Amendments to the Sentencing Guidelines (Preliminary)

April 17, 2024

This document collects the amendments to the sentencing guidelines, policy statements, and commentary in the unofficial, "reader-friendly" form in which they were made available at the Commission's public meeting on April 17, 2024. As with all amendments that the Commission has voted to promulgate but has not yet officially submitted to Congress and the Federal Register, authority to make technical and conforming changes may be exercised and motions to reconsider may be made. Once the amendments have been submitted to Congress and the Federal Register, official text of the amendments as submitted will be posted on the Commission's website at www.ussc.gov and will be available in a forthcoming edition of the Federal Register. In addition, an updated "reader-friendly" version of the amendments will be posted on the Commission's website at www.ussc.gov.

AMENDMENTS

1 RULE FOR CALCULATING LOSS

2. YOUTHFUL INDIVIDUALS

3. ACQUITTED CONDUCT

4. CIRCUIT CONFLICTS

5. MISCELLANEOUS

6. TECHNICAL

The Commission specified an effective date of **November 1, 2024**, for the amendments listed above.

PROPOSED AMENDMENT: RULE FOR CALCULATING LOSS

Synopsis of Proposed Amendment: This proposed 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. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 88 FR 60536 (Sept. 1, 2023).

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." In recent years, however, the deference afforded to various guideline commentary provisions has been debated, particularly since *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), which limited deference to agency interpretation of regulations to situations in which the regulation is "genuinely ambiguous." Applying *Kisor*, the Third Circuit recently held that Application Note 3(A) of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud) is not entitled to deference. *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022).

Section 2B1.1 includes a loss table that increases the offense level based on the amount of loss resulting from an offense. USSG §2B1.1(b)(1). Application Note 3(A) of the Commentary to §2B1.1 provides a general rule for courts to use to calculate loss for purposes of the loss table. USSG §2B1.1, comment. (n.3(A)). Under the rule, "loss is the greater of actual loss or intended loss." *Id.* The commentary then defines the terms "actual loss," "intended loss," "pecuniary harm," and "reasonably foreseeable pecuniary harm." USSG §2B1.1, comment. (n.3(A)(i)–(iv)). The commentary also provides that "[t]he 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." USSG §2B1.1, comment. (n.3(B)).

In *Banks*, the Third Circuit held that "the term 'loss' is unambiguous in the context of §2B1.1"—meaning "actual loss"—and that "[b]ecause the commentary expands the definition of 'loss' by explaining that generally 'loss is the greater of actual loss or intended loss,' we accord the commentary no weight." *Banks*, 55 F.4th at 253, 258. To date, the Third Circuit is the only appellate court to reach this conclusion. However, the loss calculations for defendants in this circuit are now computed differently than in circuits that continue to apply Application Note 3(A).

The Commission estimates that approximately one-fifth of individuals sentenced under §2B1.1 in fiscal year 2022 were sentenced using intended loss. This estimate is based on the Commission's review of a 30 percent representative sample of the 3,811 individuals sentenced under §2B1.1 in fiscal year 2022 with a known, non-zero loss amount. Intended loss was used for sentencing in 19.8 percent of cases in the sample. Using these findings to extrapolate to all §2B1.1 cases with a loss amount, the Commission estimates that approximately 750 individuals were sentenced using intended loss in fiscal year 2022. Of those 750 individuals, approximately 50 were sentenced in the Third Circuit prior to the *Banks* decision.

This proposed amendment would address the decision from the Third Circuit regarding the validity and enforceability of Application Note 3(A) of the Commentary to §2B1.1 to ensure consistent loss calculation across circuits.

The proposed amendment would create Notes to the loss table in §2B1.1(b)(1) and move the general rule establishing loss as the greater of actual loss or intended loss from the commentary to the guideline itself as part of the Notes. The proposed amendment would also move the rule providing for the use of gain as an alternative measure of loss, as well as the definitions of "actual loss," "intended loss," "pecuniary harm," and "reasonably foreseeable pecuniary harm" from the commentary to the Notes. In addition, the proposed amendment would make 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.

Proposed Amendment:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) **6**, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $6,500, increase the offense level as follows:

LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
(A) $6,500 or less	no increase
(B) More than $6,500	add **2**
(C) More than $15,000	add **4**
(D) More than $40,000	add **6**
(E) More than $95,000	add **8**

(F)	More than $150,000	add **10**
(G)	More than $250,000	add **12**
(H)	More than $550,000	add **14**
(I)	More than $1,500,000	add **16**
(J)	More than $3,500,000	add **18**
(K)	More than $9,500,000	add **20**
(L)	More than $25,000,000	add **22**
(M)	More than $65,000,000	add **24**
(N)	More than $150,000,000	add **26**
(O)	More than $250,000,000	add **28**
(P)	More than $550,000,000	add **30**.

