance Offense.'*—In determining whether a state offense is a 'crime of violence' or a 'controlled substance offense' under subsection (a)(1)(B) or (b)(1)(B), the court may only consider the statute of conviction and the following sources of information:

(A) The judgment of conviction.

(B) The charging document.

(C) The jury instructions.

(D) The judge's formal rulings of law or findings of fact.

(E) The plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.

(F) Any explicit factual finding by the trial judge to which the defendant assented.

(G) Any comparable judicial record of the sources described in paragraphs (A) through (F).

The fact that the statute of conviction describes conduct that is broader than, or encompasses types of conduct in addition to, the type of conduct covered by any of the Chapter Two guidelines listed in subsection (a)(2) or (b)(2) is not determinative.'';

in Note 3 by striking ''The provisions of § 4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under § 4B1.1.'' and inserting the following:

''The provisions of § 4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under § 4B1.1. Note that in the case of a prior 18 U.S.C. 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under § 4A1.2(a)(2).'';

and by striking Note 4 as follows:

''*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.''.

The Commentary to § 4B1.2 is amended by adding at the end the following:

''*Background:* Section 4B1.2 defines the terms 'crime of violence,' 'controlled substance offense,' and 'two prior felony convictions' for purposes of § 4B1.1 (Career Offender). Prior to [2023], to determine if an offense met the definition of 'crime of violence' or 'controlled substance offense' in § 4B1.2, courts typically used the categorical approach and the modified categorical approach, as set forth in Supreme Court jurisprudence. *See, e.g., Taylor* v. *United States,* 495 U.S. 575 (1990); *Shepard* v. *United States,* 544 U.S. 13 (2005); *Descamps* v. *United States,* 570 U.S. 254 (2013); *Mathis* v. *United States,* 579 U.S. 500 (2016). These Supreme Court cases, however, involved statutory provisions (*e.g.,* 18 U.S.C. 924(e)) rather than guideline provisions.

In [2023], the Commission amended § 4B1.2 to set forth an approach for determining whether an offense is a 'crime of violence' or a 'controlled substance offense' that does not require the application of the categorical approach and modified categorical approach established by Supreme Court jurisprudence. *See* USSG App. C, Amendment [ ] (effective [Date]). The definitions of 'crime of violence' and 'controlled substance offense,' rather than describing offenses or elements of an offense, are based upon a list of guidelines. The focus of inquiry is whether the defendant was convicted of a federal offense for which the applicable Chapter Two guideline is one of the listed guidelines, or a state offense for which the 'most appropriate' Chapter Two guideline would have been one of the listed guidelines had the defendant been sentenced in federal court under the guidelines. The approach set forth by this guideline requires the court to consider not only the statute of conviction, but also the offense conduct cited in the count of conviction, or a fact admitted or confirmed by the defendant, that establishes any of the elements, and any means of committing such an element, that formed the basis of the defendant's conviction. The court is also permitted to use certain additional sources of information, as appropriate, while conducting this inquiry.''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended in Note 2—

in the paragraph that begins '' 'Controlled substance offense' has the meaning'' by striking ''has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'' and inserting ''means a 'controlled substance offense' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'';

and in the paragraph that begins '' 'Crime of violence' has the meaning'' by striking ''has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2'' and inserting ''means a 'crime of violence' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended—

in Note 1—

in the paragraph that begins '' 'Controlled substance offense' has the meaning'' by striking ''has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'' and inserting ''means a 'controlled substance offense' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'';

and in the paragraph that begins '' 'Crime of violence' has the meaning'' by striking ''has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2'' and inserting ''means a 'crime of violence' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'';

and in Note 13(B) by striking ''have the meaning given those terms in § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'' and inserting ''mean a 'crime of violence' and a 'controlled substance offense' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)''.

The Commentary to § 2S1.1 captioned ''Application Notes'' is amended in Note 1, in the paragraph that begins '' 'Crime of violence' has the meaning'' by striking ''has the meaning given that term in subsection (a)(1) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'' and inserting ''means a 'crime of violence' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)''.

The Commentary to § 4A1.1 captioned ''Application Notes'' is amended in Note 5 by striking ''has the meaning given that term in § 4B1.2(a)'' and inserting ''means a 'crime of violence' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)''.

Section 4A1.2(p) is amended by striking ''the definition of 'crime of violence' is that set forth in § 4B1.2(a)'' and inserting '' 'crime of violence' means a 'crime of violence' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)''.

Section 4B1.4 is amended—

in subsection (b)(3)(A) by striking ''in connection with either a crime of violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b)'' and inserting ''in connection with either a crime of violence or a controlled substance offense, as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'';

and in subsection (c)(2) by striking ''in connection with either a crime of violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b)'' and inserting ''in connection with either a crime of violence or a controlled substance offense, as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)''.

The Commentary to § 5K2.17 captioned ''Application Note'' is amended in Note 1 by striking ''are defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'' and inserting ''mean a 'crime of violence' and a 'controlled substance offense' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)''.

The Commentary to § 7B1.1 captioned ''Application Notes'' is amended—

in Note 2 by striking ''is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2'' and inserting ''means a 'crime of violence' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)'';

and in Note 3 by striking ''is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2'' and inserting ''means a 'controlled substance offense' as defined and determined in accordance with § 4B1.2 (Definitions of Terms Used in Section 4B1.1)''.

Issues for Comment

1. Part A of the proposed amendment would allow courts to look to the documents expressly approved in *Taylor* v. *United States,* 495 U.S. 575 (1990), and *Shepard* v. *United States,* 544 U.S. 13 (2005), in determining whether a conviction is a ''crime of violence'' or a ''controlled substance offense.''

The Commission seeks comment on whether additional or different guidance

should be provided. For example, should the Commission provide a specific set of factors to assess the reliability of a source of information, such as whether the document came out of the adversarial process, was accepted by both parties, or was made by an impartial third party? Should the Commission list specific sources or types of sources that courts may consider, in addition to the sources expressly approved in *Taylor* and *Shepard* (*i.e.,* the *Shepard* documents)? Are there any documents or types of information that should be expressly excluded?

2. The Commentary to § 2L1.2 (Unlawfully Entering or Remaining in the United States) contains definitions for the terms ''crime of violence'' and ''drug trafficking offense'' that closely track the definitions of ''crime of violence'' and ''controlled substance offense,'' respectively, in § 4B1.2(b). *See* USSG § 2L1.2, comment. (n.2).

If the Commission were to promulgate Part A of the proposed amendment, should the Commission also amend the Commentary to § 2L1.2 to mirror the proposed approach for § 4B1.2?

(B) Meaning of ''Robbery''

Synopsis of Proposed Amendment: In 2016, the Commission amended § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to, among other things, delete the ''residual clause'' and revise the ''enumerated offenses clause'' by moving enumerated offenses that were previously listed in the commentary to the guideline itself. *See* USSG, App. C, Amendment 798 (effective Aug. 1, 2016). The ''enumerated offenses clause'' identifies specific offenses that qualify as crimes of violence. Although the guideline relies on existing case law for purposes of defining most enumerated offenses, the amendment added to the Commentary to § 4B1.2 definitions for two of the enumerated offenses: ''forcible sex offense'' and ''extortion.''

''Extortion'' is defined as ''obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.'' USSG § 4B1.2, comment. (n.1). Under case law existing at the time of the 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 18 U.S.C. 1952). However, consistent with the Commission's goal of focusing the career offender and related enhancements on the most dangerous offenders, the amendment narrowed the generic definition of extortion by limiting it to offenses 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.

The Department of Justice has expressed concern that courts have held that certain robbery offenses, such as Hobbs Act robbery, no longer constitute a ''crime of violence'' under the guideline, as amended in 2016, because the statute of conviction does not fit either the generic definition of ''robbery'' or the new guideline definition of ''extortion.'' *See, e.g.,* Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at *https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf.* The Hobbs Act defines the term ''robbery'' as ''the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person *or property* . . . . '' 18 U.S.C. 1951(b)(1) (emphasis added). Following the 2016 amendment, every circuit court addressing the issue has concluded that Hobbs Act robbery does not fall within § 4B1.2's narrow definition of ''crime of violence.'' *See United States* v. *Chappelle,* 41 F.4th 102 (2d Cir. 2022); *United States* v. *Scott*, 14 F.4th 190 (3d Cir. 2021); *United States* v. *Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States* v. *Green*, 996 F.3d 176 (4th Cir. 2021); *Bridges* v. *United States,* 991 F.3d 793 (7th Cir. 2021); *United States* v. *Eason,* 953 F.3d 1184 (11th Cir. 2020); *United States* v. *Camp,* 903 F.3d 594 (6th Cir. 2018); *United States* v. *Edling,* 895 F.3d 1153 (9th Cir. 2018); *United States* v. *O'Connor,* 874 F.3d 1147 (10th Cir. 2017). At least two circuits—the Ninth and Tenth Circuits—have found ambiguity as to whether the guideline definition of extortion includes injury to property, and (under the rule of lenity) both circuits have interpreted the new definition as excluding prior convictions where the statute encompasses injury to property offenses, such as Hobbs Act robbery. See, *e.g., United States* v. *O'Connor,* 874 F.3d 1147 (10th Cir. 2017) (Hobbs Act robbery); *United States* v. *Edling,* 895 F.3d 1153 (9th Cir. 2018) (Nevada robbery).

Part B of the proposed amendment would amend § 4B1.2 to address this issue. First, it would move the definitions of enumerated offenses (*i.e.,* ''forcible sex offense'' and ''extortion'') and ''prior felony conviction'' from the Commentary to § 4B1.2 to a new subsection (d) in the guideline itself. Second, Part B of the proposed amendment would add to new subsection (d) a definition of ''robbery'' that mirrors the ''robbery'' definition at 18 U.S.C. 1951(b)(1). Specifically, it would provide that ''robbery'' is ''the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.'' Finally, Part B of the proposed amendment brackets the possibility of defining the phrase ''actual or threatened use of force,'' for purposes of the ''robbery'' definition, as ''force that is sufficient to overcome a victim's resistance.'' This definition is informed by the Supreme Court's holding in *Stokeling* v. *United States,* 139 S. Ct. 544 (2019).

In addition, Part B of the proposed amendment sets forth conforming changes to the definition of ''crime of violence'' in the Commentary to § 2L1.2 (Unlawfully Entering or Remaining in the United States), which includes robbery as an enumerated offense.

Issues for comment are also provided.

Proposed Amendment

Section 4B1.2(a) is amended by inserting at the beginning the following new heading ''*Crime of Violence.*—''.

Section 4B1.2(b) is amended by inserting at the beginning the following new heading ''*Controlled Substance Offense.*—''.

Section 4B1.2(c) is amended by inserting at the beginning the following new heading ''*Two Prior Felony Convictions.*—''.

Section 4B1.2 is amended by adding at the end the following new subsection (d):

''(d) *Additional Definitions.*—

(1) *Forcible Sex Offense.*—'Forcible sex offense' includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(2) *Extortion.*—'Extortion' is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

(3) *Robbery.*—'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. [The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance.]

(4) *Prior Felony Conviction.*— 'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.,* a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).''.

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1—

in the heading by striking ''*Definitions.*—'' and inserting ''*Further Considerations Regarding 'Crimes of Violence' and 'Controlled Substance Offenses'.*—'';

by striking the following two 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 last paragraph as follows:

'' 'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.,* a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).''.

The Commentary to § 2L1.2 captioned ''Application Notes'' is amended in Note 2, in the paragraph that begins '' 'Crime of violence' means'' by inserting after ''territorial jurisdiction of the United States.'' the following: '' 'Robbery' is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. [The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance.]''.

Issues for Comment

1. Part B of the proposed amendment would provide a definition of ''robbery'' for purposes of § 4B1.2 (Definitions of Terms Used in Section 4B1.1) and § 2L1.2 (Unlawfully Entering or Remaining in the United States) that mirrors the Hobbs Act definition of ''robbery'' at 18 U.S.C. 1951(b)(1). The Commission seeks comment on whether the proposed definition of ''robbery'' is appropriate. Are there robbery offenses that are covered by the proposed definition but should not be? Are there robbery offenses that are not covered by the proposed definition but should be?

2. Part B of the proposed amendment brackets the possibility of defining the phrase ''actual or threatened force,'' for purposes of the proposed ''robbery'' definition, as ''force that is sufficient to overcome a victim's resistance,'' which is consistent with the Supreme Court's holding in *Stokeling* v. *United States,* 139 S. Ct. 544, 550 (2019). The Commission seeks comment regarding whether the definition of ''actual or threatened force'' is necessary after the *Stokeling* decision. If so, is the proposed definition of the phrase appropriate? Are there robbery offenses that would be covered by defining ''actual or threatened force'' in such a way but should not be? Are there robbery offenses that would not be covered but should be?

(C) Inchoate Offenses

Synopsis of Proposed Amendment: The career offender guideline includes convictions for inchoate offenses and offenses arising from accomplice liability, such as aiding and abetting, conspiring to commit, and attempting to commit a ''crime of violence'' and a ''controlled substance offense.'' *See* USSG § 4B1.2, comment. (n.1). In the original 1987 *Guidelines Manual,* these offenses were included only in the definition of ''controlled substance offense.'' *See* USSG § 4B1.2, comment. (n.2) (effective Nov. 1, 1987). In 1989, the Commission amended the guideline to provide that both definitions—''crime of violence'' and ''controlled substance offense''—include the offenses of aiding and abetting, conspiracy, and attempt to commit such crimes. *See* USSG App. C, Amendment 268 (effective Nov. 1, 1989). Two circuit conflicts have now arisen relating to the definitions of ''crime of violence'' and ''controlled substance offense'' in § 4B1.2 (Definitions of Terms Used in Section 4B1.1) and their inclusion of inchoate offenses.

