any IRS employee in their personal capacity if the IRS or DOJ has agreed to provide representation for the employee; or (d) the United States is a party to, has an interest in, or is likely to be affected by, the proceeding and the IRS or DOJ determines that the information is relevant and necessary to the proceeding. Information may be disclosed to the adjudicative body to resolve issues of relevancy, necessity, or privilege pertaining to the information.

(3) Disclose information to an appropriate Federal, state, local, tribal, or foreign agency, or other public authority, responsible for implementing or enforcing, or for investigating or prosecuting the violation of, a statute, rule, regulation, order, or license, when a record on its face, or in conjunction with other records, indicates a potential violation of law or regulation and the information disclosed is relevant to any regulatory, enforcement, investigative, or prosecutorial responsibility of the receiving authority.

(4) Disclose information to officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation.

(5) Disclose information to third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation.

(6) Disclose information to a contractor or service provider, including an expert witness or a consultant, hired by the IRS, to the extent necessary for the performance of a contract.

(7) Disclose information to the news media as described in the IRS Policy Statement 11–94 (formerly P–1–183), News Coverage to Advance Deterrent Value of Enforcement Activities Encouraged, IRM 1.2.1.11.9.

(8) Disclose information to professional organizations or associations with which individuals covered by this system of records may be affiliated, such as state bar disciplinary authorities, to meet their responsibilities in connection with the administration and maintenance of standards of conduct and discipline.

(9) Disclose information to a Federal, state, local, or tribal agency, or other public authority, which has requested information relevant or necessary to hiring or retaining an employee, or issuing or continuing a security clearance, license, contract, grant or other benefit.

(10) To appropriate agencies, entities, and persons when (1) the Department of the Treasury or IRS suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury or IRS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury and/or Treasury bureau(s) (including information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's or IRS efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm;

(11) To another Federal agency or Federal entity, when the Department of the Treasury or IRS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Paper records and electronic media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

By name, Social Security Number (SSN), access/security badge number, obfuscated system-generated identifier and other electronic identification numbers, date of birth, phone number, and other unique individual identifiers.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are maintained in accordance with IRM 1.15, Records and Information Management (also see Documents 12829 and 12990).

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Role based access controls are not less than those published in IRM 10.8, Information Technology (IT) Security, IRM 10.2, Physical Security Program, and IRM 10.5, Privacy and Information Protection.

RECORDS ACCESS PROCEDURES:

See ''Notification Procedures'' below.

CONTESTING RECORDS PROCEDURES:

See ''Notification Procedures'' below.

NOTIFICATION PROCEDURES:

This system may not be accessed for purposes of determining whether the system contains a record pertaining to a particular individual; the records are exempt under 5 U.S.C. 552a(k)(2) and (k)(5).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

Records maintained in this system haves been designated exempt from sections (c)(3), (d), (e)(1), (e)(4)(G)–(I), and (f) of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(2) and (k)(5) (See 31 CFR 1.36).

HISTORY:

None.

[FR Doc. 2024–09698 Filed 5–2–24; 8:45 am]

BILLING CODE 4810–AK–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2024, and request for comment.

SUMMARY: The United States Sentencing Commission hereby gives notice that the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index; and the Commission requests comment regarding whether it should include in the *Guidelines Manual* as changes that may be applied retroactively to previously sentenced defendants any or all of the following amendments: Amendment 1; Part A of Amendment 3; Part B of Amendment 3; and Part D of Amendment 5. This notice sets forth the text of the amendments and the reason for each amendment, and the request for comment regarding possible retroactive application of the amendments listed above.

DATES: *Effective Date of Amendments.* The Commission has specified an effective date of November 1, 2024, for the amendments set forth in this notice.

Written Public Comment. Written public comment regarding possible retroactive application of Amendment 1, Part A of Amendment 3, Part B of Amendment 3, and Part D of Amendment 5, should be received by the Commission not later than June 21, 2024. Written reply comments, which may only respond to issues raised during the original comment period, should be received by the Commission not later than July 22, 2024. Any public

comment received after the close of the comment period, and reply comment received on issues not raised during the original comment period, may not be considered.

ADDRESSES: There are two methods for submitting written public comment and reply comments.

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 20002–8002, Attention: Public Affairs—Issue for Comment on Retroactivity.

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). Absent action of the Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

(1) Amendments to the Sentencing Guidelines, Policy Statements, Official Commentary, and Statutory Index

Pursuant to its authority under 28 U.S.C. 994(p), the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index. Notice of the proposed amendment was published in the **Federal Register** on December 26, 2023 (*see* 88 FR 89142). The Commission held public hearings on the proposed amendments in Washington, DC, on March 6–7, 2024. On April 30, 2024, the Commission submitted the promulgated amendments to the Congress and specified an effective date of November 1, 2024.

The text of the amendments to the sentencing guidelines, policy statements, commentary, and statutory index, and the reason for each amendment, is set forth below. Additional information pertaining to the amendments described in this notice may be accessed through the Commission's website at *www.ussc.gov.*

(2) Request for Comment on Possible Retroactive Application of Amendment 1, Part A of Amendment 3, Part B of Amendment 3, and Part D of Amendment 5

This notice sets forth a request for comment regarding whether the Commission should list 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 any or all of the following amendments: Amendment 1 (relating to acquitted conduct); Part A of Amendment 3 (relating to § 2K2.1(b)(4)(B) enhancement); Part B of Amendment 3 (relating to the interaction between § 2K2.4 and § 3D1.2(c)); and Part D of Amendment 5 (relating to enhanced penalties for drug offenders).

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.

Authority: 28 U.S.C. 994(a), (o), (p), and (u); USSC Rules of Practice and Procedure 2.2, 4.1, and 4.1A.

Carlton W. Reeves,

Chair.

(1) Amendments to the Sentencing Guidelines, Policy Statements, Official Commentary, and Statutory Index

1. *Amendment:* Section 1B1.3 is amended—

in subsection (a), in the heading, by striking ''*Chapters Two (Offense Conduct) and Three (Adjustments).*'' and inserting ''*Chapters Two (Offense Conduct) and Three (Adjustments).*—'';

in subsection (b), in the heading, by striking ''*Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).*'' and inserting ''*Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).*—'';

and by inserting at the end the following new subsection (c):

''(c) *Acquitted Conduct.*—Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended by inserting at the end the following new Note 10:

''10. *Acquitted Conduct.*—Subsection (c) provides that relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct establishes, in whole or in part, the instant offense of conviction. There may be cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction. In those cases, the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct.''.

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, is not relevant conduct for purposes of determining the guideline range. *See* § 1B1.3(c) (Relevant Conduct). Nonetheless, nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. 3661.''.

Reason for Amendment: This amendment revises § 1B1.3 (Relevant

Conduct (Factors that Determine the Guideline Range)) to exclude acquitted conduct from the scope of relevant conduct used in calculating a sentence range under the federal guidelines. Acquitted conduct is unique, and this amendment does not comment on the use of uncharged, dismissed, or other relevant conduct as defined in § 1B1.3 for purposes of calculating the guideline range.

The use of acquitted conduct to increase a defendant's sentence has been a persistent concern for many within the criminal justice system and the subject of robust debate over the past several years. A number of jurists, including current and past Supreme Court Justices, have urged reconsideration of acquitted-conduct sentencing. *See, e.g., McClinton* v. *United States,* 143 S. Ct. 2400, 2401 & n.2 (2023) (Sotomayor, J., Statement respecting the denial of certiorari) (collecting cases and statements opposing acquitted-conduct sentencing). In denying certiorari last year in *McClinton,* multiple Justices suggested that it would be appropriate for the Commission to resolve the question of how acquitted conduct is considered under the guidelines. *See id.* at 2402–03; *id.* at 2403 (Kavanaugh, J., joined by Gorsuch, J. and Barrett, J., Statement respecting the denial of certiorari), *but see id.* (Alito, J., concurring in the denial of certiorari). Many states have prohibited consideration of acquitted conduct. *See id.* at 2401 n.2 (collecting cases). And, currently, Congress is considering bills to prohibit its consideration at sentencing, with bipartisan support. *See* Prohibiting Punishment of Acquitted Conduct Act of 2023, S. 2788, 118th Cong. (1st Sess. 2023); Prohibiting Punishment of Acquitted Conduct Act of 2023, H.R. 5430, 118th Cong. (1st Sess. 2023).