***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.

(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by **2** levels;

(B) resulted in substantial financial hardship to five or more victims, increase by **4** levels; or

(C) resulted in substantial financial hardship to 25 or more victims, increase by **6** levels.

(3) If the offense involved a theft from the person of another, increase by **2** levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.

(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.

(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.

(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by **2** levels; (ii) more than $7,000,000, increase by **3** levels; or (iii) more than $20,000,000, increase by **4** levels.

(8) (Apply the greater) If—

(A) the offense involved conduct described in 18 U.S.C. § 670, increase by **2** levels; or

(B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by **4** levels.

(9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by **4** levels. If the resulting offense level is less than **12**, increase to level **12**.

(14) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended—

(A) that the trade secret would be transported or transmitted out of the United States, increase by **2** levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **4** levels.

If subparagraph (B) applies and the resulting offense level is less than level **14**, increase to level **14**.

(15) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(17) (Apply the greater) If—

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by **4** levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed **8** levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

(18) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

(19) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

(20) If the offense involved—

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by **4** levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1

(Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (*e.g.*, 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource or a paleontological resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

Commentary

* * *

Application Notes:

* * *

3. **Loss Under Subsection (b)(1).**—This application note applies to the determination of loss under subsection (b)(1).

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

(~~I~~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~~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~~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.~~

(~~C~~B) **Estimation of Loss.**—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. *See* 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.

(ii) In the case of proprietary information (*e.g.*, trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.

(iii) The cost of repairs to damaged property.

(iv) The approximate number of victims multiplied by the average loss to each victim.

(v) The reduction that resulted from the offense in the value of equity securities or other corporate assets.

(vi) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(~~D~~C) **Exclusions from Loss.—**Loss shall not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

(~~E~~D) **Credits Against Loss.—**Loss shall be reduced by the following:

(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

(ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

(iii) Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the

recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.

(~~F~~E) **Special Rules.**—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

* * *

§2B2.3. Trespass

* * *

Commentary

* * *

Application Notes:

* * *

2. **Application of Subsection (b)(3).**—Valuation of loss is discussed in §2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to §2B1.1 ~~(Theft, Property Destruction, and Fraud)~~.

* * *

§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

* * *

Commentary

* * *

Application Notes:

* * *

3. **Application of Subsection (b)(2).**—"***Loss***", for purposes of subsection (b)(2), shall be determined in accordance with §2B1.1(b)(1) (Theft, Property Destruction, and Fraud) and Application Note 3 of the Commentary to §2B1.1 ~~(Theft, Property Destruction, and Fraud)~~. The value of "***the benefit received or to be received***" means the net value of such benefit. **Examples:** (A) A government employee, in return for a $500 bribe, reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (B) A $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the

preceding examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.

* * *

§8A1.2. Application Instructions — Organizations

* * *

Commentary

Application Notes:

* * *

3. The following are definitions of terms used frequently in this chapter:

* * *

(I) "***Pecuniary loss***" is derived from 18 U.S.C. § 3571(d) and is equivalent to the term "loss" as used in Chapter Two (Offense Conduct). *See* §2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to §2B1.1 ~~(Theft, Property Destruction, and Fraud)~~, and definitions of "tax loss" in Chapter Two, Part T (Offenses Involving Taxation).

* * *

PROPOSED AMENDMENT: YOUTHFUL INDIVIDUALS

Synopsis of Proposed Amendment: In September 2023, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2024, an examination of the treatment of youthful offenders and offenses involving youths under the *Guidelines Manual*, including possible consideration of amendments that might be appropriate. U.S. Sent'g Comm'n, "Notice of Final Priorities," 88 FR 60536 (Sept. 1, 2023).

Chapter Five, Part H (Specific Offender Characteristics) sets forth policy statements addressing the relevance of certain specific offender characteristics in sentencing. Specifically, §5H1.1 (Age (Policy Statement)) provides, 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."