The first circuit conflict concerns whether the definition of controlled substance offense in § 4B1.2(b) includes the inchoate offenses listed in Application Note 1 to § 4B1.2. Although courts had previously held that § 4B1.2's definitions include inchoate offenses based on the Commentary to § 4B1.2 and the Supreme Court's decision in *Stinson* v. *United States,* 508 U.S. 36 (1993), four circuits have now held that § 4B1.2(b)'s definition of a ''controlled substance offense'' does not include inchoate offenses because such offenses are not expressly included in the guideline text, while five have continued with their long-standing holding that such offenses are included.

The Third, Fourth, Sixth, and D.C. Circuits have held that inchoate offenses are not included in the definition of a ''controlled substance offense'' because the commentary is inconsistent with the text of the guideline and, thus, does not control. These courts have concluded that that the Commission exceeded its authority under *Stinson* when it

attempted to incorporate inchoate offenses to § 4B1.2(b)'s definition through the commentary, because the commentary can only interpret or explain the guideline, it cannot expand its scope by adding qualifying offenses. *See United States* v. *Winstead,* 890 F.3d 1082, 1090–92 (D.C. Cir. 2018) (Where the guideline ''present[ed] a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses,'' the Commentary's inclusion of such offenses had ''no grounding in the guidelines themselves.''); *United States* v. *Havis,* 927 F.3d 382, 386 (6th Cir. 2019) (en banc) (''To make attempt crimes a part of § 4B1.2(b), the Commission did not interpret a term in the guideline itself—no term in § 4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to add an offense not listed in the guideline.''); *United States* v. *Nasir,* 982 F.3d 144, 156–60 (3d Cir. 2020) (en banc), vacated and remanded on other grounds, 142 S. Ct. 56, 211 L.Ed.2d 1 (2021), aff'd on remand, 17 F.4th 459, 467–72 (3d Cir. 2021) (en banc); *United States* v. *Campbell,* 22 F.4th 438, 444–47 (4th Cir. 2022).

The First, Second, Seventh, Eighth, Ninth, and Eleventh Circuits continue to hold that inchoate offenses like attempt and conspiracy qualify as controlled substance offenses, reasoning that the commentary is consistent with the text of § 4B1.2(b) because it does not include any offense that is explicitly excluded by the text of the guideline. *See United States* v. *Smith,* 989 F.3d 575, 583–85 (7th Cir. 2021) (citing *United States* v. *Adams,* 934 F.3d 720, 727–29 (7th Cir. 2019) (''conclud[ing] that § 4B1.2's Application Note 1 is authoritative and that 'controlled substance offense' includes inchoate offenses'' (citation omitted)), cert. denied, 142 S.Ct. 488 (2021); accord *United States* v. *Lewis,* 963 F.3d 16, 21–23 (1st Cir. 2020); *United States* v. *Richardson,* 958 F.3d 151, 154–55 (2d Cir. 2020) (citing *United States* v. *Tabb,* 949 F.3d 81, 87–89 (2d Cir. 2020)); *United States* v. *Garcia,* 946 F.3d 413, 417 (8th Cir. 2019); *United States* v. *Crum,* 934 F.3d 963, 966 (9th Cir. 2019); *United States* v. *Lange,* 862 F.3d 1290, 1295 (11th Cir. 2017). See also *United States* v. *Goodin,* 835 F. App'x 771, 782 n.1 (5th Cir. 2021) (unpublished) (noting that circuit precedent provides that Application Note 1 in the career offender guideline is binding).

The second circuit conflict concerns whether certain conspiracy offenses qualify as crimes of violence or controlled substance offenses. Some courts have employed a two-step analysis in determining whether a prior conviction for conspiracy to commit a crime of violence or controlled substance offense is itself a crime of violence or controlled substance offense, by first comparing the substantive offense to its generic definition and then separately comparing the inchoate offense to its generic definition. *See, e.g., United States* v. *McCollum,* 885 F.3d 300, 303 (4th Cir. 2018) (Employing a two-step categorical approach and concluding that conspiracy to commit murder in aid of racketeering is not categorically a crime of violence because generic conspiracy requires an overt act while the conspiracy at issue does not). In doing so, these courts have held that because the generic definition of conspiracy requires proof of an overt act, certain conspiracy offenses that do not contain an ''overt act'' element are categorically excluded as crimes of violence or controlled substance offenses, even though the substantive crime is a crime of violence or a controlled substance offense. *See, e.g., United States* v. *Norman,* 935 F.3d 232, 237–39 (4th Cir. 2019) (finding that prior federal convictions for conspiracy to distribute and possess with intent to distribute crack cocaine under 21 U.S.C. 846 do not qualify as controlled substance offenses, even though there is no dispute that the underlying drug trafficking crimes qualify as controlled substance offenses); *United States* v. *Martinez-Cruz,* 836 F.3d 1305, 1314 (10th Cir. 2016) (holding that there is ''no evidence [of the intent of the Sentencing Commission] regarding whether a conspiracy conviction requires an overt act—except for the plain language of the guideline, which uses a generic, undefined term, ripe for the categorical approach.'')

In contrast, the First and Second Circuits have declined to follow this reasoning, holding instead that ''[t]he text and structure of Application Note 1 demonstrate that it was intended to include Section 846 narcotics conspiracy. Application Note 1 clarifies that 'controlled substance offenses' include 'the offense[ ] of . . . conspiring . . . to commit such offenses,' language that on its face encompasses federal narcotics conspiracy.'' *United States* v. *Tabb,* 949 F.3d 81, 88 (2d Cir. 2020), *cert. denied,* 141 S. Ct. 2793 (2021) (''To us, it is patently evident that Application Note 1 was intended to and does encompass Section 846 narcotics conspiracy.''); *see also United States* v. *Lewis,* 963 F.3d 16, 26–27 (1st Cir. 2020).

Part C of the proposed amendment would address these circuit conflicts by amending § 4B1.2 and its commentary. First, it would move the inchoate offenses provision from the Commentary to § 4B1.2 to the guideline itself as a new subsection (c). Second, Part C of the proposed amendment would revise the provision to provide that the terms ''crime of violence'' and ''controlled substance offense'' include aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a ''crime of violence'' or a ''controlled substance offense.''

Third, Part C of the proposed amendment addresses the circuit conflict regarding whether certain conspiracy offenses qualify as crimes of violence or controlled substance offenses. Two options are provided.

Option 1 would address the conspiracy issue in a comprehensive manner that would be applicable to all other inchoate offenses and offenses arising from accomplice liability. It would eliminate the need for the two-step analysis discussed above by adding the following to new subsection (c): ''To determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.''

Option 2 would take a narrower approach, addressing only conspiracy offenses without addressing whether a court must perform the two-step analysis described above with regard to other inchoate offenses. Option 2 would instead add a provision to new subsection (c) that brackets two alternatives addressing conspiracy to commit a ''crime of violence'' or a ''controlled substance offense.'' The first bracketed alternative provides that an offense of conspiring to commit a ''crime of violence'' or a ''controlled substance offense'' qualifies as a ''crime of violence'' or a ''controlled substance offense,'' regardless of whether an overt act must be proved as an element of the conspiracy offense. The second bracketed alternative provides that an offense of conspiring to commit a ''crime of violence'' or a ''controlled substance offense'' qualifies as a ''crime of violence'' or a ''controlled substance offense,'' only if an overt act must be proved as an element of the conspiracy offense.

Issues for comment are also provided.

Proposed Amendment

Section 4B1.2 is amended by redesignating subsection (c) as subsection (d), and by adding the following new subsection (c):

[*Option 1 (includes changes to the commentary):*

(c) The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.' To determine whether any offense described above qualifies as a 'crime of violence' or 'controlled substance offense,' the court shall only determine whether the underlying substantive offense is a 'crime of violence' or a 'controlled substance offense,' and shall not consider the elements of the inchoate offense or offense arising from accomplice liability.''.]

[*Option 2 (includes changes to the commentary):*

(c) The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.' [An offense of conspiring to commit a 'crime of violence' or a 'controlled substance offense' qualifies as a 'crime of violence' or a 'controlled substance offense,' regardless of whether an overt act must be proved as an element of the conspiracy offense][However, an offense of conspiring to commit a 'crime of violence' or a 'controlled substance offense' qualifies as a 'crime of violence' or a 'controlled substance offense,' only if an overt act must be proved as an element of the conspiracy offense].''.]

[*Options 1 and 2 (continued):*

The Commentary to § 4B1.2 captioned ''Application Notes'' is amended in Note 1 by striking the following paragraph:

'' 'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.''.]

Issues for Comment

1. In determining whether an inchoate offense is a ''crime of violence'' or a ''controlled substance offense,'' some courts have employed a two-step analysis. First, courts compare the substantive offense to its generic definition to determine whether it is a ''crime of violence'' or a ''controlled substance offense.'' Then, these courts make a second and separate analysis comparing the inchoate offense involving that substantive offense to the generic definition of the specific inchoate offense. Option 1 of Part C of the proposed amendment would amend § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to clarify that the offenses of aiding and abetting, attempting to commit, [soliciting to commit,] or conspiring to commit a ''crime of violence'' or a ''controlled substance offense,'' or any other inchoate offense or offense arising from accomplice liability involving a ''crime of violence'' or a ''controlled substance offense'' are a ''crime of violence'' or a ''controlled substance offense'' if the substantive offense is a ''crime of violence'' or a ''controlled substance offense.''

The Commission seeks comment on whether the guidelines should be amended to make this clarification by eliminating the two-step analysis some courts use in determining whether an inchoate offense is a ''crime of violence'' or a ''controlled substance offense.'' Should the guidelines adopt a different approach?

2. The Commission also seeks comment more broadly on how the guidelines definitions of ''crime of violence'' and ''controlled substance offense'' should address aiding and abetting, attempting to commit, soliciting to commit, or conspiring to commit a ''crime of violence'' or a ''controlled substance offense,'' or any other inchoate offense or offense arising from accomplice liability involving a ''crime of violence'' or a ''controlled substance offense.'' Specifically, should the Commission promulgate any of the options provided above? Should the Commission provide additional requirements or guidance to address these types of offenses? What additional requirements or guidance, if any, should the Commission provide? Should the Commission differentiate between ''crimes of violence'' and ''controlled substance offenses''? For example, should the guidelines require proof of an overt act for purposes of a conspiracy to commit a controlled substance offense, but not include such a requirement for conspiracy to commit a crime of violence?

Alternatively, should the Commission exclude inchoate offenses and offenses arising from accomplice liability altogether as predicate offenses for purposes of the ''crime of violence'' and ''controlled substance offenses'' definitions?

(D) Definition of ''Controlled Substance Offense''

Synopsis of Proposed Amendment: Subsection (b) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1) defines a ''controlled substance offense'' as an offense that prohibits ''the manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.'' USSG § 4B1.2(b).

The Department of Justice has raised a concern that courts have held that state drug statutes that include an offense involving an ''offer to sell'' a controlled substance do not qualify as a ''controlled substance offense'' under § 4B1.2(b) because such statutes encompass conduct that is broader than § 4B1.2(b)'s definition of a ''controlled substance offense.'' *See, e.g.,* Annual Letter from the Department of Justice to the Commission (Aug. 10, 2018), at *https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20180810/DOJ.pdf.* The Commission previously addressed a similar issue regarding the definition of a ''drug trafficking offense'' in the illegal reentry guideline at § 2L1.2 (Unlawfully Entering or Remaining in the United States). In 2008, the Commission amended the Commentary to § 2L1.2 to clarify that an offer to sell a controlled substance is a ''drug trafficking offense'' for purposes of that guideline, by adding ''offer to sell'' to the conduct listed in the definition of ''drug trafficking offense.'' *See* USSG App. C, Amendment 722 (effective Nov. 1, 2008). In 2016, the Commission comprehensively revised § 2L1.2. Among the changes made, the Commission amended the definition of ''crime of violence'' in the Commentary to § 2L1.2 to conform it to the definition in § 4B1.2, but the Commission did not make changes to the ''drug trafficking offense'' definition in the Commentary to § 2L1.2.

In addition, a separate issue has arisen as a result of statutory changes to chapter 705 of title 46 (''Maritime Drug Law Enforcement Act''). The career offender directive at 28 U.S.C. 994(h) directed the Commission to assure that ''the guidelines specify a term of imprisonment at or near the maximum term authorized'' for offenders who are 18 years or older and have been convicted of a felony that is, and also have previously been convicted of two or more felonies that are, a ''crime of violence'' or ''an offense described in section 401 of the Controlled Substances

Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and *chapter 705 of title 46*.'' 28 U.S.C. 994(h) (emphasis added). Until 2016, the only substantive criminal offense included in ''chapter 705 of title 46'' was codified in section 70503(a) and read as follows:

An individual may not knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board—

(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or

(2) any vessel if the individual is a citizen of the United States or a resident alien of the United States.

46 U.S.C. 70503(a) (2012). Section 70506(b) provided that a person attempting or conspiring to violate section 70503 was subject to the same penalties as provided for violating section 70503.

In 2016, Congress enacted the Coast Guard Authorization Act of 2015, Public Law 114–120 (2016), amending, among other things, Chapter 705 of Title 46. Specifically, Congress revised section 70503(a) as follows:

While on board a covered vessel, an individual may not knowingly or intentionally—

(1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;

(2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)); or

(3) conceal, or attempt or conspire to conceal, more than $100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

46 U.S.C. 70503(a). Section 70506(b) remained unchanged. The Act added two new offenses to section 70503(a), in subparagraphs (2) and (3). Following this statutory change, these two new offenses may not be covered by the current definition of ''controlled substance offense'' in § 4B1.2.