First, the amendment revises § 1B1.3 by adding new subsection (c), which provides that ''[r]elevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court unless such conduct also establishes, in whole or in part, the instant offense of conviction.'' This rule seeks to promote respect for the law, which is a statutory obligation of the Commission. *See* 28 U.S.C § 994(a)(2); *id.* § 991(b)(1)(A) & (B); 18 U.S.C. 3553(a)(2).

This amendment seeks to promote respect for the law by addressing some of the concerns that numerous commenters have raised about acquitted-conduct sentencing, including those involving the ''perceived fairness'' of the criminal justice system. *McClinton,* 143 S. Ct. at 2401 (Sotomayor, J., Statement respecting the denial of certiorari). Some commenters were concerned that consideration of acquitted conduct to increase the guideline range undermines the historical role of the jury and diminishes ''the public's perception that justice is being done, a concern that is vital to the legitimacy of the criminal justice system.'' *McClinton,* 143 S. Ct. at 2402–03 (Sotomayor, J., Statement respecting the denial of certiorari); *see United States* v. *Settles,* 530 F.3d 920, 924 (D.C. Cir. 2008) (expressing concern that ''using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system''). They argue that consideration of acquitted conduct at sentencing contributes to the erosion of the jury-trial right and enlarges the already formidable power of the government, reasoning that defendants who choose to put the government to its proof ''face all the risks of conviction, with no practical upside to acquittal unless they . . . are absolved of *all* charges.'' *United States* v. *Bell,* 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of reh'g en banc). For these reasons, ''acquittals have long been 'accorded special weight,' distinguishing them from conduct that was never charged and passed upon by a jury,'' *McClinton,* 143 S. Ct. at 2402 (Sotomayor, J., Statement respecting the denial of certiorari (quoting *United States* v. *DiFrancesco,* 449 U.S. 117, 129 (1980))) and viewed as ''inviolate,'' *McElrath* v. *Georgia,* 601 U.S. 87, 94 (2024).

Second, the amendment adds new Application Note 10 to § 1B1.3(c), which instructs that in ''cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction . . . , the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct.'' The amendment thus clarifies that while ''acquitted conduct'' cannot be considered in determining the guideline range, any conduct that establishes—in whole or in part—the instant offense of conviction is properly considered, even as relevant conduct and even if that same conduct also underlies a charge of which the defendant has been acquitted. During the amendment cycle, commenters raised questions about how a court would be able to parse out acquitted conduct in a variety of specific scenarios, including those involving ''linked or related charges'' or ''overlapping conduct'' (*e.g.,* conspiracy counts in conjunction with substantive counts or obstruction of justice counts in conjunction with substantive civil rights counts). Commission data demonstrate that cases involving acquitted conduct will be rare. In fiscal year 2022, of 62,529 sentenced individuals, 1,613 were convicted and sentenced after a trial (2.5% of all sentenced individuals), and of those, only 286 (0.4% of all sentenced individuals) were acquitted of at least one offense or found guilty of only a lesser included offense.

To ensure that courts may continue to appropriately sentence defendants for conduct that establishes counts of conviction, rather than define the specific boundaries of ''acquitted conduct'' and ''convicted conduct'' in such cases, the Commission determined that the court that presided over the proceeding will be best positioned to determine which conduct can properly be considered as part of relevant conduct based on the individual facts in those cases.

The amendment limits the scope of ''acquitted conduct'' to only those charges of which the defendant has been acquitted in federal court. This limitation reflects the principles of the dual-sovereignty doctrine and responds to concerns about administrability. The chief concern regarding administrability raised by commenters throughout the amendment cycle was whether courts would be able to parse acquitted conduct from convicted conduct in cases in which some conduct relates to both the acquitted and convicted counts. The Commission appreciates that federal courts may have greater difficulty making this determination if it involves proceedings that occurred in another jurisdiction and at different times.

Third, and finally, the amendment makes corresponding changes to § 6A1.3 (Resolution of Disputed Factors (Policy Statement)), restating the principle provided in § 1B1.3(c) and further clarifying that ''nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. 3661.''

2. *Amendment:* Section 2B1.1(b)(1) is amended by inserting the following at the end:

''*Notes to Table:*

(A) *Loss.*—Loss is the greater of actual loss or intended loss.

(B) *Gain.*—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) For purposes of this guideline—

(i) 'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) 'Intended loss' (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.,* as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) 'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) 'Reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.''.

The Commentary to § 2B1.1 captioned ''Application Notes'' is amended in Note 3—

by striking subparagraphs (A) and (B) as follows:

''(A) *General Rule.*—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) *Actual Loss.*—'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) *Intended Loss.*—'Intended loss' (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.,* as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) *Pecuniary Harm.*—'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) *Reasonably Foreseeable Pecuniary Harm.*—For purposes of this guideline, 'reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) *Rules of Construction in Certain Cases.*—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) *Product Substitution Cases.*—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(II) *Procurement Fraud Cases.*—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) *Offenses Under 18 U.S.C. 1030.*—In the case of an offense under 18 U.S.C. 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(B) *Gain.*—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.'';

inserting the following new subparagraph (A):

''(A) *Rules of Construction in Certain Cases.*—In the cases described in clauses (i) through (iii), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(i) *Product Substitution Cases.*—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(ii) *Procurement Fraud Cases.*—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(iii) *Offenses Under 18 U.S.C. 1030.*—In the case of an offense under 18 U.S.C. 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.'';

and by redesignating subparagraphs (C), (D), (E), and (F) as subparagraphs (B), (C), (D), and (E), respectively.

The Commentary to § 2B2.3 captioned ''Application Notes'' is amended in Note 2 by striking ''the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to § 2B1.1''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended in Note 3 by striking ''Application Note 3 of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud) and Application Note 3 of the Commentary to § 2B1.1''.

The Commentary to § 8A1.2 captioned ''Application Notes'' is amended in Note 3(I) by striking ''the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to § 2B1.1''.

Reason for Amendment: This amendment is a result of the Commission's continued study of the *Guidelines Manual* to address case law concerning the validity and enforceability of guideline commentary. In *Stinson* v. *United States,* 508 U.S. 36, 38 (1993), the Supreme Court held that commentary ''that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'' Following *Kisor* v. *Wilkie,* 139 S. Ct. 2400, 2415 (2019), which limited deference to executive agencies' interpretation of regulations to situations in which the regulation is ''genuinely ambiguous,'' the deference afforded to various guideline commentary provisions has been

debated and is the subject of conflicting court decisions.

Applying *Kisor,* the Third Circuit has held that Application Note 3(A) of the commentary to § 2B1.1 (Theft, Property Destruction, and Fraud) is not entitled to deference. *See United States* v. *Banks,* 55 F.4th 246 (3d Cir. 2022). Application Note 3(A) provides a general rule that ''loss is the greater of actual loss or intended loss'' for purposes of the loss table in § 2B1.1(b)(1), which increases an individual's offense level based on loss amount. In *Banks,* the Third Circuit held that ''the term 'loss' [wa]s unambiguous in the context of § 2B1.1'' and that it unambiguously referred to ''actual loss.'' The Third Circuit reasoned that ''the commentary expand[ed] the definition of 'loss' by explaining that generally 'loss is the greater of actual loss or intended loss,' '' and therefore ''accord[ed] the commentary no weight.'' *Banks,* 55 F.4th at 253, 258.