Research has shown that brain development continues until the mid-20s on average, potentially contributing to impulsive actions and reward-seeking behavior, although a more precise age would have to be determined on an individualized basis. *See, e.g.*, U.S. SENT'G COMM'N, YOUTHFUL OFFENDERS IN THE FEDERAL SYSTEM 6–7 (2017); Daniel Romer et al., *Beyond Stereotypes of Adolescent Risk Taking: Placing the Adolescent Brain in Developmental Context,* 27 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 19 (2017); Laurence Steinberg & Grace Icenogle, *Using Developmental Science to Distinguish Adolescents and Adults Under the Law*, 1 ANN. REV. DEVELOPMENTAL PSYCH. 21 (2019).

Research also has shown a correlation between age and rearrest rates, with younger individuals being rearrested at higher rates, and sooner after release, than older individuals. *See* RYAN COTTER, COURTNEY SEMISCH & DAVID RUTTER, U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010 (2021); *see also* KIM STEVEN HUNT & BILLY EASLEY II, U.S. SENT'G COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS (2017).

The proposed amendment would amend the first sentence in §5H1.1 to delete "(including youth)" and "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." Thus, the first sentence in §5H1.1 would provide solely that "[a]ge may be relevant in determining whether a departure is warranted." It would also add language specifically providing for a downward departure for cases in which the defendant was youthful at the time of the offense or prior offenses, and set forth considerations for the court relating to youthful individuals.

Proposed Amendment:

§5H1.1. Age (Policy Statement)

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.

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).

* * *

PROPOSED AMENDMENT: ACQUITTED CONDUCT

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of possible amendments to the *Guidelines Manual* to prohibit the use of acquitted conduct in applying the guidelines. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 88 FR 60536 (Sept. 1, 2023).

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

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

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

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

The *Guidelines Manual* also includes Chapter Six, Part A (Sentencing Procedures) addressing sentencing procedures that are applicable in all cases. Specifically, §6A1.3 provides for resolution of any reasonably disputed factors important to the sentencing determination. Section 6A1.3(a) provides, in pertinent part, that "[i]n resolving any dispute concerning a factor important to sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." The Commentary to §6A1.3 instructs that "[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible

at trial" and that "[a]ny information may be considered" so long as it has sufficient indicia of reliability to support its probable accuracy. The Commentary cites to 18 U.S.C. § 3661 and Supreme Court case law upholding the sentencing court's discretion in considering any information at sentencing, so long as it is proved by a preponderance of the evidence. Consistent with the Supreme Court case law, the Commentary also provides that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."

In fiscal year 2022, nearly all sentenced individuals (62,529; 97.5%) were convicted through a guilty plea. The remaining 1,613 sentenced individuals (2.5% of all sentenced individuals) were convicted and sentenced after a trial, and 286 of those sentenced individuals (0.4% of all sentenced individuals) were acquitted of at least one offense or found guilty of only a lesser included offense.

The proposed amendment would amend the *Guidelines Manual* to address the use of acquitted conduct for purposes of determining a sentence. It would provide that relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction. It also would add Application Note 10 to the Commentary of §1B1.3, which would note that there may be cases in which 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.

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

Proposed Amendment:

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) CHAPTERS TWO (OFFENSE CONDUCT) AND THREE (ADJUSTMENTS).—Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) CHAPTERS FOUR (CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD) AND FIVE (DETERMINING THE SENTENCE).—Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

(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.

Commentary

Application Notes:

* * *

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.

* * *

§6A1.3. Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P.

Commentary

Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. *See, e.g.*, *United States v. Ibanez*, 924 F.2d 427 (2d Cir. 1991). An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. *See, e.g.*, *United States v. Jimenez Martinez*, 83 F.3d 488, 494–95 (1st Cir. 1996) (finding error in district court's denial of defendant's motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing); *United States v. Roberts*, 14 F.3d 502, 521(10th Cir. 1993) (remanding because district court did not hold evidentiary hearing to address defendants' objections to drug quantity determination or make requisite findings of fact regarding drug quantity); *see also*, *United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980). The

sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. *See* 18 U.S.C. § 3661; ~~*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~~397–401 (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~~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); *Nichols v. United States*, 511 U.S. 738, 747–48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. ~~*Watts*, 519 U.S. at 157~~*Witte*, 515 U.S. at 399–401; *Nichols*, 511 U.S. at 748; *United States v. Zuleta-Alvarez*, 922 F.2d 33 (1st Cir. 1990), *cert. denied*, 500 U.S. 927 (1991); *United States v. Beaulieu*, 893 F.2d 1177 (10th Cir.), *cert. denied*, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. *United States v. Petty*, 982 F.2d 1365 (9th Cir. 1993), *cert. denied*, 510 U.S. 1040 (1994); *United States v. Sciarrino*, 884 F.2d 95 (3d Cir.), *cert. denied*, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means. *United States v. Rogers*, 1 F.3d 341 (5th Cir. 1993); *see also United States v. Young*, 981 F.2d 180 (5th Cir.), *cert. denied*, 508 U.S. 980 (1993); *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. *United States v. Ortiz*, 993 F.2d 204 (10th Cir. 1993).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case. 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.