Part D of the proposed amendment would amend the definition of ''controlled substance offense'' in § 4B1.2(b) to address these issues. First, it would amend the definition to include offenses involving an offer to sell a controlled substance, which would align it with the current definition of ''drug trafficking offense'' in the Commentary to § 2L1.2. Second, it would revise the ''controlled substance offense'' definition to also include ''an offense described in 46 U.S.C. 70503(a) or 70506(b).''

An issue for comment is also provided.

Proposed Amendment

Section 4B1.2(b) is amended by striking the following:

''The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.'',

and inserting the following:

''The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) prohibits the manufacture, import, export, distribution, or dispensing of, 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; or

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

Issue for Comment

1. Part D of the proposed amendment would amend the definition of ''controlled substance offense'' in subsection (b) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to include offenses involving an offer to sell a controlled substance. The Commission seeks comment on the extent to which such offenses should be included as ''controlled substance offenses'' for purposes of the career offender guideline. Are there other drug offenses that are not included under this definition, but should be?

If the Commission were to amend the definition of ''controlled substance offense'' in § 4B1.2(b) to include other drug offenses, in addition to offenses involving an offer to sell a controlled substance, should the Commission revise the definition of ''controlled substance offense'' at § 2L1.2 (Unlawfully Entering or Remaining in the United States) to conform it to the revised definition set forth in § 4B1.2(b)?

7. Criminal History

Synopsis of Proposed Amendment: The proposed amendment contains three parts (Parts A through C). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive. Parts A through C of the proposed amendment all address the Commission's priority on criminal history. *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 87 FR 67756 (Nov. 9, 2022) (''In light of Commission studies, consideration of possible amendments to the *Guidelines Manual* relating to criminal history to address (A) the impact of 'status' points under subsection (d) of section 4A1.1 (Criminal History Category); (B) the treatment of defendants with zero criminal history points; and (C) the impact of simple possession of marihuana offenses.''). Part B of the proposed amendment also addresses the Commission's priority on 28 U.S.C. 994(j). *Id.* (''Consideration of possible amendments to the *Guidelines Manual* addressing 28 U.S.C. 994(j).'').

A defendant's criminal history score is calculated pursuant to Chapter Four, Part A (Criminal History). To calculate a criminal history score, courts are instructed to assign one, two, or three points to qualifying prior sentences under subsections (a) through (c) of § 4A1.1 (Criminal History Category). One point is also added under § 4A1.1(e) for any prior sentence resulting from a crime of violence that was not otherwise already assigned points. Finally, two criminal history points are added under § 4A1.1(d) if the defendant committed the instant offense ''while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.'' USSG § 4A1.1(e). A ''criminal justice sentence'' refers to a ''sentence countable under § 4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required.'' USSG § 4A1.1, comment. (n.4).

(A) Status Points Under § 4A1.1

''Status points'' are relatively common in cases with at least one criminal history point, having been applied in 37.5 percent of cases with criminal history points over the last five fiscal years. Of the offenders who received ''status points'', 61.5 percent had a higher CHC as a result of the status points. Like other provisions in Chapter Four, ''status points'' are included in the

calculation of a defendant's criminal history as a reflection of several statutory purposes of sentencing. As described in the Introductory Commentary to Chapter Four, accounting for a defendant's criminal history in the guidelines, including status points, addresses the need for the sentence ''(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; [and] (C) to protect the public from further crimes of the defendant.'' 18 U.S.C. 3553(a)(2)(A)–(C). A series of recent Commission publications has focused on just one of these purposes of sentencing—specific deterrence—through detailed analyses regarding the recidivism rates of federal offenders. *See, e.g.,* U.S. Sent'g Comm'n, Recidivism of Offenders Released in 2010 (2021), *available at https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010.* These reports again concluded that a defendant's criminal history calculation under the guidelines is strongly associated with the likelihood of future recidivism by the defendant. In a related publication, the Commission also found, however, that status points add little to the overall predictive value associated with the criminal history score. U.S. Sent'g Comm'n, Revisiting Status Points (2022), *available at https://www.ussc.gov/research/research-reports/revisiting-status-points.*

Part A of the proposed amendment addresses the impact of ''status points'' under the guidelines. Three options are provided.

Option 1 would add a downward departure provision in Application Note 4 of the Commentary to § 4A1.1 for cases in which ''status points'' are applied.

Option 2 would reduce the impact of ''status points'' overall, by decreasing the criminal history points added under § 4A1.1(d) from two points to one point. It would also add a departure provision in Application Note 4 of the Commentary to § 4A1.1 that could result in either an upward departure or a downward departure, depending on the circumstances.

Option 3 would eliminate the ''status points'' provided in § 4A1.1(d). It would also make conforming changes to § 2P1.1 (Escape, Instigating or Assisting Escape) and § 4A1.2 to reflect the removal of ''status points'' from the *Guidelines Manual.* In addition, Option 3 would amend the Commentary to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide an example of an instance in which an upward departure from the defendant's criminal history may be warranted.

Issues for comment are also provided.

(B) Zero Point Offenders

The Sentencing Table in Chapter Five, Part A of the *Guidelines Manual* comprises two components: offense level and criminal history category. Criminal history forms the horizontal axis of the table and is divided into six categories, from I (lowest) to VI (highest). Chapter Four, Part A of the *Guidelines Manual* provides instructions on how to calculate a defendant's criminal history category by assigning points for certain prior convictions. Criminal History Category I includes offenders with zero criminal history points and those with one criminal history point. Accordingly, the following types of offenders are classified under the same category: (1) offenders with no prior convictions; (2) offenders who have prior convictions that are not counted because they were not within the time limits set forth in subsection (d) and (e) of § 4A1.2 (Definitions and Instructions for Computing Criminal History); (3) offenders who have prior convictions that are not used in computing the criminal history category for reasons other than their ''staleness'' (*e.g.,* sentences resulting from foreign or tribal court convictions, minor misdemeanor convictions, or infractions); and (4) offenders with a prior conviction that received only one criminal history point. In fiscal year 2021, there were approximately 17,500 offenders who received zero criminal history points, of whom approximately 13,200 had no prior convictions.

Chapter Five also address what types of sentences a court may impose (*e.g.,* probation or imprisonment), according to the location of the defendant's applicable sentencing range in one of the four Zones (A–D) of the Sentencing Table. Specifically, § 5C1.1 (Imposition of a Term of Imprisonment) provides that defendants in Zones A and B may receive, in the court's discretion, a probationary sentence or a sentence of incarceration; defendants in Zone C may receive a ''split'' sentence of incarceration followed by community confinement or a sentence of incarceration only at the court's discretion; and defendants in Zone D may only receive a sentence of imprisonment absent a downward departure or variance from that zone. The Commentary to § 5C1.1 contains an application note that provides that ''[i]f 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.'' USSG § 5C1.1, comment. (n.4).

Recidivism data analyzed by the Commission suggest that offenders with zero criminal history points (''zero-point'' offenders) have considerably lower recidivism rates than other offenders, including lower recidivism rates than the offenders in Criminal History Category I with one criminal history point. *See* U.S. Sent'g Comm'n, Recidivism of Federal Offenders Released in 2010 (2021), *available at https://www.ussc.gov/research/research-reports/recidivism-federal-offenders-released-2010.* Among other findings, the report concluded that ''zero-point'' offenders were less likely to be rearrested than ''one point'' offenders (26.8% compared to 42.3%), the largest variation of any comparison of offenders within the same Criminal History Category. In addition, 28 U.S.C. 994(j) directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense.

Part B of the proposed amendment sets forth a new Chapter Four guideline, at § 4C1.1 (Adjustment for Certain Zero-Point Offenders). New § 4C1.1 would provide a decrease of [1 level][2 levels] from the offense level determined under Chapters Two and Three for zero-point offenders who meet certain criteria. It provides two options for establishing the criteria.

Option 1 would make the adjustment applicable to zero-point offenders with no prior convictions. It would provide a [1][2]-level decrease if the defendant meets all of the following criteria: (1) the defendant did not receive any criminal history points from Chapter Four, Part A, and had no prior convictions or other comparable judicial dispositions of any kind; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant's acts or omissions did not result in substantial financial hardship to [one or more victims][five or more victims][25 or more victims]; (5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under § 3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and (6) [the defendant is not determined to be a

repeat and dangerous sex offender against minors under § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime]. Under Option 1, approximately 10,500 offenders sentenced in fiscal year 2021 would have been eligible under § 4C1.1 depending on the exclusionary criteria.

Option 2 would make the adjustment applicable to all offenders who had no countable convictions (*i.e.,* offenders who received zero criminal history points based upon the criminal history rules in Chapter Four). It would provide a [1 level][2 levels] decrease if the defendant meets all of the following criteria: (1) the defendant did not receive any criminal history points from Chapter Four, Part A; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant's acts or omissions did not result in substantial financial hardship to [one or more victims][five or more victims][25 or more victims]; (5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under § 3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and (6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime]. Option 2 also provides for an upward departure that would be applicable if the adjustment under new § 4C1.1 substantially underrepresents the seriousness of the defendant's criminal history. Under Option 2, approximately 13,500 offenders sentenced in fiscal year 2021 would have been eligible under § 4C1.1 depending on the exclusionary criteria.

Both options include a subsection (c) that provides definitions and additional considerations for purposes of applying the guideline.

Part B of the proposed amendment would also amend the Commentary to § 5C1.1 (Imposition of a Term of Imprisonment) as part of the Commission's implementation of 28 U.S.C. 994(j). Section 994(j) directed the Commission to ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense. Part B of the proposed amendment would address the alternatives to incarceration available to ''zero-point'' offenders by revising the application note in § 5C1.1 that addresses ''nonviolent first offenders'' to focus on ''zero-point'' offenders. Two new provisions would be added. New Application Note 4(A) would provide that if the defendant received an adjustment under new § 4C1.1 and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. New Application Note 4(B) would provide that if the defendant received an adjustment under new § 4C1.1, the defendant's applicable guideline range is in Zone C or D of the Sentencing Table, and the defendant's instant offense of conviction is not an otherwise serious offense, a departure to a sentence other than a sentence of imprisonment [may be appropriate][is generally appropriate]. Of the approximately 10,500 offenders who received zero criminal history points and had no prior convictions in fiscal year 2021 who would be eligible under § 4C1.1 under Option 1, about one-quarter were in Zones A and B, about ten percent were in Zone C, and over 60 percent were in Zone D. Of the approximately 13,500 offenders who received zero criminal history points in fiscal year 2021 who would be eligible under § 4C1.1 under Option 2, about 30 percent were in Zones A and B, ten percent were in Zone C, and about 60 percent were in Zone D.

In addition, Part B of the proposed amendment would amend subsection (b)(2)(A) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide that a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited, ''unless otherwise specified.'' Part B of the proposed amendment would also amend Chapter One, Part A, Subpart 1(4)(d) (Probation and Split Sentences) to provide an explanatory note addressing amendments to the *Guidelines Manual* related to the implementation of 28 U.S.C. 994(j), first offenders, and ''zero-point'' offenders.

Finally, Part B of the proposed amendment provides issues for comment.

(C) Impact of Simple Possession of Marihuana Offenses

While marihuana remains a Schedule I controlled substance under the federal Controlled Substances Act (CSA), subjecting offenders to up to one year in prison (and up to two or three years in prison for repeat offenders), many states and territories have reduced or eliminated the penalties for possessing small quantities of marihuana for personal use. Twenty-one states and territories have removed legal prohibitions, including criminal and civil penalties, for the possession of small quantities for recreational use. An additional 14 states and territories have lowered the punishment for possession of small quantities for recreational use from criminal penalties (such as imprisonment) to solely civil penalties (such as a fine). At the end of fiscal year 2021, possession of marihuana remained illegal for all purposes only in 12 states and territories.

The Commission recently published a report on the impact of simple possession of marihuana offenses on sentencing. *See* U.S. Sent'g Comm'n, Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System (2023), *available at https://www.ussc.gov/research/research-reports/weighing-impact-simple-possession-marijuana.*

The key findings from the report include—

- In fiscal year 2021, 4,405 federal offenders (8.0%) received criminal history points under the federal sentencing guidelines for prior marihuana possession sentences. Most (79.3%) of the prior sentences were for less than 60 days in prison, including non-custodial sentences. Furthermore, ten percent (10.2%) of these 4,405 offenders had no other criminal history points.

- The criminal history points for prior marihuana possession sentences resulted in a higher Criminal History Category for 40 percent (40.1%) of the 4,405 offenders (1,765).

Part C of the proposed amendment would amend the Commentary to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to include sentences resulting from possession of marihuana offenses as an example of when a downward departure from the defendant's criminal history may be warranted. Specifically, Part C of the proposed amendment would provide that a downward departure may be warranted if the defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

Issues for comment are provided.

(A) Status Points Under § 4A1.1

Proposed Amendment

[*Option 1 (Departure Provision for Status Points):*

The Commentary to § 4A1.1 captioned ''Application Notes'' is amended in Note 4 by adding at the end the following new paragraph:

''There may be cases in which adding points under § 4A1.1(d) results in a Criminal History Category that substantially overrepresents the seriousness of the defendant's criminal history. In such a case, a downward departure may be warranted in accordance with § 4A1.3 (Departures Based on Inadequacy of Criminal History Category).''.]

[*Option 2 (Reducing Status Points):*

Section 4A1.1(d) is amended by striking ''2 points'' and inserting ''1 point''.

The Commentary to § 4A1.1 captioned ''Application Notes'' is amended in Note 4 by striking ''Two points are added'' and inserting ''One point is added'', and by adding at the end the following new paragraph:

''There may be cases in which adding a point under § 4A1.1(d) results in a Criminal History Category that substantially overrepresents or underrepresents the seriousness of the defendant's criminal history. In such a case, a departure may be warranted in accordance with § 4A1.3 (Departures Based on Inadequacy of Criminal History Category).''.