The loss calculations for individuals in the Third Circuit are now computed differently than elsewhere, where other circuit courts have uniformly applied the general rule in Application Note 3(A). The Commission estimates that before the *Banks* decision approximately 50 individuals per year were sentenced using intended loss in the Third Circuit.

To ensure consistent loss calculation across circuits, the amendment creates Notes to the loss table in § 2B1.1(b)(1) and moves the general rule establishing loss as the greater of actual loss or intended loss from the commentary to the guideline itself as part of the Notes. The amendment also moves rules providing for the use of gain as an alternative measure of loss, as well as the definitions of ''actual loss,'' ''intended loss,'' ''pecuniary harm,'' and ''reasonably foreseeable pecuniary harm,'' from the Commentary to the Notes. In addition, the amendment makes corresponding changes to the Commentary to §§ 2B2.3 (Trespass), 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions), and 8A1.2 (Application Instructions—Organizations), which calculate loss by reference to the Commentary to § 2B1.1.

While the Commission may undertake a comprehensive review of § 2B1.1 in a future amendment cycle, this amendment aims to ensure consistent guideline application in the meantime without taking a position on how loss may be calculated in the future.

3. *Amendment:*

Part A (§ 2K2.1(b)(4)(B) Enhancement)

Section 2K2.1(b)(4)(B)(i) is amended by striking ''any firearm had an altered or obliterated serial number'' and inserting ''any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye''.

The Commentary to § 2K2.1 is amended—

in Note 8(A) by striking ''if the offense involved a firearm with an altered or obliterated serial number'' and inserting ''if the offense involved a firearm with a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye''; and by striking ''This is because the base offense level takes into account that the firearm had an altered or obliterated serial number.'';

and in Note 8(B) by striking ''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 ''regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye''.

Part B (Interaction Between § 2K2.4 and § 3D1.2(c))

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 4 by striking the following:

''*Weapon Enhancement.*—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under § 2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under § 2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or § 2K2.1(b)(6)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. 922(g), the enhancement under § 2K2.1(b)(6)(B) would not apply.

In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) (*i.e.,* the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed

the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a).'';

and inserting the following:

''*Non-Applicability of Certain Enhancements.*—

(A) *In General.*—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under § 2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under § 2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or § 2K2.1(b)(6)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. 922(g), the enhancement under § 2K2.1(b)(6)(B) would not apply.

(B) *Impact on Grouping.*—If two or more counts would otherwise group under subsection (c) of § 3D1.2 (Groups of Closely Related Counts), the counts are to be grouped together under § 3D1.2(c) despite the non-applicability of certain enhancements under Application Note 4(A). Thus, for example, in a case in which the defendant is convicted of a felon-in-possession count under 18 U.S.C. 922(g) and a drug trafficking count underlying a conviction under 18 U.S.C. 924(c), the counts shall be grouped pursuant to § 3D1.2(c). The applicable Chapter Two guidelines for the felon-in-possession count and the drug trafficking count each include 'conduct that is treated as a specific offense characteristic' in the other count, but the otherwise applicable enhancements did not apply due to the rules in § 2K2.4 related to 18 U.S.C. 924(c) convictions.

(C) *Upward Departure Provision.*—In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) (*i.e.,* the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a).''.

Reason for Amendment: This amendment addresses circuit conflicts involving § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). Part A addresses whether the serial number of a firearm must be illegible for application of the enhancement for an ''altered or obliterated'' serial number at § 2K2.1(b)(4)(B), and Part B addresses whether subsection (c) of § 3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. 922(g) with a drug trafficking count, where the defendant also has an 18 U.S.C. 924(c) conviction.

Part A—Section 2K2.1(b)(4)(B) Enhancement

Part A of the amendment resolves the differences in how the circuits interpret the term ''altered'' in the 4-level enhancement at § 2K2.1(b)(4)(B), which applies when the serial number of a firearm has been ''altered or obliterated.'' A circuit conflict has arisen as to whether the serial number must be illegible for this enhancement to apply and as to what test for legibility should be employed.

The Sixth and Second Circuits have adopted the naked eye test. The Sixth Circuit held that a serial number must be illegible, noting that ''a serial number that is defaced but remains visible to the naked eye is not 'altered or obliterated' under the guideline.'' *United States* v. *Sands,* 948 F.3d 709, 719 (6th Cir. 2020). The Sixth Circuit reasoned that ''[a]ny person with basic vision and reading ability would be able to tell immediately whether a serial number is legible,'' and may be less inclined to purchase a firearm without a legible serial number. *Id.* at 717. The Second Circuit followed the Sixth Circuit in holding that ''altered'' means illegible for the same reasons. *United States* v. *St. Hilaire,* 960 F.3d 61, 66 (2d Cir. 2020).

By contrast, the Fourth, Fifth, and Eleventh Circuits have upheld the enhancement where a serial number is ''less legible.'' The Fourth Circuit held that ''a serial number that is made *less* legible is made different and therefore is altered for purposes of the enhancement.'' *United States* v. *Harris,* 720 F.3d 499, 501 (4th Cir. 2013). The Fifth Circuit similarly affirmed the enhancement even though the damage did not render the serial number unreadable because ''the serial number of the firearm [ ] had been materially changed in a way that made its accurate information less accessible.'' *United States* v. *Perez,* 585 F.3d 880, 884 (5th Cir. 2009). In an unpublished opinion, the Eleventh Circuit reasoned that an interpretation where ''altered'' means illegible ''would render 'obliterated' superfluous.'' *United States* v. *Millender,* 791 F. App'x 782, 783 (11th Cir. 2019).

This amendment resolves this circuit conflict by amending the enhancement to adopt the holdings of the Second and Sixth Circuits. As amended, the enhancement applies if ''any firearm had a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye.'' This amendment is consistent with the Commission's recognition in 2006 of ''both the difficulty in tracing firearms with altered and obliterated serial numbers, and the increased market for these types of weapons.'' *See* USSG, App. C, amend. 691 (effective Nov. 1, 2006). By employing the ''unaided eye'' test for legibility, the amendment also seeks to resolve the circuit split and ensure uniform application.

Part B—Grouping: § 2K2.4, Application Note 4

Part B resolves a difference among circuits concerning whether subsection (c) of § 3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. 924(c). Section 3D1.2 (Grouping of Closely Related Counts) contains four rules for determining whether multiple counts should group because they are closely related. Subsection (c) states that counts are grouped together ''[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.'' The Commentary to § 3D1.2 further explains that ''[s]ubsection (c) provides that when conduct that represents a separate count, *e.g.,* bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor.''

While there is little disagreement that the felon-in-possession and drug trafficking counts ordinarily group under § 3D1.2(c), courts differ regarding the extent to which the presence of the count under 18 U.S.C. 924(c) prohibits grouping under the guidelines. Section 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) is applicable to certain statutes with mandatory minimum terms of imprisonment (*e.g.,* 18 U.S.C. 924(c)). The Commentary to § 2K2.4 provides that ''[i]f a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense.''

The Sixth, Eighth, and Eleventh Circuits have held that such counts can group together under § 3D1.2(c) because the felon-in-possession convictions and drug trafficking convictions each include conduct that is treated as specific offense characteristics in the other offense, even if those specific offense characteristics do not apply due to § 2K2.4. *United States* v. *Gibbs,* 395 F. App'x 248, 250 (6th Cir. 2010); *United States* v. *Bell,* 477 F.3d 607, 615–16 (8th Cir. 2007); *United States* v. *King,* 201 F. App'x 715, 718 (11th Cir. 2006). By contrast, the Seventh Circuit has held that felon-in-possession and drug trafficking counts do not group under these circumstances because the grouping rules apply only after the offense level for each count has been determined and ''by virtue of § 2K2.4, [the counts] did not operate as specific offense characteristics of each other, and the enhancements in §§ 2D1.1(b)(1) and 2K2.1(b)(6)(B) did not apply.'' *United States* v. *Sinclair,* 770 F.3d 1148, 1157–58 (7th Cir. 2014).