* * *

PROPOSED AMENDMENT: CIRCUIT CONFLICTS

Synopsis of Proposed Amendment: This proposed amendment addresses certain circuit conflicts involving §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 88 FR 60536 (Sept. 1, 2023) (identifying resolution of circuit conflicts as a priority). The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both parts, as they are not mutually exclusive.

Part A would amend §2K2.1 to address a circuit conflict concerning whether a serial number must be illegible in order to apply the 4-level increase in §2K2.1(b)(4)(B)(i) for a firearm that "had an altered or obliterated serial number."

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

(A) Circuit Conflict Concerning §2K2.1(b)(4)(B)(ii)

Synopsis of Proposed Amendment: Subsection (b)(4) of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an alternative enhancement for a firearm that was stolen, that had an altered or obliterated serial number, or that was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968). Specifically, subsection (b)(4)(A) provides for a 2-level increase where a firearm is stolen, while subsection (b)(4)(B) provides for a 4-level increase where (i) a firearm has an altered or obliterated serial number or (ii) the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact. The Commentary to §2K2.1 provides that subsection (b)(4)(A) and (B)(i) apply regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number. USSG §2K2.1, comment. (n.8(B)).

The circuits are split regarding whether a serial number must be illegible in order to apply the 4-level increase in §2K2.1(b)(4)(B)(i) for a firearm that "had an altered or obliterated serial number." The Ninth Circuit first analyzed the meaning of "altered or obliterated" and determined that "a firearm's serial number is 'altered or obliterated' when it is materially changed in a way that makes accurate information less accessible." *See* United States v. Carter, 421 F.3d 909, 916 (9th Cir. 2005). Various circuits have cited this decision, with different conclusions on the extent of legibility.

The Sixth Circuit has determined that a serial number must be illegible, adopting a "naked eye test", that is, "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). This holding is based on the Sixth Circuit's determination 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 has followed the Sixth Circuit in holding that "altered" means illegible for the same reasons. *See* United States v. St. Hilaire, 960 F.3d 61, 66 (2d Cir. 2020) ("We follow the Sixth Circuit, which defines 'altered' to mean illegible." (citing *Sands*, 948 F.3d at 715, 719)).

By contrast, the Fourth, Fifth, and Eleventh Circuits have upheld the enhancement where a serial number is legible or "less legible." *See*, *e.g.*, United States v. Millender, 791 F. App'x 782 (11th Cir. 2019); United States v. Harris, 720 F.3d 499 (4th Cir. 2013); United States v. Perez, 585 F.3d 880 (5th Cir. 2009). 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." *Harris*, 720 F.3d at 501. Similarly, the Fifth Circuit affirmed the enhancement where the damage did not render the serial number unreadable but "the serial number of the firearm [] had been materially changed in a way that made its accurate information less accessible." *Perez*, 585 F.3d at 884. While the Eleventh Circuit reasoned that an interpretation where altered means illegible "would render 'obliterated' superfluous." *Millender*, 791 App'x at 783.

Part A of the proposed amendment would amend §2K2.1(b)(4) to address the circuit conflict by adopting an approach similar to the approach of the Second and Sixth Circuits. It would amend §2K2.1(b)(4)(B)(i) to provide that the 4-level 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."

Part A of the proposed amendment would also make changes to Application Note 8 of the Commentary to §2K2.1.

Proposed Amendment:

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

(b) Specific Offense Characteristics

* * *

(4) If (A) any firearm was stolen, increase by **2** levels; or (B)(i) any firearm had ~~an altered or obliterated serial number~~a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye; or (ii) the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, increase by **4** levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level **29**, except if subsection (b)(3)(A) applies.

* * *

Commentary

* * *

Application Notes:

* * *

8. **Application of Subsection (b)(4).—**

(A) **Interaction with Subsection (a)(7).—**If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level

takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with ~~an altered or obliterated serial number~~a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(B)(i) or (ii).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(B)(i). ~~This is because the base offense level takes into account that the firearm had an altered or obliterated serial number.~~ However, if the offense involved a stolen firearm or stolen ammunition, or if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact, apply subsection (b)(4)(A) or (B)(ii).