The Commentary to § 4A1.1 captioned ''Background'' is amended by striking ''Section 4A1.1(d) adds two points'' and inserting ''Section 4A1.1(d) adds one point''.]

[*Option 3 (Eliminating Status Points):*

Section 4A.1.1 is amended—

by striking subsection (d) as follows:

''(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.'';

and by redesignating subsection (e) as subsection (d).

The Commentary to § 4A1.1 captioned ''Application Notes'' is amended—

by striking Note 4 as follows:

''4. *§ 4A1.1(d).* Two points are added if the defendant committed any part of the instant offense (*i.e.,* any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. *See* § 4A1.2(n). For the purposes of this subsection, a ''criminal justice sentence'' means a sentence countable under § 4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.,* a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. *See* § 4A1.2(m).'';

by redesignating Note 5 as Note 4;

and in Note 4 (as so redesignated) by striking ''§ 4A1.1(e)'' each place such term appears and inserting ''§ 4A.1.1(d)'', and by striking ''§ 4A1.2(p)'' and inserting ''§ 4A1.2(n)''.

The Commentary to § 4A1.1 captioned ''Background'' is amended by striking the last paragraph as follows:

''Section 4A1.1(d) adds two points if the defendant was under a criminal justice sentence during any part of the instant offense.''.

The Commentary to § 2P1.1 captioned ''Application Notes'' is amended in Note 5 by striking ''and § 4A1.1(d) (custody status)''.

Section 4A1.2 is amended—

in subsection (a)(2) by striking ''§ 4A1.1(e)'' and inserting ''§ 4A1.1(d)'';

in subsection (l) by striking ''§ 4A1.1(a), (b), (c), (d), and (e)'' and inserting ''§ 4A1.1(a), (b), (c), and (d)'';

by striking subsections (m) and (n) as follows:

''(m) *Effect of a Violation Warrant*

For the purposes of § 4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.,* a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) *Failure to Report for Service of Sentence of Imprisonment*

For the purposes of § 4A1.1(d), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.'';

by redesignation subsections (o) and (p) as subsections (m) and (n), respectively;

and in subsection (n) (as so redesignated) by striking ''§ 4A1.1(e)'' and inserting ''§ 4A1.1(d)''.

The Commentary to § 4A1.3 captioned ''Application Notes'' is amended in Note 2(A) by adding at the end the following new subparagraph:

''(v) The defendant committed the instant offense (*i.e.,* any relevant conduct to the instant offense under § 1B1.3 (Relevant Conduct)) while under any criminal justice sentence having a custodial or supervisory component (including probation, parole, supervised release, imprisonment, work release, or escape status).''.

Issues for Comment

1. Option 3 of Part A of the proposed amendment would eliminate the ''status points'' provided in subsection (d) of § 4A1.1 (Criminal History Category). Instead of eliminating ''status points'' altogether, should the Commission eliminate ''status points'' related to certain categories of prior offenses, but not others? For example, should ''status points'' continue to apply if the defendant was under a criminal justice sentence resulting from a violent prior offense? Should ''status points'' continue to apply if the defendant was recently placed under a criminal justice sentence involving a custodial or supervisory component?

2. Option 3 of Part A of the proposed amendment would amend the Commentary to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide an example of an instance in which an upward departure from the defendant's criminal history may be warranted. Instead of a departure provision, should the Commission account in some other way for the ''custody status'' of the defendant during the commission of the instant offense? If so, how should the Commission account for such ''status''?

(B) Zero Point Offenders

Proposed Amendment

Chapter Four is amended by inserting at the end the following new Part C:

''PART C—ADJUSTMENT FOR CERTAIN ZERO-POINT OFFENDERS

§ 4C1.1. *Adjustment for Certain Zero-Point Offenders*

[*Option 1 (Zero-Point Offenders with No Prior Convictions):*

(a) *Adjustment.*—If the defendant meets all of the following criteria:

(1) the defendant did not receive any criminal history points from Chapter Four, Part A, and had no prior convictions or other comparable judicial dispositions of any kind;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury;

(4) the defendant's acts or omissions did not result in substantial financial hardship to [one or more victims][five or more victims][25 or more victims];

(5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under § 3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and

(6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime];

decrease the offense level determined under Chapters Two and Three by [1 level][2 levels].

(b) *Definitions And Additional Considerations.*—

(1) 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.

(2) 'Dangerous weapon,' 'firearm,' 'offense,' and 'serious bodily injury' have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).

(3) Consistent with § 1B1.3 (Relevant Conduct), the term 'defendant' limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(4) In determining whether the defendant's acts or omissions resulted in 'substantial financial hardship' to a victim, the court shall consider, among other things, the non-exhaustive list of factors provided in Application Note 4(F) of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud).

[(5) ''Covered sex crime'' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this definition.]''.]

[*Option 2 (Zero-Point Offenders with No Countable Convictions):*

(a) *Adjustment.*—If the defendant meets all of the following criteria:

(1) the defendant did not receive any criminal history points from Chapter Four, Part A;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury;

(4) the defendant's acts or omissions did not result in substantial financial hardship to [one or more victims][five or more victims][25 or more victims];

(5) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under § 3B1.1 (Aggravating Role), and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and

(6) [the defendant is not determined to be a repeat and dangerous sex offender against minors under § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors)][the instant offense of conviction is not a covered sex crime];

decrease the offense level determined under Chapters Two and Three by [1 level][2 levels].

(b) *Definitions And Additional Considerations.*—

(1) 'Dangerous weapon,' 'firearm,' 'offense,' and 'serious bodily injury' have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).

(2) Consistent with § 1B1.3 (Relevant Conduct), the term 'defendant' limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(3) In determining whether the defendant's acts or omissions resulted in 'substantial financial hardship' to a victim, the court shall consider, among other things, the non-exhaustive list of factors provided in Application Note 4(F) of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud).

[(4) 'Covered sex crime' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this definition.]

Commentary

Application Notes:

1. *Upward Departure.*—An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant's criminal history. For example, an upward departure may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.''.]

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended—

by inserting at the beginning of Note 1 the following new heading: ''*Application of Subsection (a).*—'';

by inserting at the beginning of Note 2 the following new heading: ''*Application of Subsection (b).*—'';

by inserting at the beginning of Note 3 the following new heading: ''*Application of Subsection (c).*—'';

in Note 4 by striking the following:

''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.'',

and inserting the following:

''*Zero-Point Offenders.*—

(A) *Zero-Point Offenders in Zones A and B of the Sentencing Table.*—If the defendant received an adjustment under § 4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. 994(j).

(B) *Zero-Point Offenders in Zones C and D of the Sentencing Table.*—If the

defendant received an adjustment under § 4C1.1 (Adjustment for Certain Zero-Point Offenders), the defendant's applicable guideline range is in Zone C or D of the Sentencing Table, and the defendant's instant offense of conviction is not an otherwise serious offense, a departure to a sentence other than a sentence of imprisonment [may be appropriate][is generally appropriate]. *See* 28 U.S.C. 994(j).'';

by inserting at the beginning of Note 5 the following new heading: ''*Application of Subsection (d).*—'';

by inserting at the beginning of Note 6 the following new heading: ''*Application of Subsection (e).*—'';

by inserting at the beginning of Note 7 the following new heading: ''*Departures Based on Specific Treatment Purpose.*—'';

by inserting at the beginning of Note 8 the following new heading: ''*Use of Substitutes for Imprisonment.*—'';

by inserting at the beginning of Note 9 the following new heading: ''*Residential Treatment Program.*—'';

and by inserting at the beginning of Note 10 the following new heading: ''*Application of Subsection (f).*—''.

Section 4A1.3(b)(2)(A) is amended by striking ''A departure'' and inserting ''Unless otherwise specified, a departure''.

The Commentary to § 4A1.3 captioned ''Application Notes'' is amended in Note 3 by striking ''due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism'' and inserting ''unless otherwise specified''.

Chapter One, Part A is amended in Subpart 1(4)(d) (Probation and Split Sentences)—

by adding an asterisk after ''community confinement or home detention.'';

by adding a second asterisk after ''through departures.*'';

and by striking the following:

''*Note:* Although the Commission had not addressed ''single acts of aberrant behavior'' at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See USSG App. C, amendment 603.)'',

and inserting the following:

''*Note:* The Commission expanded Zones B and C of the Sentencing Table in 2010 to provide a greater range of sentencing options to courts with respect to certain offenders. (*See* USSG App. C, amendment 738.) In 2018, the Commission added a new application note to the Commentary to § 5C1.1 (Imposition of a Term of Imprisonment), stating 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.' (*See* USSG App. C, amendment 801.) In [2023], the Commission added a new Chapter Four guideline, at § 4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of [1 level][2 levels] from the offense level determined under Chapters Two and Three for 'zero-point' offenders who meet certain criteria. In addition, the Commission further amended the Commentary to § 5C1.1 to address the alternatives to incarceration available to 'zero-point' offenders by revising the application note in § 5C1.1 that addressed 'nonviolent first offenders' to focus on 'zero-point' offenders. (*See* USSG App. C, amendment [____].)

** *Note:* Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (*See* USSG App. C, amendment 603.)''.

Issues for Comment

1. Part B of the proposed amendment would set forth a new Chapter Four guideline, at § 4C1.1 (Adjustment for Certain Zero-Point Offenders), that provides a decrease of [1 level][2 levels] from the offense level determined under Chapters Two and Three if the defendant meets certain criteria. It provides two options: one option for zero-point offenders with no prior convictions and another option for zero-point offenders with no countable convictions. The Commission seeks comment on which option is preferable, or whether there is an alternative approach that the Commission should consider. For example, if the Commission decides to exclude offenders with prior convictions, should the Commission consider a third option that nevertheless makes the new adjustment available to offenders with prior convictions that were not counted under a specific provision of § 4A1.2 (Definitions and Instructions for Computing Criminal History)? If so, what type of prior convictions that did not receive criminal history points should not be excluded? For example, should the Commission allow the new adjustment to apply to offenders with prior convictions for misdemeanors and petty offenses that were not counted under § 4A1.2(c)? Should the Commission instead exclude offenders with certain prior convictions that were not otherwise counted under § 4A1.2? For example, should the Commission exclude offenders with prior convictions for sex offenses or violent offenses that were not counted for criminal history purposes?

If the Commission were to promulgate an option of § 4C1.1 that excludes offenders with prior convictions not countable under Chapter Four, Part A (Criminal History), are there any practical issues or challenges that such an approach would present due to the availability of records documenting such convictions? If so, what are these practical issues or challenges?

2. Part B of the proposed amendment provides that the [1 level][2 levels] decrease under the new guideline applies if the defendant meets all of the criteria set forth in the two options. Should the Commission incorporate additional or different exclusionary criteria into either of the options set forth in Part B of the proposed amendment? Should the Commission change or remove any of the exclusionary criteria set forth in either of the options thereby making the adjustment available to a broader group of defendants?

3. If the Commission were to promulgate one of the proposed options, what conforming changes, if any, should the Commission make to other provisions of the *Guidelines Manual*?

4. Part B of the proposed amendment would also amend the Commentary to § 5C1.1 (Imposition of a Term of Imprisonment) to address the alternatives to incarceration available to ''zero-point'' offenders. The Commission seeks comment on whether it should provide additional guidance about how to apply this new departure provision. If so, what additional guidance should the Commission provide? For example, should the Commission provide guidance on how courts should determine whether the instant offense of conviction is ''not an otherwise serious offense''?

(C) Impact of Simple Possession of Marihuana Offenses

Proposed Amendment

The Commentary to § 4A1.3 captioned ''Application Notes'' is amended in Note 3 by striking the following:

''*Downward Departures.*—A downward departure from the defendant's criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure

below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.'',

and inserting the following:

''*Downward Departures.*—

(A) *Examples.*—A downward departure from the defendant's criminal history category may be warranted based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(ii) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

(B) *Downward Departures from Criminal History Category I.*—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.''.

Issues for Comment

1. Part C of the proposed amendment provides for a possible downward departure if the defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person. The Commission seeks comment on whether it should provide additional guidance for purposes of determining whether a downward departure is warranted in such cases. If so, what additional guidance should the Commission provide?

2. The Commission also seeks comment on whether there is an alternative approach it should consider for addressing sentences for possession of marihuana. For example, instead of a departure, should the Commission exclude such sentences from the criminal history score calculation if the offense is no longer subject to criminal penalties in the jurisdiction in which the defendant was convicted at the time of sentencing for the instant offense? Alternatively, should the Commission exclude all sentences for possession of marihuana offenses from the criminal history score calculation, regardless of whether such offenses are punishable by a term of imprisonment or subject to criminal penalties in the jurisdiction in which the defendant was convicted at the time of sentencing for the instant offense?

8. Acquitted Conduct

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of possible amendments to the *Guidelines Manual* to prohibit the use of acquitted conduct in applying the guidelines. *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 87 FR 67756 (Nov. 9, 2022).

Acquitted conduct is not expressly addressed in the *Guidelines Manual,* except for a reference in the parenthetical summary of the holding in *United States* v. *Watts,* 519 U.S. 148 (1997). *See* USSG § 6A1.3, Comment. However, consistent with the Supreme Court's holding in *Watts,* consideration of acquitted conduct is permitted under the guidelines through the operation of § 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), in conjunction with § 1B1.4 (Information to be Used in Imposing Sentence) and § 6A1.3 (Resolution of Disputed Factors (Policy Statement)).

Section 1B1.3 sets forth the principles and limits of sentencing accountability for purposes of determining a defendant's guideline range, a concept referred to as ''relevant conduct.'' Relevant conduct impacts nearly every aspect of guidelines application, including the determination of: base offense levels where more than one level is provided, specific offense characteristics, and any cross references in Chapter Two (Offense Conduct); any adjustments in Chapter Three (Adjustment); the criminal history calculations in Chapter Four, Part A (Criminal History); and departures and adjustments in Chapter Five (Determining the Sentence).