This amendment revises Application Note 4 to § 2K2.4 and reorganizes it into three subparagraphs. Subparagraph A retains the same instruction on the non-applicability of certain enhancements; subparagraph B explains the impact on grouping; and subparagraph C retains the upward departure provision. As amended, subparagraph B resolves the circuit conflict by explicitly instructing that ''[i]f two or more counts would otherwise group under subsection (c) of § 3D1.2 (Groups of Closely Related Counts), the counts are to be grouped together under § 3D1.2(c) despite the non-applicability of certain enhancements under Application Note 4(A).''

This amendment aligns with the holdings of the majority of circuits involved in the circuit conflict. Additionally, this amendment clarifies the Commission's view that promulgation of this Application Note originally was not intended to place any limitations on grouping.

4. *Amendment:* Section 5H1.1 is amended by striking the following:

''Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).'';

and inserting the following:

''Age may be relevant in determining whether a departure is warranted.

Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense or prior offenses. Certain risk factors may affect a youthful individual's development into the mid-20's and contribute to involvement in criminal justice systems, including environment, adverse childhood experiences, substance use, lack of educational opportunities, and familial relationships. In addition, youthful individuals generally are more impulsive, risk-seeking, and susceptible to outside influence as their brains continue to develop into young adulthood. Youthful individuals also are more amenable to rehabilitation.

The age-crime curve, one of the most consistent findings in criminology, demonstrates that criminal behavior tends to decrease with age. Age-appropriate interventions and other protective factors may promote desistance from crime. Accordingly, in an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing.

Physical condition, which may be related to age, is addressed at § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).''.

Reason for Amendment: This amendment makes several revisions to § 5H1.1 (Age (Policy Statement)), which addresses the relevance of age in sentencing. Before the amendment, § 5H1.1 provided, in relevant part, that ''[a]ge (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.''

The amendment revises the first sentence in § 5H1.1 to provide more broadly that ''[a]ge may be relevant in determining whether a departure is warranted.'' It also adds language specifically providing that a downward departure may be warranted in cases in which the defendant was youthful at the time of the instant offense or any prior offenses. In line with the Commission's statutory duty to establish sentencing policies that reflect ''advancement in knowledge of human behavior as it relates to the criminal justice process,'' 28 U.S.C. 991(b)(1)(C), this amendment reflects the evolving science and data surrounding youthful individuals, including recognition of the age-crime curve and that cognitive changes lasting into the mid-20s affect individual behavior and culpability. The amendment also reflects expert testimony to the Commission indicating that certain risk factors may contribute to youthful involvement in criminal justice systems, while protective factors, including appropriate interventions, may promote desistance from crime.

5. Amendment:

Part A (Export Control Reform Act of 2018)

The Commentary to § 2M5.1 captioned ''Statutory Provisions'' is amended by striking ''50 U.S.C. 1705; 50 U.S.C. 4601–4623'' and inserting ''50 U.S.C. 1705, 4819''.

The Commentary to § 2M5.1 captioned ''Application Notes'' is amended—

by striking Notes 1 through 4 as follows:

''1. In the case of a violation during time of war or armed conflict, an upward departure may be warranted.

2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

3. In addition to the provisions for imprisonment, 50 U.S.C. 4610 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is $250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or $1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.

4. For purposes of subsection (a)(1)(B), 'a country supporting international terrorism' means a country designated under section 6(j) of the Export Administration Act (50 U.S.C. 4605).'';

and by inserting the following new Notes 1, 2, and 3:

''1. *Definition.*—For purposes of subsection (a)(1)(B), 'a country supporting international terrorism' means a country designated under section 1754 of the Export Controls Act of 2018 (50 U.S.C. 4813).

2. *Additional Penalties.*—In addition to the provisions for imprisonment, 50 U.S.C. 4819 contains provisions for criminal fines and forfeiture as well as civil penalties.

3. *Departure Provisions.*—

(A) *In General.*—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

(B) *War or Armed Conflict.*—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.''.

Appendix A (Statutory Index) is amended in the line referenced to 50 U.S.C. 4610 by striking ''§ 4610'' and inserting ''§ 4819''.

Part B (Offenses Involving Records and Reports on Monetary Instruments Transactions)

Section 2S1.3(b)(2)(B) is amended by striking ''committed the offense as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period'' and inserting ''committed the offense while violating another law of the United States or as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period''.

Part C (Antitrust Offenses)

The Commentary to § 2R1.1 captioned ''Statutory Provisions'' is amended by striking ''§§ 1, 3(b)'' and inserting ''§§ 1, 3(a)''.

The Commentary to § 2R1.1 captioned ''Application Notes'' is amended—

in Note 3 by inserting at the beginning the following new heading: ''*Fines for Organizations.*—'';

in Note 4 by inserting at the beginning the following new heading: ''*Another Consideration in Setting Fine.*—'';

in Note 5 by inserting at the beginning the following new heading: ''*Use of Alternatives Other Than Imprisonment.*—'';

in Note 6 by inserting at the beginning the following new heading: ''*Understatement of Seriousness.*—'';

and in Note 7 by inserting at the beginning the following new heading: ''*Defendant with Previous Antitrust Convictions.*—''.

The Commentary to § 2R1.1 captioned ''Background'' is amended by striking ''These guidelines apply'' and inserting ''This guideline applies''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 3(b) by striking ''§ 3(b)'' and inserting ''§ 3(a)''.

Part D (Enhanced Penalties for Drug Offenders)

Section 2D1.1(a) is amended by striking paragraphs (1) through (4) as follows:

''(1) 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

(2) 38, 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; or

(3) 30, if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), 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

(4) 26, if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or'';

and by inserting the following new paragraphs (1) through (4):

''(1) 43, if (A) the defendant is convicted of an offense 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), to which the mandatory statutory term of life imprisonment applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under § 1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(2) 38, if (A) the defendant is convicted of an offense 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), to which the statutory term of imprisonment of not less than 20 years to life applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under § 1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(3) 30, if (A) the defendant is convicted of an offense under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5) to which the statutory maximum term of imprisonment of 30 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under § 1B1.2 (Applicable Guidelines); or (ii) such base offense level; or

(4) 26, if (A) the defendant is convicted of an offense under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5) to which the statutory maximum term of imprisonment of 15 years applies; or (B) the parties stipulate to (i) such an offense for purposes of calculating the guideline range under § 1B1.2 (Applicable Guidelines); or (ii) such base offense level; or''.

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

by striking Notes 1 through 4 as follows:

''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.

2. '*Mixture or Substance'.*—'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

3. *Classification of Controlled Substances.*—Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 CFR 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 CFR 1308.13–15 is the appropriate classification.

4. *Applicability to 'Counterfeit' Substances.*—The statute and guideline also apply to 'counterfeit' substances, which are defined in 21 U.S.C. 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.'';

and inserting the following new Notes 1 through 4:

''1. *Definition of '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).

2. *Application of Subsection (a).*—Subsection (a) provides base offense levels for offenses under 21 U.S.C. 841 and 960 based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.

Subsection (a)(1) provides a base offense level of 43 for offenses 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), to which the mandatory statutory term of life imprisonment applies because death or serious bodily injury resulted from the use of the controlled substance and the defendant committed the offense after one or more prior convictions for a serious drug felony, serious violent felony, or felony drug offense.

Subsection (a)(2) provides a base offense level of 38 for offenses 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), to which the statutory minimum term of imprisonment of not less than 20 years to life applies because death or serious bodily injury resulted from the use of the controlled substance.

Subsection (a)(3) provides a base offense level of 30 for offenses under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5) to which the statutory maximum term of imprisonment of 30 years applies because death or serious bodily injury resulted from the use of the controlled substance and the defendant committed the offense after one or more prior convictions for a felony drug offense.