Specifically, § 1B1.3(a)(1) provides that relevant conduct comprises ''all acts and omissions . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.'' Relevant conduct includes, in subsection (a)(1)(A), ''all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant,'' and, in subsection (a)(1)(B), all acts and omissions of others ''in the case of a jointly undertaken criminal activity,'' that ''occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.'' *See* USSG § 1B1.3(a)(1).

Relevant conduct also includes, for some offense types, ''all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction,'' ''all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions,'' and ''any other information specified in the applicable guideline.'' *See* USSG § 1B1.3(a)(2)–(a)(4). The background commentary to § 1B1.3 explains that ''[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.''

The *Guidelines Manual* also includes Chapter Six, Part A (Sentencing Procedures) addressing sentencing procedures that are applicable in all cases. Specifically, § 6A1.3 provides for resolution of any reasonably disputed factors important to the sentencing determination. Consistent with 18 U.S.C. 3661, § 6A1.3(a) provides, in pertinent part, that ''[i]n resolving any dispute concerning a factor important to sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.'' The Commentary to § 6A1.3 instructs that ''[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial'' and that ''[a]ny information may be considered'' so long as it has sufficient indicia of reliability to support its probable accuracy. The Commentary cites to 18 U.S.C. 3661 and Supreme Court case law upholding the sentencing court's unrestricted discretion in considering any information at sentencing, so long as it is proved by a preponderance of the evidence. Consistent with the Supreme Court case law, the Commentary also provides that ''[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.''

In fiscal year 2021, nearly all offenders (56,324; 98.3%) were convicted through a guilty plea. The remaining 963 offenders (1.7% of all offenders) were convicted and sentenced after a trial, and of those offenders, 157 offenders (0.3% of all offenders) were acquitted of at least one offense.

The proposed amendment would amend § 1B1.3 to add a new subsection (c) providing that acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless the conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, the instant offense of conviction. The new provision would define ''acquitted conduct'' as conduct underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction.

The proposed amendment would also amend the Commentary to § 6A1.3 (Resolution of Disputed Factors (Policy Statement)) to make conforming revisions addressing the use of acquitted conduct for purposes of determining the guideline range.

Two issues for comment are also provided.

Proposed Amendment

Section 1B1.3 is amended by adding at the end the following new subsection (c):

''(c) *Acquitted Conduct.*—

(1) *Limitation.*—Acquitted conduct shall not be considered relevant conduct for purposes of determining the guideline range unless such conduct—

(A) was admitted by the defendant during a guilty plea colloquy; or

(B) was found by the trier of fact beyond a reasonable doubt;

to establish, in whole or in part, the instant offense of conviction.

(2) *Definition of Acquitted Conduct.*—For purposes of this guideline, 'acquitted conduct' means conduct (*i.e.,* any acts or omission) underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction.''.

The Commentary to § 6A1.3 is amended—

by striking ''*see also United States* v. *Watts,* 519 U.S. 148, 154 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); *Witte* v. *United States,* 515 U.S. 389, 399–401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution);'' and inserting ''*Witte* v. *United States,* 515 U.S. 389, 397–401 (1995) (noting that sentencing courts have traditionally considered a wide range of information without the procedural protections of a criminal trial, including information concerning uncharged criminal conduct, in sentencing a defendant within the range authorized by statute);''

by striking ''Watts, 519 U.S. at 157'' and inserting ''Witte, 515 U.S. at 399–401''

and by inserting at the end of the paragraph that begins ''The Commission believes that use of a preponderance of the evidence standard'' the following: ''Acquitted conduct, however, generally shall not be considered relevant conduct for purposes of determining the guideline range. *See* subsection (c) of § 1B1.3 (Relevant Conduct). Acquitted conduct may be considered in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* § 1B1.4 (Information to be Used in Imposing a Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)).''.

Issues for Comment

1. The proposed amendment is intended to generally prohibit the use of acquitted conduct for purposes of determining the guideline range, except when such conduct was admitted by the defendant during a guilty plea colloquy or was found by the trier of fact beyond a reasonable doubt to establish the instant offense of conviction. However, conduct underlying an acquitted charge may overlap with conduct found by the trier of fact beyond a reasonable doubt to establish the instant offense of conviction. Does this proposed amendment allow a court to consider such ''overlapping'' conduct for purposes of determining the guideline range? Should the Commission provide additional guidance to address this conduct?

2. The Commission seeks comment on whether the limitation on the use of acquitted conduct is too broad or too narrow. If so, how? For example, should the Commission account for acquittals for reasons such as jurisdiction, venue, or statute of limitations, that are otherwise unrelated to the substantive evidence?

9. Sexual Abuse Offenses

Synopsis of Proposed Amendment: The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive. Part A of the proposed amendment responds to recently enacted legislation. *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 87 FR 67756 (Nov. 9, 2022) (identifying as a priority ''[i]mplementation of any legislation warranting Commission action''). Part B of the proposed amendment is a result of the Commission's ''[c]onsideration of possible amendments to the *Guidelines Manual* to address sexual abuse or contact offenses against a victim in the custody, care, or supervision of, and committed by law enforcement or correctional personnel.'' *Id.*

(A) Violence Against Women Act Reauthorization Act of 2022

Part A of the proposed amendment responds to title XII of the Violence Against Women Act Reauthorization Act of 2022 (''the Act''). The Act is part of the Consolidated Appropriations Act, 2022, Public Law 117–103 (2022). It created two new offenses concerning sexual misconduct while committing civil rights offenses and sexual abuse of an individual in federal custody.

First, the Act created a new offense at 18 U.S.C. 250 (Penalties for civil rights offenses involving sexual misconduct). New section 250(a) prohibits any person from engaging in, or causing another to engage in, sexual misconduct while committing a civil rights offense under chapter 13 (Civil Rights) of part I (Crimes) of title 18, United States Code, or an offense under section 901 of the Fair Housing Act (42 U.S.C. 3631). The statute does not define ''sexual misconduct,'' but new section 250(b) delineates different maximum statutory terms of imprisonment for different degrees of sexual misconduct, ranging from two years to any term of years or life. The maximum penalties are: (1) any term of years or life if the offense involved aggravated sexual abuse, as defined in 18 U.S.C. 2241, or sexual abuse, as defined in 18 U.S.C. 2242, or any attempts to commit such conduct; (2) any term of years or life if the offense involved abusive sexual contact of a child who has not attained the age of 16, of the type prohibited by 18 U.S.C. 2244(a)(5); (3) 40 years if the offense involved a sexual act, as defined in 18 U.S.C. 2246, without the other person's permission and the sexual act does not amount to sexual abuse or aggravated sexual abuse; (4) 10 years if the offense involved abusive sexual contact of the type prohibited by 18 U.S.C. 2244(a)(1) or (b) (excluding abusive sexual contact through the clothing), with an enhanced maximum penalty of 30 years if such abusive sexual contact involved a child

under the age of 12; (5) 3 years if the offense involved abusive sexual contact of the type prohibited by 18 U.S.C. 2244(a)(2), with an enhanced maximum penalty of 20 years if such abusive sexual contact involved a child under the age of 12; (6) 2 years if the offense involved abusive sexual contact through the clothing of the type prohibited by 18 U.S.C. 2244(a)(3), (a)(4), or (b), with an enhanced maximum penalty of 10 years if such abusive sexual conduct through the clothing involved a child under the age of 12.

Second, the Act amended 18 U.S.C. 2243 and created a new offense at subsection (c). The new section 2243(c) prohibits an individual, while acting in their capacity as a federal law enforcement officer, from knowingly engaging in a sexual act with an individual who is under arrest, under supervision, in detention, or in federal custody. The statutory maximum term of imprisonment for the offense is 15 years, which is the same maximum penalty for offenses under sections 2243(a) (prohibiting knowingly engaging in a sexual act with a minor who had attained the age of twelve but not the age of sixteen and is at least four years younger than the person so engaging) and 2243(b) (prohibiting knowingly engaging in a sexual act with a ward in official detention (including in a federal prison or any prison, institution, or facility where people are held in custody by the direction of, or pursuant to a contract or agreement with, any federal department or agency) and under the custodial, supervisory, or disciplinary authority of the person so engaging).

The Act also included a provision defining ''federal law enforcement officer'' at 18 U.S.C. 2246(7) as having the meaning given the term in 18 U.S.C. 115 (*i.e.,* ''any officer, agent, or employee of the United States authorized by law or by a Government agency to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of Federal criminal law.''). In addition, the Act amended 18 U.S.C. 2244 (Abusive sexual contact) to add a new penalty provision at subsection (a)(6) stating any person that knowingly engages in or causes sexual contact with or by another person, if doing so would violate new section 2243(c), would face a maximum statutory term of imprisonment of two years.

Part A of the proposed amendment would amend Appendix A (Statutory Index) to reference offenses under 18 U.S.C. 250 to § 2H1.1 (Offenses Involving Individual Rights), and offenses under 18 U.S.C. 2243(c) to § 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts). Part A of the proposed amendment would also amend the Commentary to §§ 2A3.3 and 2H1.1 to reflect that these statutes are referenced to these guidelines. In addition, it would amend the title of § 2A3.3 to add ''Criminal Sexual Abuse of an Individual in Federal Custody.''

Issues for comment are also provided.

(B) Sexual Abuse Offenses Committed by Law Enforcement and Correctional Personnel

Part B of the proposed amendment addresses concerns regarding the increasing number of cases involving sexual abuse committed by law enforcement or correctional personnel against victims in their custody, care, or supervision. In its annual letter to the Commission, the Department of Justice urged the Commission to consider amending the *Guidelines Manual* to better account for such sexual abuse offenses, including offenses under 18 U.S.C. 2243(b) and the offense conduct covered by the new statute at 18 U.S.C. 2243(c) (discussed in Part A of the proposed amendment). According to the Department of Justice, the provisions of the guideline applicable to such offenses, § 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), do not sufficiently account for the severity of the conduct in such offenses, nor provide adequate penalties in accordance with the statutory maximum terms of imprisonment provided for these offenses.

Part B of the proposed amendment would amend § 2A3.3 in several ways to address these concerns. First, it would increase the base offense level of the guideline from 14 to [22]. Second, Part B of the proposed amendment would address the presence of aggravating factors in sexual abuse offenses, such as causing serious bodily injury and the use or threat of force, in the same way § 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) currently does, by providing a cross reference to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) for cases where the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. 2241 or § 2242).

Issues for comment are also provided.

(A) Violence Against Women Act Reauthorization Act of 2022

Proposed Amendment

Appendix A (Statutory Index) is amended—

by inserting before the line referenced to 18 U.S.C. 281 the following new line reference:

''18 U.S.C. 250 2H1.1'';

and by inserting before the line referenced to 18 U.S.C. 2244 the following new line reference:

''18 U.S.C. 2243(c) 2A3.3''.

Section 2A3.3 is amended in the heading by inserting after ''Acts'' the following: ''; Criminal Sexual Abuse of an Individual in Federal Custody''.

The Commentary to § 2A3.3 captioned ''Statutory Provision'' is amended by inserting after ''§ 2243(b)'' the following: '', 2243(c)''.

The Commentary to § 2H1.1 captioned ''Statutory Provisions'' is amended by striking ''246, 247, 248, 249'' and inserting ''246–250''.

Issues for Comment

1. In response to the Violence Against Women Act Reauthorization Act of 2022, Part A of the proposed amendment would reference 18 U.S.C. 250 to § 2H1.1 (Offenses Involving Individual Rights). The Commission seeks comment on whether the proposed reference is appropriate and whether any additional changes to the guidelines are required to account for section 250's offense conduct. Specifically, should the Commission amend § 2H1.1 to provide a higher or lower base offense level if 18 U.S.C. 250 is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add specific offense characteristics to § 2H1.1 in response to section 250? If so, what should any such specific offense characteristic provide and why?

The new statute at 18 U.S.C. 250 provides different maximum statutory terms of imprisonment, ranging from two years to any term of years or life, depending on the sexual misconduct involved in the offense. Should the Commission amend § 2H1.1 to address this range of penalties? If so, how should the Commission address these different penalties and why?

2. In response to the Violence Against Women Act Reauthorization Act of 2022, Part A of the proposed amendment would reference 18 U.S.C. 2243(c) to § 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts). The Commission seeks comment on whether the proposed reference is appropriate and whether

any additional changes to the guidelines are required to account for section 2243(c)'s offense conduct. Specifically, should the Commission amend § 2A3.3 to provide a higher or lower base offense level if 18 U.S.C. 2243(c) is the offense of conviction? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to § 2A3.3 in response to section 2243(c)? If so, what should that specific offense characteristic provide and why?

(B) Sexual Abuse Offenses Committed by Law Enforcement and Correctional Personnel

Proposed Amendment

Section 2A3.3 is amended—

in subsection (a) by striking ''14'' and inserting ''[22]'';

and by inserting at the end the following new subsection (c):

''(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. 2241 or § 2242), apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, § 2A3.1 shall apply, regardless of the 'consent' of the victim.''.

Issues for Comment

1. Part B of the proposed amendment would amend § 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts) to increase the base offense level of the guideline from 14 to [22]. The proposed base offense level of [22] for § 2A3.3 would result in proportionate penalties with offenses sentenced under § 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), where, like § 2A3.3, the victim is incapable of granting consent. Specifically, § 2A3.2 provides a base offense level of 18 and a 4-level increase at § 2A3.2(b)(1) that applies in cases where the victim was in the custody, care, or supervisory control of the defendant. The Commission seeks comment on whether the proposed base offense level for § 2A3.3 is appropriate and, if not, what should the base offense level be and why. Are there distinctions between sexual offenses against minors and sexual offenses against wards that may warrant different base offense levels? If so, what are those distinctions and how should they be accounted for in § 2A3.3?