Subsection (a)(4) provides a base offense level of 26 for offenses under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5) to which the statutory maximum term of imprisonment of 15 years applies because death or serious bodily injury resulted from the use of the controlled substance.

The terms 'serious drug felony,' 'serious violent felony,' and 'felony drug offense' are defined in 21 U.S.C. 802. The base offense levels in subsections (a)(1) through (a)(4) would also apply if the parties stipulate to the applicable offense described in those provisions for purposes of calculating the guideline range under § 1B1.2 (Applicable Guidelines) or to any such base offense level.

3. *'Mixture or Substance'.*—'Mixture or substance' as used in this guideline has the same meaning as in 21 U.S.C. 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the

fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

4. *In General.—*

(A) *Classification of Controlled Substances.*—Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 CFR 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 CFR 1308.13–15 is the appropriate classification.

(B) *Applicability to 'Counterfeit' Substances.*—The statute and guideline also apply to 'counterfeit' substances, which are defined in 21 U.S.C. 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.''.

Part E (''Sex Offense'' Definition in § 4C1.1 (Adjustment for Certain Zero-Point Offenders))

Section 4C1.1(b)(2) is amended by striking '' 'Sex offense' means (A) an offense, perpetrated against a minor, under''; and inserting '' 'Sex offense' means (A) an offense under''.

Reason for Amendment: This multi-part amendment responds to recently enacted legislation and miscellaneous guideline application issues.

Part A—Export Control Reform Act of 2018

Part A of the amendment amends Appendix A (Statutory Index) to reference the new statutory provisions from the Export Control Reform Act (ECRA) of 2018, enacted as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115–232 (Aug. 13, 2018), to § 2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism). The ECRA repealed the Export Administration Act (EAA) of 1979 regarding dual-use export controls, previously codified at 50 U.S.C. 4601–4623. At the same time, the Act promulgated new provisions, codified at 50 U.S.C. 4811–4826, relating to export controls for national security and foreign policy purposes. Section 4819 prohibits a willful violation of the Act or attempts and conspiracies to violate any regulation, order, license, or other authorization issued under the Act, with a maximum term of imprisonment of 20 years. Section 4819 replaced the penalty provision of the repealed Act, at 50 U.S.C. 4610 (Violations), which had been referenced in Appendix A to § 2M5.1. The Commission determined that § 2M5.1 remains the most analogous guideline for the offenses prohibited under the new section 4819. As such, the amendment revises Appendix A to delete the reference to 50 U.S.C. 4610 and replaces it with a reference to 50 U.S.C. 4819, with conforming changes in the Commentary.

Part B—Offenses Involving Records and Reports on Monetary Instruments Transactions

Part B of the amendment revises the 2-level enhancement at subsection (b)(2)(B) of § 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) to better account for certain enhanced penalty provisions in subchapter II (Records and Reports on Monetary Instruments Transactions) of chapter 53 (Monetary Transactions) of title 31 (Money and Finance), United States Code (''subchapter II'').

Most substantive criminal offenses in subchapter II are punishable at 31 U.S.C. 5322 (Criminal penalties). Section 5322(a) provides a maximum term of imprisonment of five years for a simple violation. Section 5322(b) provides an enhanced maximum term of imprisonment of ten years if the offense was committed while ''violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period.'' Two additional criminal offenses in subchapter II provide substantially similar enhanced maximum terms of imprisonment, at sections 5324(d)(2) (Structuring transactions to evade reporting requirement prohibited) and 5336(h)(3)(B)(ii)(II) (Beneficial ownership information reporting requirements).

While § 2S1.3(b)(2)(B) accounted for offenses involving a ''a pattern of any illegal activity involving more than $100,000,'' the Department of Justice raised concerns that it does not address the other aggravating statutory condition of committing the offense while ''violating another law of the United States.'' Addressing these concerns, the Commission determined that an amendment to § 2S1.3(b)(2)(B) that expressly provides for this additional alternative factor more fully gives effect to the enhanced penalty provisions provided for in sections 5322(b), 5324(d)(2), and 5336(h)(3)(B)(ii)(II).

Part C—Antitrust Offenses

Part C of the amendment responds to concerns raised by the Department of Justice relating to the statutes referenced in Appendix A to § 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors). In 2002, Congress amended 15 U.S.C. 3 to create a new criminal offense. *See* Section 14102 of the Antitrust Technical Corrections Act of 2002, Public Law 107–273 (Nov. 2, 2002). Prior to the Antitrust Technical Corrections Act of 2002, 15 U.S.C. 3 contained only one provision prohibiting any contract or combination in the form of trust or otherwise (or any such conspiracy) in restraint of trade or commerce in any territory of the United States or the District of Columbia. The Act redesignated the existing provision as section 3(a) and added a new criminal offense at a new section 3(b). Section 3(b) prohibits monopolization, attempts to monopolize, and combining or conspiring with another person to monopolize any part of the trade or commerce in or involving any territory of the United States or the District of Columbia. 15 U.S.C. 3(b). At the time, the Commission referenced section 3(b) in Appendix A to § 2R1.1 but did not reference section 3(a) to any guideline.

Part C of the amendment amends Appendix A and the Commentary to § 2R1.1 to replace the reference to 15 U.S.C. 3(b) with a reference to 15 U.S.C.

3(a). This change reflects the fact that § 2R1.1 is intended to apply to antitrust offenses involving agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, the type of conduct proscribed at section 3(a), and does not address monopolization offenses, the type of conduct prohibited by section 3(b).

Part D—Enhanced Penalties for Drug Offenders

Part D of the amendment clarifies that the alternative enhanced base offense levels at § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) are based on the offense of conviction, not relevant conduct. Sections 841 and 960 of title 21, United States Code, contain crimes with mandatory minimum penalties for defendants whose instant offense resulted in death or serious bodily injury and crimes with mandatory minimum penalties for defendants with the combination of both an offense resulting in death or serious bodily injury and prior convictions for certain specified offenses. The Commission received public comment and testimony that it was unclear whether the Commission intended for §§ 2D1.1(a)(1)–(a)(4) to apply only when the defendant was convicted of one of these crimes or whenever a defendant meets the applicable requirements based on relevant conduct.

The amendment resolves the issue by amending §§ 2D1.1(a)(1)–(4) to clarify that the base offense levels in those provisions apply only when the individual is convicted of an offense under sections 841(b) or 960(b) to which the applicable enhanced statutory mandatory minimum term of imprisonment applies, or when the parties have stipulated to: (i) such an offense for purposes of calculating the guideline range under § 1B1.2 (Applicable Guidelines); or (ii) such base offense level. The amendment is intended to clarify the Commission's original intent that the enhanced base offense levels apply because the statutory elements have been established and the defendant was convicted under the enhanced penalty provision provided in sections 841(b) or 960(b). The amendment also responds to comments made by the Federal Public and Community Defenders and the Department of Justice that the enhanced penalties should also apply when the parties stipulate to their application. The amendment also amends the Commentary to § 2D1.1 to add an application note explaining the applicable mandatory minimum terms of imprisonment that apply ''based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.''

Part E—''Sex Offense'' Definition in § 4C1.1 (Adjustment for Certain Zero-Point Offenders)

Part E of the amendment responds to concerns that the definition of ''sex offense'' in subsection (b)(2) of § 4C1.1 (Adjustment for Certain Zero-Point Offenders) was too restrictive because it applied only to offenses perpetrated against minors.

In 2023, the Commission added a new Chapter Four guideline at § 4C1.1 that provides a 2-level decrease from the offense level determined under Chapters Two and Three for ''zero-point'' offenders who meet certain criteria. *See* USSG App. C, amend. 821 (effective Nov. 1, 2023). The 2-level decrease applies only if none of the exclusionary criteria set forth in subsections (a)(1) through (a)(10) apply. Among the exclusionary criteria is subsection (a)(5), requiring that ''the [defendant's] instant offense of conviction is not a sex offense.'' Section 4C1.1(b)(2) defined ''sex offense'' as ''(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 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 subparagraphs (A)(i) through (iv) of this definition.''

The amendment revises the definition of ''sex offense'' at § 4C1.1(b)(2) by striking the phrase ''perpetrated against a minor'' to ensure that any individual who commits a covered sex offense against any victim, regardless of age, is excluded from receiving the 2-level reduction under § 4C1.1. In making this revision, the Commission determined that expanding the definition to cover all conduct in the provisions listed in the definition regardless of the victim's age was appropriate for two reasons. First, given the egregious nature of sexual assault and the gravity of the physical, emotional, and psychological harms that victims experience, the Commission determined that its initial policy determination to treat adult and minor victims differently for purposes of the 2-level reduction should be revised. Second, the Commission concluded that while some individuals would already be excluded from the 2-level reduction if they employed violence or their conduct resulted in death or serious bodily injury to the victim (conduct which is taken into account at § 4C1.1(a)(3) and (a)(4), respectively), many serious sex offenses are committed through coercion and other non-violent means and can leave lasting consequences on victims.

6. *Amendment:* Section 1B1.1(a)(6) is amended by striking ''Part B of Chapter Four'' and inserting ''Parts B and C of Chapter Four''.

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

in Note 1 by inserting at the beginning the following new heading: ''*Frequently Used Terms Defined.*—'';

in Note 1(F) by striking ''subdivision'' and inserting ''clause'';

in Note 2 by inserting at the beginning the following new heading: ''*Definition of Additional Terms.*—''; and by striking ''case by case basis'' and inserting ''case-by-case basis'';

in Note 3 by inserting at the beginning the following new heading: ''*List of Statutory Provisions.*—'';

in Note 4 by inserting at the beginning the following new heading: ''*Cumulative Application of Multiple Adjustments.*—'';

in Note 4(A) by striking ''specific offense characteristic subsection'' and inserting ''specific offense characteristic''; and by striking ''subdivisions'' and inserting ''subparagraphs'';

and in Note 5 by inserting at the beginning the following new heading: ''*Two or More Guideline Provisions Equally Applicable.*—''.

Chapter Two is amended in the Introductory Commentary by striking ''Chapter Four, Part B (Career Offenders and Criminal Livelihood)'' and inserting ''Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)''.

Section 2B1.1(b)(7) is amended by striking ''Federal'' and inserting ''federal''; and by striking ''Government'' both places such term appears and inserting ''government''.

Section 2B1.1(b)(17) is amended by striking ''subdivision'' both places such term appears and inserting ''subparagraph''.

Section 2B1.1(b)(19)(B) is amended by striking ''subdivision'' and inserting ''subparagraph''.

Section 2B1.1(c) is amended by striking ''subdivision'' and inserting ''paragraph''.

The Commentary to 2B1.1 captioned ''Application Notes'' is amended—

in Note 1 by striking '' 'Equity securities' '' and inserting '' 'Equity security' '';

in Note 3(E), as redesignated by Amendment 2 of this document, by striking ''subdivision (A)'' and inserting ''subparagraph (A)'';

in Note 3(E)(i), as redesignated by Amendment 2 of this document, by striking ''this subdivision'' and inserting ''this clause'';

in Note 3(E)(viii), as redesignated by Amendment 2 of this document, by striking ''a Federal health care offense'' and inserting ''a federal health care offense''; and by striking ''Government health care program'' both places such term appears and inserting ''government health care program'';

and in Note 4(C)(ii) by striking ''subdivision'' and inserting ''subparagraph''.

The Commentary to § 2B6.1 captioned ''Application Notes'' is amended in Note 1 by striking ''United State Code'' both places such term appears and inserting ''United States Code''; and by striking ''subdivision (B)'' and inserting ''subparagraph (B)''.

Section 2B3.1(b)(3) is amended by striking ''subdivisions'' both places such term appears and inserting ''subparagraphs''; and by striking ''cumulative adjustments from (2) and (3)'' and inserting ''cumulative adjustments from application of paragraphs (2) and (3)''.

The Commentary to § 2B3.1 captioned ''Application Notes'' is amended—

in Note 1 by inserting at the beginning the following new heading: ''*Definitions.*—'';

in Note 2 by inserting at the beginning the following new heading: ''*Dangerous Weapon.*—'';

in Note 3 by inserting at the beginning the following new heading: ''*Definition of 'Loss'.*—'';

in Note 4 by inserting at the beginning the following new heading: ''*Cumulative Application of Subsections (b)(2) and (b)(3).*—'';

in Note 5 by inserting at the beginning the following new heading: ''*Upward Departure Provision.*—'';

and in Note 6 by inserting at the beginning the following new heading: '' *'A Threat of Death'.*—''.

Section 2B3.2(b)(3)(B) is amended by striking ''subdivisions'' and inserting ''clauses''.

Section 2B3.2(b)(4) is amended by striking ''subdivisions'' both places such term appears and inserting ''subparagraphs''; and by striking ''cumulative adjustments from (3) and (4)'' and inserting ''cumulative adjustments from application of paragraphs (3) and (4)''.

The Commentary to § 2B3.2 captioned ''Application Notes'' is amended—

in Note 2 by inserting at the beginning the following new heading: ''*Threat of Injury or Serious Damage.*—'';

in Note 3 by inserting at the beginning the following new heading: ''*Offenses Involving Public Officials and Other Extortion Offenses.*—'';

in Note 4 by inserting at the beginning the following new heading: ''*Cumulative Application of Subsections (b)(3) and (b)(4).*—'';

in Note 5 by inserting at the beginning the following new heading: ''*Definition of 'Loss to the Victim'.*—'';

in Note 6 by inserting at the beginning the following new heading: ''*Defendant's Preparation or Ability to Carry Out a Threat.*—'';

in Note 7 by inserting at the beginning the following new heading: ''*Upward Departure Based on Threat of Death or Serious Bodily Injury to Numerous Victims.*—'';

and in Note 8 by inserting at the beginning the following new heading: ''*Upward Departure Based on Organized Criminal Activity or Threat to Family Member of Victim.*—''.

Section 2C1.8(b)(3) is amended by striking ''Federal'' and inserting ''federal''.

The Commentary to § 2C1.8 captioned ''Application Notes'' is amended in Note 2 by striking ''Federal'' both places such term appears and inserting ''federal''; and by striking ''Presidential'' and inserting ''presidential''.

Section 2D1.1(b)(14)(C)(ii) is amended by striking ''subdivision'' and inserting ''subparagraph''.

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

in Note 8(D)—

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 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'';

and inserting the following:

''1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) =	680 gm
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 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =	2.5 kg'';

and under the heading relating to Schedule III Substances (except Ketamine), by striking ''1 unit of a Schedule III Substance'' and inserting ''1 unit of a Schedule III Substance (except Ketamine)'';

and in Note 9, under the heading relating to Hallucinogens, by striking the following:

''2,5-Dimethoxy-4-methylamphetamine (STP, DOM) *	3 mg
MDA	250 mg
MDMA	250 mg
Mescaline	500 mg
PCP *	5 mg'';

and inserting the following:

''2,5-Dimethoxy-4-methylamphetamine (STP, DOM) *	3 mg
3,4-Methylenedioxyamphetamine (MDA)	250 mg
3,4-Methylenedioxymethamphetamine (MDMA)	250 mg
Mescaline	500 mg
Phencyclidine (PCP) *	5 mg''.

The Commentary to § 2D1.1 captioned ''Background'' is amended by striking ''Section 6453 of the Anti-Drug Abuse Act of 1988'' and inserting ''section 6453 of Public Law 100–690''.

The Commentary to § 2D1.2 captioned ''Background'' is amended by striking ''Section 6454 of the Anti-Drug Abuse Act of 1988'' and inserting ''section 6454 of Public Law 100–690''.