2. Part B of the proposed amendment would also amend § 2A3.3 to provide a cross reference to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) for cases where the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. 2241 or § 2242). This cross reference is the same as the one currently provided for in § 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts). The Commission seeks comment on whether adding a cross reference to § 2A3.1 in § 2A3.3 is appropriate to address the presence of aggravating factors in the offenses referenced to this guideline, such as causing serious bodily injury and the use or threat of force. If not, how should the Commission take into account such aggravating factors? For example, should the Commission add specific offense characteristics to address these aggravating factors?

10. Alternative–to–Incarceration Programs

In November 2022, the Commission identified as one of its policy priorities a ''[m]ultiyear study of court-sponsored diversion and alternatives-to-incarceration programs (*e.g.,* Pretrial Opportunity Program, Conviction And Sentence Alternatives (CASA) Program, Special Options Services (SOS) Program), including consideration of possible amendments to the *Guidelines Manual* that might be appropriate.'' U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 87 FR 67756 (Nov. 9, 2022). As part of its work on this priority, the Commission is publishing these issues for comment on alternative-to-incarceration programs to inform the Commission's consideration of this policy priority.

Issues for Comment

1. The Commission invites general comment on how it should approach any study related to this policy priority. What should be the scope, duration, and sources of information of such a study, and what specific questions should be addressed?

The Commission further seeks comment on any relevant developments in recent legal or social science literature on court-sponsored diversion and alternatives-to-incarceration programs.

2. The Commission invites general comment on whether the *Guidelines Manual* should be amended to address court-sponsored diversion and alternatives-to-incarceration programs. The Commission also seeks comment on whether it should consider amending the guidelines for such purposes during this amendment cycle, or whether it should first undertake further study of court-sponsored diversion and alternatives-to-incarceration programs. In either case, how should the Commission amend the *Guidelines Manual* to address court-sponsored diversion and alternatives-to-incarceration programs?

For example, should the Commission add to Chapter Five, Part K, Subpart 2 (Other Grounds for Departure) a new policy statement permitting a downward departure if the defendant successfully completed the necessary requirements of an alternative-to-incarceration court program? If so, what type of programs should be addressed by such departure provision? Should the Commission provide criteria for purposes of applying a departure provision related to alternative-to-incarceration court programs? If so, what criteria should the Commission use? For example, should such a downward departure only apply to defendants who successfully completed the necessary requirements of an alternative-to-incarceration court program? In the alternative, should the Commission allow the departure to apply also to defendants who productively participated in any such program without fulfilling all requirements because they were administratively discharged from the program due to reasons beyond the defendant's control (*e.g.,* health reasons, scheduling issues)?

11. Fake Pills

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of miscellaneous guidelines application issues. *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 87 FR 67756 (Nov. 9, 2022) (identifying as a priority ''[c]onsideration of other miscellaneous issues, including possible amendments to (A) section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to address offenses involving misrepresentation or marketing of a controlled substance as another substance . . . .'').

The proposed amendment responds to concerns expressed by the Drug Enforcement Administration (DEA) about the proliferation of ''fake pills'' (*i.e.,* illicitly manufactured pills represented or marketed as legitimate pharmaceutical pills) containing fentanyl or fentanyl analogue.

According to the DEA, these fake pills resemble legitimately manufactured pharmaceutical pills (such as OxyContin, Xanax, and Adderall) but can result in sudden death or poisoning

due to the unknown presence and quantities of dangerous substances, such as fentanyl and fentanyl analogues.

The DEA reported that it seized over 50.6 million fentanyl-laced, fake prescription pills in calendar year 2022. *See* Drug Enforcement Administration, Press Release: Drug Enforcement Administration Announces the Seizure of Over 379 million Deadly Doses of Fentanyl in 2022 (Dec. 20, 2022), *https://www.dea.gov/press-releases/2022/12/20/drug-enforcement-administration-announces-seizure-over-379-million-deadly.* DEA laboratory testing indicates that the number of fake pills laced with fentanyl have sharply increased in recent years and that six out of ten fentanyl-laced faked pills have been found to contain a potentially fatal dose of fentanyl. *See* Drug Enforcement Administration, Public Safety Alert: DEA Laboratory Testing Reveals that 6 out of 10 Fentanyl-Laced Fake Prescription Pills Now Contain a Potentially Lethal Dose of Fentanyl (2022), *https://www.dea.gov/alert/dea-laboratory-testing-reveals-6-out-10-fentanyl-laced-fake-prescription-pills-now-contain.*

According to the Centers for Disease Control and Prevention (CDC), overdose deaths from synthetic opioids containing fentanyl, including pills purporting to be legitimate pharmaceuticals, have sharply increased in recent years. *See* Christine L. Mattson et al., *Trends and Geographic Patterns in Drug and Synthetic Opioid Overdose Deaths—United States, 2013–2019,* 70 Morb Mortal Wkly Rep 6 (Feb. 12, 2021), *https://www.cdc.gov/mmwr/volumes/70/wr/mm7006a4.htm.*

In order to address this issue, the DEA recommended that the Commission review the 4-level enhancement for knowingly distributing or marketing as another substance a mixture or substance containing fentanyl or fentanyl analogue as a different substance at subsection (b)(13) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking). Specifically, the DEA suggested that the Commission consider changing the *mens rea* requirement to expand the application of the enhancement to offenders who may not have known fentanyl or fentanyl analogue was in the substance but distributed or marketed a substance without regard to whether such dangerous substances could have been present.

The proposed amendment would amend § 2D1.1(b)(13) to add a new subparagraph with an alternative 2-level enhancement for cases where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug. The new provision would refer to 21 U.S.C. 321(g)(1) for purposes of defining the term ''drug.''

An issue for comment is provided.

Proposed Amendment

Section 2D1.1(b)(13) is amended—

by inserting after ''defendant'' the following: ''(A)'';

and by inserting after ''4 levels'' the following: ''; or (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug, increase by [2] levels. For purposes of subsection (b)(13)(B), the term 'drug' has the meaning given that term in 21 U.S.C. 321(g)(1)''.

Issue for Comment

1. The proposed amendment would amend subsection (b)(13) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to add an alternative 2-level enhancement applicable if the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, with reason to believe that such mixture or substance was not the legitimately manufactured drug. The Commission seeks comment on whether the proposed alternative enhancement at § 2D1.1(b)(13)(B) is appropriate to address the concerns raised by the Drug Enforcement Administration. If not, is there an alternative approach that the Commission should consider? Should the Commission expand the scope of § 2D1.1(b)(13)(B) to include other synthetic opioids? If so, what other synthetic opioids should be included?

The Commission also seeks comment on whether the *mens rea* requirement proposed for § 2D1.1(b)(13)(B) is appropriate. Should the Commission provide a different *mens rea* requirement for the new provision? If so, what *mens rea* requirement should the Commission provide? Should the Commission instead make § 2D1.1(b)(13)(B) an offense-based enhancement as opposed to exclusively defendant-based?

12. Miscellaneous

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of miscellaneous guidelines application issues. *See* U.S. Sent'g Comm'n, ''Notice of Final Priorities,'' 87 FR 67756 (Nov. 9, 2022) (identifying as a priority ''[c]onsideration of other miscellaneous issues, including possible amendments to . . . (B) section 3D1.2 (Grouping of Closely Related Counts) to address the interaction between section 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) and section 3D1.2(d); and (C) section 5F1.7 (Shock Incarceration Program (Policy Statement)) to reflect that the Bureau of Prisons no longer operates a shock incarceration program.''). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not mutually exclusive.

Part A responds to a guideline application issue concerning the interaction of § 2G1.3 and § 3D1.2 (Grouping of Closely Related Counts). Although subsection (d) of § 3D1.2 specifies that offenses covered by § 2G1.1 are not grouped under the subsection, it does not specify whether or not offenses covered by § 2G1.3 are so grouped. Part A would amend § 3D1.2(d) to provide that offenses covered by § 2G1.3, like offenses covered by § 2G1.1, are not grouped under subsection (d).

Part B revises the guidelines to address the fact that the Bureau of Prisons (''BOP'') no longer operates a shock incarceration program as described in § 5F1.7 (Shock Incarceration Program (Policy Statement)). Part B would amend the Commentary to § 5F1.7 to reflect the fact that BOP no longer operates the program.

(A) Grouping of Offenses Covered by § 2G1.3

Synopsis of Proposed Amendment: Part A of the proposed amendment revises § 3D1.2 (Grouping of Closely Related Counts) to provide that offenses covered by § 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) are not grouped under § 3D1.2(d).

Section 3D1.2 addresses the grouping of closely related counts for purposes of determining the offense level when a defendant has been convicted on multiple counts. Subsection (d) states that counts are grouped together ''[w]hen the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.'' Subsection (d) also contains lists of (1) guidelines for which the offenses covered by the guideline are to be grouped under the subsection and (2) guidelines for which the covered offenses are specifically excluded from grouping under the subsection.

Section 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) is included in the list of guidelines for which the covered offenses are excluded from grouping under § 3D1.2(d). Section 2G1.3 is, however, not included on that list, even though several offenses that are referenced to § 2G1.3 when the offense involves a minor are referenced to § 2G1.1 when the offense involves an individual other than a minor. In addition, several offenses that were referenced to § 2G1.1 before § 2G1.3 was promulgated are now referenced to § 2G1.3. *See* USSG App. C, Amendment 664 (effective Nov. 1, 2004). Furthermore, Application Note 6 of the Commentary to § 2G1.3 states that multiple counts under § 2G1.3 are not to be grouped.

Section 2G1.3 is also not included on the list of guidelines for which the covered offenses are to be grouped under § 3D1.2(d). Because § 2G1.3 is included on neither list, § 3D.1(d) provides that ''grouping under [the] subsection may or may not be appropriate and a ''case-by-case determination must be made based upon the facts of the case and the applicable guideline (including specific offense characteristics and other adjustments) used to determine the offense level.''

Part A of the proposed amendment would amend § 3D1.2(d) to add § 2G1.3 to the list of guidelines for which the covered offenses are specifically excluded from grouping.

Proposed Amendment

Section 3D1.2(d) is amended by striking ''§§ 2G1.1, 2G2.1'' and inserting ''§§ 2G1.1, 2G1.3, 2G2.1''.

(B) Policy Statement on Shock Incarceration Programs

Synopsis of Proposed Amendment: Part B of the proposed amendment revises the guidelines to address the fact that the Bureau of Prisons (''BOP'') no longer operates a shock incarceration program as described in § 5F1.7 (Shock Incarceration Program (Policy Statement)) and the corresponding commentary.

Section 4046 of title 18, United States Code, authorizes BOP to place any person who has been sentenced to a term of imprisonment of more than 12 but not more than 30 months in a shock incarceration program if the person consents to that placement. Sections 3582(a) and 3621(b)(4) of title 18 authorize a court, in imposing sentence, to make a recommendation regarding the type of prison facility that would be appropriate for the defendant. In making such a recommendation, the court ''shall consider any pertinent policy statements issued by the Sentencing Commission.'' 18 U.S.C. 3582(a).

Section 5F1.7 provides that, pursuant to sections 3582(a) and 3621(b)(4), a sentencing court may recommend that a defendant who meets the criteria set forth in section 4046 participate in a shock incarceration program. The Commentary to § 5F1.7 describes the authority for BOP to operate a shock incarceration program and the procedures that the BOP established in 1990 regarding operation of such a program.

In 2008, BOP terminated its shock incarceration program and removed the rules governing its operation. Part B of the proposed amendment would amend the Commentary to § 5F1.7 to reflect those developments. It would also correct two typographical errors in the commentary.

Proposed Amendment

The Commentary to § 5F1.7 captioned ''Background'' is amended—

by striking ''six months'' and inserting ''6 months'';

by striking ''as the Bureau deems appropriate. 18 U.S.C. 4046.' '' and inserting ''as the Bureau deems appropriate.' 18 U.S.C. 4046.'';

and by striking the final paragraph as follows:

''The Bureau of Prisons has issued an operations memorandum (174–90 (5390), November 20, 1990) that outlines eligibility criteria and procedures for the implementation of this program (which the Bureau of Prisons has titled 'intensive confinement program'). Under these procedures, the Bureau will not place a defendant in an intensive confinement program unless the sentencing court has approved, either at the time of sentencing or upon consultation after the Bureau has determined that the defendant is otherwise eligible. In return for the successful completion of the 'intensive confinement' portion of the program, the defendant is eligible to serve the remainder of his term of imprisonment in a graduated release program comprised of community corrections center and home confinement phases.'',

and inserting the following:

''In 1990, the Bureau of Prisons issued an operations memorandum (174–90 (5390), November 20, 1990) that outlined eligibility criteria and procedures for the implementation of a shock incarceration program (which the Bureau of Prisons titled the 'intensive confinement program'). In 2008, however, the Bureau of Prisons terminated the program and removed the rules governing its operation. *See* 73 FR 39863 (July 11, 2008).''.

13. Technical

Synopsis of Proposed Amendment: This proposed amendment would make technical and other non-substantive changes to the *Guidelines Manual.*

Part A of the proposed amendment would make technical changes to provide updated references to certain sections in the United States Code that were redesignated in legislation. The Frank LoBiondo Coast Guard Authorization Act of 2018, Public Law 115–282 (Dec. 4, 2018) (hereinafter ''the Act''), among other things, established a new chapter 700 (Ports and Waterway Safety) in subtitle VII (Security and Drug Enforcement) of title 46 (Shipping) of the United States Code. Section 401 of the Act repealed the Ports and Waterways Safety Act of 1972, previously codified in 33 U.S.C. 1221–1232b, and restated its provisions with some revisions in the new chapter 700 of title 46, specifically at 46 U.S.C. 70001–70036. Appendix A (Statutory Index) includes references to Chapter Two guidelines for both former 33 U.S.C. 1227(b) and 1232(b). Specifically, former section 1227(b) is referenced to §§ 2J1.1 (Contempt) and 2J1.5 (Failure to Appear by Defendant), while former section 1232(b) is referenced to § 2A2.4

(Obstructing or Impeding Officers). Part A of the proposed amendment would amend Appendix A to delete the references to 33 U.S.C. 1227(b) and 1232(b) and replace them with updated references to 46 U.S.C. 70035(b) and 70036(b). The Act did not make substantive revisions to either of these provisions.

Part B of the proposed amendment would make technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective December 1, 2015, the Office of Law Revision Counsel eliminated the Appendix to title 50 of the United States Code and transferred the non-obsolete provisions to new chapters 49 to 57 of title 50 and to other titles of the United States Code. To reflect the new section numbers of the reclassified provisions, Part B of the proposed amendment would make changes to § 2M4.1 (Failure to Register and Evasion of Military Service), § 2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism), and Appendix A. Similarly, effective September 1, 2016, the Office of Law Revision Counsel also transferred certain provisions from Chapter 14 of title 25 to four new chapters in title 25 in order to improve the organization of the title. To reflect these changes, Part B of the proposed amendment would make further changes to Appendix A.

Part C of the proposed amendment would make certain technical changes to the Commentary to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). First, Part C of the proposed amendment would amend the Drug Conversion Tables at Application Note 8(D) and the Typical Weight Per Unit Table at Application Note 9 to reorganize the controlled substances contained therein in alphabetical order to make the tables more user-friendly. It would also make minor changes to the controlled substance references to promote consistency in the use of capitalization, commas, parentheticals, and slash symbols throughout the Drug Conversion Tables. For example, the proposed amendment would change the reference to ''Phencyclidine (actual)/PCP (actual)'' to ''Phencyclidine (PCP) (actual).'' Second, Part C of the proposed amendment would make clerical changes throughout the Commentary to correct some typographical errors. Finally, Part C of the proposed amendment would amend the Background Commentary to add a specific reference to Amendment 808, which replaced the term ''marihuana equivalency'' with the new term ''converted drug weight'' and changed the title of the ''Drug Equivalency Tables'' to ''Drug Conversion Tables.'' *See* USSG App. C, amend. 808 (effective Nov. 1, 2018).

Part D of the proposed amendment would make technical changes to the Commentary to §§ 2A4.2 (Demanding or Receiving Ransom Money), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), and to Appendix A, to provide references to the specific applicable provisions of 18 U.S.C. 876.

Part E of the proposed amendment would make technical changes to the commentary of several guidelines in Chapter Eight (Sentencing of Organizations). First, the proposed amendment would replace the term ''prior criminal adjudication,'' as found and defined in Application Note 3(G) of § 8A1.2 (Application Instructions—Organizations), with ''criminal adjudication'' to better reflect how that term is used throughout Chapter Eight. In addition, the proposed amendment would make conforming changes to the Commentary to § 8C2.5 (Culpability Score) to account for the new term. Part E of the proposed amendment would also make changes to the Commentary to § 8C3.2 (Payment of the Fine—Organizations). Section 207 of the Mandatory Victims Restitution Act of 1996, Public Law 104–132 (Apr. 24, 1996), amended 18 U.S.C. 3572(d) to eliminate the requirement that if the court permits something other than the immediate payment of a fine or other monetary payment, the period for payment shall not exceed five years. Part E of the proposed amendment would revise Application Note 1 of § 8C3.2 to reflect the current language of 18 U.S.C. 3572(d) by providing that if the court permits other than immediate payment of a fine or other monetary payment, the period provided for payment shall be the shortest time in which full payment can reasonably be made.

Part F of the proposed amendment would make clerical changes to correct typographical errors in: § 1B1.1 (Application Instructions); § 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)); § 1B1.4 (Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)); § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)); § 2D2.3 (Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs); § 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); § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information); § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition); § 2M1.1 (Treason); § 2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents); the Introductory Commentary to Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes); the Introductory Commentary to Chapter Two, Part T, Subpart 3 (Customs Taxes); the Introductory Commentary to Chapter Three, Part A (Victim-Related Adjustments); § 3A1.1 (Hate Crime Motivation or Vulnerable Victim); the Introductory Commentary to Chapter Three, Part B (Role in the Offense); § 3C1.1 (Obstructing or Impeding the Administration of Justice); the Introductory Commentary to Chapter Three, Part D (Multiple Counts); § 3D1.1 (Procedure for Determining Offense Level on Multiple Counts); § 3D1.2 (Groups of Closely Related Counts); § 3D1.3 (Offense Level Applicable to Each Group of Closely Related Counts); § 3D1.4 (Determining the Combined Offense Level); § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)); § 4B1.1 (Career Offender); § 5C1.1 (Imposition of a Term of Imprisonment); § 5E1.1 (Restitution); § 5E1.3 (Special Assessments); § 5E1.4 (Forfeiture); the Introductory Commentary to Chapter Five, Part H (Specific Offender Characteristics); the Introductory Commentary to Chapter Six, Part A (Sentencing Procedures); Chapter Seven, Part A (Introduction to Chapter Seven); § 8B1.1 (Restitution—Organizations); § 8B2.1 (Effective Compliance and Ethics Program); § 8C3.3 (Reduction of Fine Based on Inability to Pay); and § 8E1.1 (Special Assessments—Organizations).

Part G of the proposed amendments would also make clerical changes to the Commentary to §§ 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)) and 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged

Term of Imprisonment or Anticipated State Term of Imprisonment), to update the citation of Supreme Court cases. In addition, Part G of the proposed amendment would amend (1) the Commentary to § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to add a missing reference to 18 U.S.C. 844(o); (2) the Commentary to § 2M6.1 (Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons Of Mass Destruction; Attempt or Conspiracy), to delete the definitions of two terms that are not currently used in the guideline; (3) the Commentary to §§ 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose) and 2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), to correct references to the Code of Federal Regulations; and (4) the Commentary to § 3A1.2 (Official Victim), to add missing content in Application Note 3.

Proposed Amendment

(A) Frank LoBiondo Coast Guard Authorization Act of 2018

Appendix A (Statutory Index) is amended—

by striking the following line references:

''33 U.S.C. 1227(b) 2J1.1, 2J1.5
33 U.S.C. 1232(b)(2) 2A2.4'';

and by inserting before the line referenced to 46 U.S.C. App. § 1707a(f)(2) the following new line references:

''46 U.S.C. 70035(b) 2J1.1, 2J1.5
46 U.S.C. 70036(b) 2A2.4''.

(B) Reclassification of Sections of United States Code

The Commentary to § 2M4.1 captioned ''Statutory Provisions'' is amended by striking ''50 U.S.C. App. § 462'' and inserting ''50 U.S.C. § 3811''.

The Commentary to § 2M5.1 captioned ''Statutory Provisions'' is amended by striking ''50 U.S.C. App. §§ 2401–2420'' and inserting ''50 U.S.C. §§ 4601–4623. For additional statutory provision(s), *see* Appendix A (Statutory Index)''.

The Commentary to § 2M5.1 captioned ''Application Notes'' is amended—

in Note 3 by striking ''50 U.S.C. App. § 2410'' and inserting ''50 U.S.C. § 4610'';

and in Note 4 by striking ''50 U.S.C. App. 2405'' and inserting ''50 U.S.C. § 4605''.

Appendix A (Statutory Index) is amended—

in the line referenced to 25 U.S.C. §§ 450d by striking ''§ 450d'' and inserting ''§ 5306'';

by striking the following line references:

''50 U.S.C. App. § 462 2M4.1
50 U.S.C. App. § 527(e) 2X5.2
50 U.S.C. App. § 2410 2M5.1'';

and inserting before the line referenced to 52 U.S.C. §§ 10307(c) the following new line references:

''50 U.S.C. § 3811 2M4.1
50 U.S.C. § 3937(e) 2X5.2
50 U.S.C. § 4610 2M5.1''.

(C) Technical Changes to Commentary to § 2D1.1

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended—

in Note 8(A) by striking ''the statute (21 U.S.C. § 841(b)(1)), as the primary basis'' and inserting ''the statute (21 U.S.C. § 841(b)(1)) as the primary basis'', and by striking ''fentanyl, LSD and marihuana'' and inserting ''fentanyl, LSD, and marihuana'';

in Note 8(D)—

under the heading relating to Schedule I or II Opiates, by striking the following:

''1 gm of Heroin = 1 kg
1 gm of Dextromoramide = 670 gm
1 gm of Dipipanone = 250 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP = 700 gm
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP = 700 gm
1 gm of Alphaprodine = 100 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) = 2.5 kg
1 gm of a Fentanyl Analogue = 10 kg
1 gm of Hydromorphone/Dihydromorphinone = 2.5 kg
1 gm of Levorphanol = 2.5 kg
1 gm of Meperidine/Pethidine = 50 gm
1 gm of Methadone = 500 gm
1 gm of 6-Monoacetylmorphine = 1 kg
1 gm of Morphine = 500 gm
1 gm of Oxycodone (actual) = 6700 gm
1 gm of Oxymorphone = 5 kg
1 gm of Racemorphan = 800 gm
1 gm of Codeine = 80 gm
1 gm of Dextropropoxyphene/Propoxyphene-Bulk = 50 gm
1 gm of Ethylmorphine = 165 gm
1 gm of Hydrocodone (actual) = 6700 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum = 250 gm
1 gm of Opium = 50 gm
1 gm of Levo-alpha-acetylmethadol (LAAM) = 3 kg'',

and inserting the following:

''1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine (PEPAP) = 700 gm
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine (MPPP) = 700 gm
1 gm of 6-Monoacetylmorphine = 1 kg
1 gm of Alphaprodine = 100 gm
1 gm of Codeine = 80 gm
1 gm of Dextromoramide = 670 gm
1 gm of Dextropropoxyphene/Propoxyphene-Bulk = 50 gm
1 gm of Dipipanone = 250 gm
1 gm of Ethylmorphine = 165 gm
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) = 2.5 kg
1 gm of a Fentanyl Analogue = 10 kg
1 gm of Heroin = 1 kg
1 gm of Hydromorphone/Dihydromorphinone = 2.5 kg
1 gm of Levo-alpha-acetylmethadol (LAAM) = 3 kg
1 gm of Levorphanol = 2.5 kg
1 gm of Meperidine/Pethidine = 50 gm
1 gm of Methadone = 500 gm
1 gm of Mixed Alkaloids of Opium/Papaveretum = 250 gm
1 gm of Morphine = 500 gm
1 gm of Opium = 50 gm
1 gm of Oxycodone (actual) = 6,700 gm
1 gm of Oxymorphone = 5 kg
1 gm of Racemorphan = 800 gm'';

under the heading relating to Cocaine and Other Schedule I and II Stimulants (and their immediate precursors), by striking the following:

''1 gm of Cocaine = 200 gm
1 gm of N-Ethylamphetamine = 80 gm
1 gm of Fenethylline = 40 gm
1 gm of Amphetamine = 2 kg
1 gm of Amphetamine (Actual) = 20 kg
1 gm of Methamphetamine = 2 kg
1 gm of Methamphetamine (Actual) = 20 kg
1 gm of ''Ice'' = 20 kg
1 gm of Khat = .01 gm
1 gm of 4-Methylaminorex ('Euphoria') = 100 gm
1 gm of Methylphenidate (Ritalin) = 100 gm
1 gm of Phenmetrazine = 80 gm
1 gm Phenylacetone/P_2P (when possessed for the purpose of manufacturing methamphetamine) = 416 gm
1 gm Phenylacetone/P_2P (in any other case) = 75 gm
1 gm Cocaine Base ('Crack') = 3,571 gm
1 gm of Aminorex = 100 gm
1 gm of N-N-Dimethylamphetamine = 40 gm
1 gm of N-Benzylpiperazine = 100 gm'',

and inserting the following:

''1 gm of 4-Methylaminorex ('Euphoria') = 100 gm

1 gm of Aminorex = 100 gm
1 gm of Amphetamine = 2 kg
1 gm of Amphetamine (actual) = 20 kg
1 gm of Cocaine = 200 gm
1 gm of Cocaine Base ('Crack') = 3,571 gm
1 gm of Fenethylline = 40 gm
1 gm of 'Ice' = 20 kg
1 gm of Khat = .01 gm
1 gm of Methamphetamine = 2 kg
1 gm of Methamphetamine (actual) = 20 kg
1 gm of Methylphenidate (Ritalin) = 100 gm
1 gm of N-Benzylpiperazine = 100 gm
1 gm of N-Ethylamphetamine = 80 gm
1 gm of N-N-Dimethylamphetamine = 40 gm
1 gm of Phenmetrazine = 80 gm
1 gm of Phenylacetone (P_2P) (when possessed for the purpose of manufacturing methamphetamine) = 416 gm
1 gm of Phenylacetone (P_2P) (in any other case) = 75 gm'';

under the heading relating to Synthetic Cathinones (except Schedule III, IV, and V Substances), by striking ''a synthetic cathinone'' and inserting ''a Synthetic Cathinone'';

under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the following:

''1 gm of Bufotenine = 70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD = 100 kg
1 gm of Diethyltryptamine/DET = 80 gm
1 gm of Dimethyltryptamine/DM = 100 gm
1 gm of Mescaline = 10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) = 1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) = 0.1 gm
1 gm of Peyote (Dry) = 0.5 gm
1 gm of Peyote (Wet) = 0.05 gm
1 gm of Phencyclidine/PCP = 1 kg
1 gm of Phencyclidine (actual)/PCP (actual) = 10 kg
1 gm of Psilocin = 500 gm
1 gm of Psilocybin = 500 gm
1 gm of Pyrrolidine Analog of Phencyclidine/PHP = 1 kg
1 gm of Thiophene Analog of Phencyclidine/TCP = 1 kg
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB = 2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM = 1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine/MDA = 500 gm
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA = 500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA = 500 gm
1 gm of Paramethoxymethamphetamine/PMA = 500 gm
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC = 680 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) = 1 kg'',

and inserting the following:

''1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) = 680 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) = 2.5 kg
1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) = 1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) = 500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) = 500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) = 500 gm
1 gm of Bufotenine = 70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide (LSD) = 100 kg
1 gm of Diethyltryptamine (DET) = 80 gm
1 gm of Dimethyltryptamine (DM) = 100 gm
1 gm of Mescaline = 10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (dry) = 1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (wet) = 0.1 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) = 1 kg
1 gm of Paramethoxymethamphetamine (PMA) = 500 gm
1 gm of Peyote (dry) = 0.5 gm
1 gm of Peyote (wet) = 0.05 gm
1 gm of Phencyclidine (PCP) = 1 kg
1 gm of Phencyclidine (PCP) (actual) = 10 kg
1 gm of Psilocin = 500 gm
1 gm of Psilocybin = 500 gm
1 gm of Pyrrolidine Analog of Phencyclidine (PHP) = 1 kg
1 gm of Thiophene Analog of Phencyclidine (TCP) = 1 kg'';

under the heading relating to Schedule I Marihuana, by striking the following:

''1 gm of Marihuana/Cannabis, granulated, powdered, etc. = 1 gm
1 gm of Hashish Oil = 50 gm
1 gm of Cannabis Resin or Hashish = 5 gm
1 gm of Tetrahydrocannabinol, Organic = 167 gm
1 gm of Tetrahydrocannabinol, Synthetic = 167 gm'',

and inserting the following:

''1 gm of Cannabis Resin or Hashish = 5 gm
1 gm of Hashish Oil = 50 gm
1 gm of Marihuana/Cannabis (granulated, powdered, etc.) = 1 gm
1 gm of Tetrahydrocannabinol (organic) = 167 gm
1 gm of Tetrahydrocannabinol (synthetic) = 167 gm'';

under the heading relating to Synthetic Cannabinoids (except Schedule III, IV, and V Substances), by striking ''a synthetic cannabinoid'' and inserting ''a Synthetic Cannabinoid'', and by striking '' 'Synthetic cannabinoid,' for purposes of this guideline'' and inserting '' 'Synthetic Cannabinoid,' for purposes of this guideline'';

under the heading relating to Schedule I or II Depressants (except gamma-hydroxybutyric acid), by striking ''except gamma-hydroxybutyric acid'' both places such term appears and inserting ''except Gamma-hydroxybutyric Acid'';

under the heading relating to Gamma-hydroxybutyric Acid, by striking ''of gamma-hydroxybutyric acid'' and inserting ''of Gamma-hydroxybutyric Acid'';

under the heading relating to Schedule III Substances (except ketamine), by striking ''except ketamine'' in the heading and inserting ''except Ketamine'';

under the heading relating to Ketamine, by striking ''of ketamine'' and inserting ''of Ketamine'';

under the heading relating to Schedule IV (except flunitrazepam), by striking ''except flunitrazepam'' in the heading and inserting ''except Flunitrazepam'';

under the heading relating to List I Chemicals (relating to the manufacture of amphetamine or methamphetamine), by striking ''of amphetamine or methamphetamine'' in the heading and inserting ''of Amphetamine or Methamphetamine'';

under the heading relating to Date Rape Drugs (except flunitrazepam, GHB, or ketamine), by striking ''except flunitrazepam, GHB, or ketamine'' in the heading and inserting ''except Flunitrazepam, GHB, or Ketamine'', by striking ''of 1,4-butanediol'' and inserting ''of 1,4-Butanediol'', and by striking ''of gamma butyrolactone'' and inserting ''of Gamma Butyrolactone'';

in Note 9, under the heading relating to Hallucinogens, by striking the following:

''MDA 250 mg
MDMA 250 mg
Mescaline 500 mg
PCP* 5 mg
Peyote (dry) 12 gm
Peyote (wet) 120 gm

Psilocin* 10 mg
Psilocybe mushrooms (dry) 5 gm
Psilocybe mushrooms (wet) 50 gm
Psilocybin* 10 mg
2,5-Dimethoxy-4-methylamphetamine (STP, DOM)* 3 mg'',

and inserting the following:

''2,5-Dimethoxy-4-methylamphetamine (STP, DOM)* 3 mg
MDA 250 mg
MDMA 250 mg
Mescaline 500 mg
PCP* 5 mg
Peyote (dry) 12 gm
Peyote (wet) 120 gm
Psilocin* 10 mg
Psilocybe mushrooms (dry) 5 gm
Psilocybe mushrooms (wet) 50 gm
Psilocybin* 10 mg'';

and in Note 21, by striking ''Section § 5C1.2(b)'' and inserting ''Section 5C1.2(b)''.

The Commentary to § 2D1.1 captioned ''Background'' is amended by striking ''Public Law 103–237'' and inserting ''Public Law 104–237'', and by inserting after ''to change the title of the Drug Equivalency Tables to the 'Drug Conversion Tables.' '' the following: ''*See* USSG App. C, Amendment 808 (effective November 1, 2018).''.

(D) References to 18 U.S.C. 876

The Commentary to § 2A4.2 captioned ''Statutory Provisions'' is amended by striking ''§§ 876,'' and inserting ''§§ 876(a),''.

The Commentary to § 2A6.1 captioned ''Statutory Provisions'' is amended by striking ''876,'' and inserting ''876(c),''.

The Commentary to § 2B3.2 captioned ''Statutory Provisions'' is amended by striking ''§§ 875(b), 876,'' and inserting ''§§ 875(b), (d), 876(b), (d),''.

Appendix A (Statutory Index) is amended—

by striking the following line reference:

''18 U.S.C. 876 2A4.2,2A6.1, 2B3.2, 2B3.3''

and by inserting before the line referenced to 18 U.S.C. 877 the following new line references:

''18 U.S.C. 876(a) 2A4.2, 2B3.2
18 U.S.C. 876(b) 2B3.2
18 U.S.C. 876(c) 2A6.1
18 U.S.C. 876(d) 2B3.2, 2B3.3''.

(E) Technical Changes to Commentary in Chapter Eight

The Commentary to § 8A1.2 captioned ''Application Notes'' is amended in Note 3(G) by striking '' 'Prior criminal adjudication' '' and inserting '' 'Criminal Adjudication' ''.

The Commentary to § 8C2.5 captioned ''Application Notes'' is amended in Note 1 by striking '' 'prior criminal adjudication' '' and inserting '' 'criminal adjudication' ''.

The Commentary to § 8C3.2 captioned ''Application Note'' is amended in Note 1 by striking ''the period provided for payment shall in no event exceed five years'' and inserting ''the period provided for payment shall be the shortest time in which full payment can reasonably be made''.

(F) Clerical Changes to Correct Typographical Errors

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1(E) by striking ''(*e.g.* a defendant'' and inserting ''(*e.g.,* a defendant''.

The Commentary to § 1B1.3 captioned ''Background'' is amended by striking ''the guidelines in those Chapters'' and inserting ''the guidelines in those chapters''.

The Commentary to § 1B1.4 captioned ''Background'' is amended by striking ''in imposing sentence within that range'' and inserting ''in imposing a sentence within that range''.

The Commentary to § 1B1.10 captioned ''Background'' is amended by striking ''Title 18'' and inserting ''title 18''.

The Commentary to § 2D2.3 captioned ''Background'' is amended by striking ''Section 6482'' and inserting ''section 6482''.

Section 2G2.1(b)(6)(A) is amended by striking ''engage sexually explicit conduct'' and inserting ''engage in sexually explicit conduct''.

The Commentary to § 2H3.1 captioned ''Application Notes'' is amended in Note 5(B) by striking ''(*e.g.* physical harm'' and inserting ''(*e.g.,* physical harm''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 8(A) by striking ''However, it the offense involved a stolen firearm'' and inserting ''However, if the offense involved a stolen firearm''.

The Commentary to § 2M1.1 captioned ''Application Notes'' is amended by striking ''this Part'' and inserting ''this part''.

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended in Note 7 by striking ''Subchapter C corporation'' and inserting ''subchapter C corporation''.

The Commentary to § 2T1.1 captioned ''Background'' is amended by striking ''the treasury'' and inserting ''the Treasury''.

Chapter Two, Part T, Subpart 2 is amended in the introductory commentary by striking ''Parts I–IV of Subchapter J of Chapter 51 of Subtitle E of Title 26'' and inserting ''parts I–IV of subchapter J of chapter 51 of subtitle E of title 26, United States Code''.

Chapter Two, Part T, Subpart 3 is amended in the introductory commentary by striking ''Subpart'' both places such term appears and inserting ''subpart''.

Chapter Three, Part A is amended in the introductory commentary by striking ''Part'' and inserting ''part''.

The Commentary to § 3A1.1 captioned ''Background'' is amended by striking ''Section 280003'' and inserting ''section 280003''.

Chapter Three, Part B is amended in the introductory commentary by striking ''Part'' and inserting ''part''.

The Commentary to § 3C1.1 captioned ''Application Notes'' is amended in Note 4(I) by striking ''Title 18'' and inserting ''title 18''.

Chapter Three, Part D is amended in the introductory commentary by striking ''Part'' each place such term appears and inserting ''part''.

The Commentary to § 3D1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''Part'' both places such term appears and inserting ''part''.

The Commentary to § 3D1.1 captioned ''Background'' is amended by striking ''Chapter 3'' and inserting ''Chapter Three'', and by striking ''Chapter Four'' and inserting ''Chapter Four''.

The Commentary to § 3D1.2 captioned ''Background'' is amended by striking ''Part'' both places such term appears and inserting ''part''.

The Commentary to § 3D1.3 captioned ''Background'' is amended by striking ''Part'' and inserting ''part''.

The Commentary to § 3D1.4 captioned ''Background'' is amended by striking ''Part'' and inserting ''part''.

The Commentary to § 4A1.3 captioned ''Application Notes'' is amended in Note 2(C)(v) by striking ''this Chapter'' and inserting ''this chapter''.

The Commentary to § 4B1.1 captioned ''Background'' is amended by striking ''Title 28'' and inserting ''title 28''.

The Commentary to § 5C1.1 captioned ''Application Notes'' is amended in Note 1 by striking ''this Chapter'' and inserting ''this chapter''.

The Commentary to § 5E1.1 captioned ''Application Notes'' is amended in Note 1 by striking ''Chapter'' both places such term appears and inserting ''chapter''; by striking ''Title 18'' both places such term appears and inserting ''title 18''; and by striking ''Subchapter C'' and inserting ''subchapter C''.

The Commentary to § 5E1.1 captioned ''Background'' is amended by striking ''Title 18'' and inserting ''title 18''.

The Commentary to § 5E1.3 captioned ''Background'' is amended by striking ''Title 18'' and inserting ''title 18'', and

by striking ''The Victims'' and inserting ''the Victims''.

The Commentary to § 5E1.4 captioned ''Background'' is amended by striking ''Titles'' and inserting ''titles''.

Chapter Five, Part H is amended in the introductory commentary by striking ''Part'' each place such term appears and inserting ''part''.

Chapter Six, Part A is amended in the introductory commentary by striking ''Part'' and inserting ''part''.

Chapter Seven, Part A, Subpart 3(b) (Choice between Theories) is amended by striking ''Title 21'' and inserting ''title 21''.

The Commentary to § 8B1.1 captioned ''Background'' is amended by striking ''Title 18'' and inserting ''title 18''.

The Commentary to § 8B2.1 captioned ''Application Notes'' is amended in Note 1, in the paragraph that begins '' 'Governing authority' means'' by striking ''means the (A) the Board'' and inserting ''means (A) the Board''.

Section 8C3.3(a) is amended by striking ''its ability'' and inserting ''the ability of the organization''.

The Commentary to § 8E1.1 captioned ''Background'' is amended by striking ''Title 18'' and inserting ''title 18''.

(G) Additional Clerical Changes to Guideline Commentary

The Commentary to § 1B1.11 captioned ''Background'' is amended by striking ''133 S. Ct. 2072, 2078'' and inserting ''569 U.S. 530, 533''.

The Commentary to § 2K2.4 captioned ''Statutory Provisions'' is amended by striking ''§§ 844(h)'' and inserting ''§§ 844(h), (o)''.

The Commentary to § 2M5.3 captioned ''Application Notes'' is amended in Note 1, in the paragraph that begins '' 'Specially designated global terrorist' has'' by striking ''§ 594.513'' and inserting ''§ 594.310''.

The Commentary to § 2M6.1 captioned ''Application Notes'' is amended in Note 1—

by striking the following paragraph:

'' 'Restricted person' has the meaning given that term in 18 U.S.C. 175b(d)(2).'',

and by striking the following paragraph:

'' 'Vector' has the meaning given that term in 18 U.S.C. 178(4).''.

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended in Note 6, in the paragraph that begins '' 'Gross income' has'' by striking ''§ 1.61'' and inserting ''§ 1.61–1''.

The Commentary to § 3A1.2 captioned ''Application Notes'' is amended in Note 3 by striking ''the victim was a government officer or employee, or a member of the immediate family thereof'' and inserting ''the victim was a government officer or employee, a former government officer or employee, or a member of the immediate family thereof''.

The Commentary to § 5G1.3 captioned ''Background'' is amended by striking ''132 S. Ct. 1463, 1468'' and inserting ''566 U.S. 231, 236'', and by striking ''132 S. Ct. at 1468'' and inserting ''566 U.S. at 236''.

[FR Doc. 2023–01346 Filed 2–1–23; 8:45 am]

BILLING CODE 2210–40–P