The Commentary to § 2D1.5 captioned ''Application Notes'' is amended—

in Note 1 by inserting at the beginning the following new heading: ''*Inapplicability of Chapter Three Adjustment.*—'';

in Note 2 by inserting at the beginning the following new heading: ''*Upward Departure Provision.*—'';

in Note 3 by inserting at the beginning the following new heading: '' *'Continuing Series of Violations'.*—'';

and in Note 4 by inserting at the beginning the following new heading: ''*Multiple Counts.*—''.

The Commentary to § 2D1.5 captioned ''Background'' is amended by striking ''Title 21 U.S.C. 848'' and inserting ''Section 848 of title 21, United States Code,''.

Section 2E2.1(b)(2) is amended by striking ''subdivisions'' both places such term appears and inserting ''subparagraphs''; and by striking ''the combined increase from (1) and (2)'' and inserting ''the combined increase from application of paragraphs (1) and (2)''.

The Commentary to § 2E2.1 captioned ''Application Notes'' is amended—

in Note 1 by inserting at the beginning the following new heading: ''*Definitions.*—'';

and in Note 2 by inserting at the beginning the following new heading: ''*Interpretation of Specific Offense Characteristics.*—''.

Section 2E3.1(a)(1) is amended by striking ''subdivision'' and inserting ''paragraph''.

The Commentary to § 2E3.1 captioned ''Application Notes'' is amended in Note 1 by striking ''§ 2156(g)'' and inserting ''§ 2156(f)''.

Section 2H2.1(a)(2) is amended by striking ''in (3)'' and inserting ''in paragraph (3)''.

The Commentary to § 2H2.1 captioned ''Application Note'' is amended in Note 1 by inserting at the beginning the following new heading: ''*Upward Departure Provision.*—''.

Section 2K1.4(b)(2) is amended by striking ''under (a)(4)'' and inserting ''under subsection (a)(4)''.

The Commentary to § 2K2.4 captioned ''Application Notes'' is amended in Note 1 by striking ''United State Code'' both places such term appears and inserting ''United States Code''.

The Commentary to § 2S1.1 captioned ''Application Notes'' is amended—

in Note 1 by striking ''authorized Federal official'' and inserting ''authorized federal official'';

and in Note 4(B)(vi) by striking ''subdivisions'' and inserting ''clauses''.

Section 3B1.1(c) is amended by striking ''in (a) or (b)'' and inserting ''in subsection (a) or (b)''.

The Commentary to § 3B1.1 captioned ''Application Notes'' is amended—

in Note 1 by inserting at the beginning the following new heading: ''*Definition of 'Participant'.*—'';

in Note 2 by inserting at the beginning the following new heading: ''*Organizer, Leader, Manager, or Supervisor of One or More Participants.*—'';

in Note 3 by inserting at the beginning the following new heading: '' *'Otherwise Extensive'.*—'';

and in Note 4 by inserting at the beginning the following new heading: ''*Factors to Consider.*—''; and by striking ''decision making'' and inserting ''decision-making''.

The Commentary to § 3D1.1 captioned ''Application Notes'' is amended in Note 2 by inserting at the beginning the following new heading: ''*Application of Subsection (b).*—''.

The Commentary to § 3D1.1 captioned ''Background'' is amended by striking ''Chapter Four, Part B (Career Offenders and Criminal Livelihood)'' and inserting ''Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)''.

The Commentary to § 3D1.5 is amended by striking ''Chapter Four, Part B (Career Offenders and Criminal Livelihood)'' and inserting ''Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)''.

Section 4A1.1(b) is amended by striking ''in (a)'' and inserting ''in subsection (a)''.

Section 4A1.1(c) is amended by striking ''in (a) or (b)'' and inserting ''in subsection (a) or (b)''.

Section 4A1.1(d) is amended by striking ''under (a), (b), or (c)'' and inserting ''under subsection (a), (b), or (c)''.

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

in Note 1, in the heading, by striking ''*§ 4A1.1(a).*'' and inserting ''*§ 4A1.1(a).*—'';

in Note 2, in the heading, by striking ''*§ 4A1.1(b).*'' and inserting ''*§ 4A1.1(b).*—'';

in Note 3, in the heading, by striking ''*§ 4A1.1(c).*'' and inserting ''*§ 4A1.1(c).*—'';

in Note 4, in the heading, by striking ''*§ 4A1.1(d).*'' and inserting ''*§ 4A1.1(d).*—'';

and in Note 5, in the heading, by striking ''*§ 4A1.1(e).*'' and inserting ''*§ 4A1.1(e).*—''.

Section 4A1.2(a)(2) is amended by striking ''by (A) or (B)'' and inserting ''by subparagraph (A) or (B)''.

Section 4A1.2(d)(2)(B) is amended by striking ''in (A)'' and inserting ''in subparagraph (A)''.

Section 4C1.1(a) is amended—

in paragraph (9) by striking ''and'';

by striking paragraph (10) as follows:

''(10) the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848;'';

and by inserting at the end the following new paragraphs (10) and (11):

''(10) the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role); and

(11) the defendant was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848;''.

Section 5E1.2(c)(2) is amended by striking ''in (4)'' and inserting ''in paragraph (4)''.

Section 5F1.6 is amended by striking ''Federal'' and inserting ''federal''.

The Commentary to 5F1.6 captioned ''Application Note'' is amended in Note 1 by inserting at the beginning the following new heading: ''*Definition of 'Federal Benefit'.*—''.

The Commentary to § 5G1.2 captioned ''Application Notes'' is amended—

in Note 1 by striking ''*See* Note 3'' and inserting ''*See* Application Note 3'';

in Note 2(A) by striking ''subdivision'' and inserting ''subparagraph'';

in Note 4(B)(i) by striking ''a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20 year statutory maximum)'' and inserting ''a drug trafficking offense (5-year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20-year statutory maximum)'';

in Note 4(B)(ii) by striking ''one count of 18 U.S.C. 924(c) (5 year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20 year statutory maximum)'' and inserting ''one count of 18 U.S.C. 924(c) (5-year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20-year statutory maximum)'';

and in Note 4(B)(iii) by striking the following:

''The defendant is convicted of two counts of 18 U.S.C. 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. 113(a)(3) (10 year statutory maximum). Applying § 4B1.1(c), the court determines that a sentence of 460 months is appropriate (applicable guideline range of 460–485 months). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. 924(c) count; and (III) a sentence of 100 months on the 18 U.S.C. 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.'';

and inserting the following:

''The defendant is convicted of two counts of 18 U.S.C. 924(c) (5-year mandatory minimum on each count) and one count of violating 18 U.S.C. 113(a)(3) (10-year statutory maximum). Applying § 4B1.1(c), the court determines that a sentence of 262 months is appropriate (applicable guideline range of 262–327 months). The court then imposes (I) a sentence of 82 months on the first 18 U.S.C. 924(c) count; (II) a sentence of 60 months on the second 18 U.S.C. 924(c) count; and (III) a sentence of 120 months on the 18 U.S.C. 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.''.

The Commentary to § 5K1.1 captioned ''Application Notes'' is amended—

in Note 1 by inserting at the beginning the following new heading: ''*Sentence Below Statutorily Required Minimum Sentence.*—'';

in Note 2 by inserting at the beginning the following new heading: ''*Interaction with Acceptance of Responsibility Reduction.*—'';

and in Note 3 by inserting at the beginning the following new heading: ''*Government's Evaluation of Extent of Defendant's Assistance.*—''.

The Commentary to § 5K1.1 captioned ''Background'' is amended by striking ''*in camera*'' and inserting ''in camera''.

Section 5K2.0(e) is amended by striking ''*in camera*'' and inserting ''in camera''.

The Commentary to § 5K2.0 captioned ''Application Notes'' is amended in Note 3(C) by striking ''subdivision'' and inserting ''subparagraph''.

Section 6A1.5 is amended by striking ''Federal'' and inserting ''federal''.

The Commentary to § 8B2.1 captioned ''Application Notes'' is amended in Note 4(A) by striking ''any Federal, State,'' and inserting ''any federal, state,''.

Reason for Amendment: This amendment makes technical, stylistic, and other non-substantive changes to the *Guidelines Manual.*

The amendment makes technical and conforming changes in response to the recent promulgation of § 4C1.1 (Adjustment for Certain Zero-Point Offenders), which provides a 2-level decrease for certain defendants who have zero criminal history points. The decrease applies only if none of the exclusionary criteria set forth in subsection (a) applies. Currently, the exclusionary criteria include subsection (a)(10), requiring that ''the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848.'' Since promulgation of § 4C1.1, several stakeholders have questioned whether either condition in subsection (a)(10) is disqualifying or whether only the combination of both conditions is disqualifying. The Commission intended § 4C1.1(a)(10) to track the safety valve criteria at 18 U.S.C. 3553(f)(4), such that defendants are ineligible for safety valve relief if they either have an aggravating role or engaged in a continuing criminal enterprise. It is not required to demonstrate both. *See, e.g., United States* v. *Bazel,* 80 F.3d 1140, 1143 (6th Cir. 1996); *United States* v. *Draheim,* 958 F.3d 651, 660 (7th Cir. 2020). To clarify the Commission's intention that a defendant is ineligible for the adjustment if the defendant meets either of the disqualifying conditions in the provision, the amendment makes technical changes to § 4C1.1 to divide subsection (a)(10) into two separate provisions (subsections (a)(10) and (a)(11)).

The amendment also adds references to Chapter Four, Part C (Adjustment for Certain Zero-Point Offenders) in § 1B1.1 (Application Instructions), the Introductory Commentary to Chapter Two (Offense Conduct), and the Commentary to §§ 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 3D1.5 (Determining the Total Punishment). These guidelines and commentaries refer to the order in which the provisions of the *Guidelines Manual* should be applied.

Finally, the amendment makes technical and clerical changes to—

- the Commentary to § 1B1.1 (Application Instructions), to add headings to some application notes, provide stylistic consistency in how subdivisions are designated, and correct a typographical error;
- § 2B1.1 (Theft, Property Destruction, and Fraud), to provide consistency in the use of capitalization and how subdivisions are designated, and to correct a reference to the term ''equity security'';
- the Commentary to § 2B1.6 (Aggravated Identity Theft), to correct some typographical errors and provide stylistic consistency in how subdivisions are designated;
- § 2B3.1 (Robbery), to provide stylistic consistency in how subdivisions are designated and add headings to the application notes in the Commentary;
- § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), to provide stylistic consistency in how subdivisions are designated and add headings to some application notes in the Commentary;
- § 2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property), to provide consistency in the use of capitalization;
- § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking

(Including Possession with Intent to Commit These Offenses)), to provide stylistic consistency in how subdivisions are designated, make clerical changes to some controlled substance references in the Drug Conversion Tables at Application Note 8(D) and the Typical Weight Per Unit Table at Application Note 9, and correct a reference to a statute in the Background Commentary;

- the Background Commentary to § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), to correct a reference to a statute;
- the Commentary to § 2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy), to add headings to application notes and correct a reference to a statutory provision;
- § 2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means), to provide stylistic consistency in how subdivisions are designated and add headings to the application notes in the Commentary;
- § 2E3.1 (Gambling Offenses; Animal Fighting Offenses), to provide stylistic consistency in how subdivisions are designated and correct a reference to a statutory provision in the Commentary;
- § 2H2.1 (Obstructing an Election or Registration), to provide stylistic consistency in how subdivisions are designated and add a heading to the application note in the Commentary;
- § 2K1.4 (Arson; Property Damage by Use of Explosives), to provide stylistic consistency in how subdivisions are designated;
- the Commentary to § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), to correct typographical errors;
- the Commentary to § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), to provide consistency in the use of capitalization and how subdivisions are designated;
- § 3B1.1 (Aggravating Role), to provide stylistic consistency in how subdivisions are designated, add headings to the application notes in the Commentary, and correct a typographical error;
- the Commentary to § 3D1.1 (Procedure for Determining Offense Level on Multiple Counts), to add a heading to an application note;
- § 4A1.1 (Criminal History Category), to provide stylistic consistency in how subdivisions are designated and correct the headings of the application notes in the Commentary;
- § 4A1.2 (Definitions and Instructions for Computing Criminal History), to provide stylistic consistency in how subdivisions are designated;
- the Commentary to § 5G1.2 (Sentencing on Multiple Counts of Conviction), to provide stylistic consistency in how subdivisions are designated, fix typographical errors in the Commentary, and update an example that references 18 U.S.C. 924(c) (which was amended by the First Step Act of 2018, Public Law 115–391 (Dec. 21, 2018) to limit 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);
- the Commentary to § 5K1.1 (Substantial Assistance to Authorities (Policy Statement)), to add headings to application notes and correct a typographical error;
- § 5K2.0 (Grounds for Departure (Policy Statement)), to correct a typographical error and provide stylistic consistency in how subdivisions are designated;
- § 5E1.2 (Fines for Individual Defendants), to provide stylistic consistency in how subdivisions are designated;
- § 5F1.6 (Denial of Federal Benefits to Drug Traffickers and Possessors), to provide consistency in the use of capitalization and add a heading to an application note in the Commentary;
- § 6A1.5 (Crime Victims' Rights (Policy Statement)), to provide consistency in the use of capitalization; and
- the Commentary to § 8B2.1 (Effective Compliance and Ethics Program), to provide consistency in the use of capitalization.

(2) Request for Comment on Possible Retroactive Application of Amendment 1, Part A of Amendment 3, Part B of Amendment 3, and Part D of Amendment 5

On April 30, 2024, the Commission submitted to the Congress amendments to the sentencing guidelines, policy statements, official commentary, and Statutory Index, which become effective on November 1, 2024, unless Congress acts to the contrary. Such amendments and the reason for each amendment are included in this notice.

Section 3582(c)(2) of title 18, United States Code, provides that ''in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.'' Pursuant to 28 U.S.C. 994(u), ''[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.'' The Commission lists in subsection (d) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2).

The following amendments may have the effect of lowering guideline ranges: Amendment 1 (relating to acquitted conduct); Part A of Amendment 3 (relating to § 2K2.1(b)(4)(B) enhancement); Part B of Amendment 3 (relating to the interaction between § 2K2.4 and § 3D1.2(c)); and Part D of Amendment 5 (relating to enhanced penalties for drug offenders). The Commission intends to consider whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any or all of these amendments should be included in § 1B1.10(d) as an amendment that may be applied retroactively to previously sentenced defendants. In considering whether to do so, the Commission will consider, among other things, a retroactivity impact analysis and public comment. Accordingly, the Commission seeks public comment on whether it should make any or all of these amendments available for retroactive application. To help inform public comment, the retroactivity impact analyses of these amendments will be made available to the public as soon as practicable.

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 Commission seeks comment on whether it should list in § 1B1.10(d) as changes that may be applied retroactively to previously sentenced defendants any or all of the following amendments: Amendment 1 (relating to acquitted conduct); Part A of Amendment 3 (relating to § 2K2.1(b)(4)(B) enhancement); Part B of Amendment 3 (relating to the interaction between § 2K2.4 and § 3D1.2(c)); and Part D of Amendment 5 (relating to enhanced penalties for drug offenders). For each of these amendments, the Commission requests comment on whether any such amendment should be listed in § 1B1.10(d) as an amendment that may be applied retroactively.

If the Commission does list any or all of these amendments in § 1B1.10(d) as an amendment that may be applied retroactively to previously sentenced defendants, should the Commission provide further guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced?

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