(B) **Defendant's State of Mind.**—Subsection (b)(4)(A) or (B)(i) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had ~~an altered or obliterated serial number~~a serial number that was modified such that the original information is rendered illegible or unrecognizable to the unaided eye. However, subsection (b)(4)(B)(ii) only applies if the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact.

* * *

(B) Circuit Conflict Concerning the Interaction between §2K2.4 and §3D1.2(c)

Synopsis of Proposed Amendment: Section 3D1.2 (Grouping of Closely Related Counts) addresses the grouping of closely related counts for purposes of determining the offense level when a defendant has been convicted on multiple counts. 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." USSG §3D1.2, comment. (n.5).

Section 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) is the guideline applicable to certain statutes with mandatory minimum terms of imprisonment (*e.g.*, 18 U.S.C. § 924(c)). The guideline provides that if a defendant, whether or not convicted of another crime, was convicted of a violation of any of these statutes, the guideline sentence is the minimum term of imprisonment required by statute. *See* USSG §2K2.4(a)–(b). Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) do not apply to that count of conviction. *Id.* In addition, 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." *Id.* comment. (n.4). The examples included in the application note specifically referenced 18 U.S.C. § 924(c) (which penalizes the possession or use of a firearm during, and in relation to, an underlying "crime of violence" or "drug trafficking crime" by imposing a mandatory minimum penalty consecutive to the sentence for the underlying offense).

The circuits are split regarding whether §3D1.2(c) permits grouping of a firearms count under 18 U.S.C. § 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. § 924(c) based on the drug trafficking count. Ordinarily, the firearms and drug trafficking counts would group under §3D1.2(c). The circuit conflict focuses on the presence of the count under 18 U.S.C. § 924(c) and its interaction with the Commentary to §2K2.4 cited above precluding application of the relevant specific offense characteristics where the conduct covered by any such enhancement forms the basis of the conviction under 18 U.S.C.§ 924(c).

The Sixth, Eighth, and Eleventh Circuits have held that such counts can be grouped in this situation. *See*, *e.g.*, United States v. Gibbs, 395 F. App'x 248, 250 (6th Cir. 2010) ("The district court properly grouped together Gibbs's drug and felon-in-possession offenses."); United States v. Bell, 477 F.3d 607, 615–16 (8th Cir. 2007) ("the felon in possession count and the crack cocaine count should have been grouped together for sentencing purposes"); United States v. King, 201 F. App'x 715, 718 (11th Cir. 2006) (grouping permitted; felon-in-possession count "embodies conduct that is treated as a specific offense characteristic" to drug trafficking counts). These circuits held that grouping was permissible as the Chapter Two guidelines for the felon-in-possession conviction and drug conviction each include "conduct that is treated as

specific offense characteristics in the other offense," regardless of whether the enhancements are used due to the rules in §2K2.4 related to 18 U.S.C. § 924(c)). *Bell*, 477 F.3d at 615–16.

By contrast, the Seventh Circuit has held that there is no basis for grouping felon-in-possession and drug trafficking counts since grouping rules are to be applied 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); *see also* United States v. Lamon, 893 F.3d 369, 371 (7th Cir. 2018) (declining to overturn *Sinclair* to rectify the circuit split; "the mere existence of a circuit split does not justify overturning precedent . . . especially true here, because in *Sinclair* we knew that we were *creating* the split, and in doing so weighed the impact that our contrary decision would have on uniformity among the circuits"). The Seventh Circuit further explained, "[w]ith this particular combination of offenses, the otherwise applicable basis for grouping the drug-trafficking and felon-in-possession counts dropped out of the case." *Sinclair*, 770 F.3d at 1157–58.

Part B of the proposed amendment generally follows the Sixth, Eighth, and Eleventh Circuits' approach. It would amend the Commentary to §2K2.4 to restate the grouping rule in §3D1.2(c) and provide an example stating that, in accordance with §3D1.2(c), in 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), such counts shall be grouped.

Proposed Amendment:

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

(a) If the defendant, whether or not convicted of another crime, was convicted of violating section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

(b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.

(c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). Except for

§§3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three and Four shall not apply to that count of conviction.

(d) Special Instructions for Fines

(1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section.

Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), (o), 924(c), 929(a).

Application Notes:

1. **Application of Subsection (a).**—Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by that statute. Section 844(h) of title 18, United State Code, also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

2. **Application of Subsection (b).—**

(A) **In General.**—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (*e.g.*, not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.

(B) **Upward Departure Provision.**—In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense but is not determined to be a career offender under §4B1.1.

3. **Application of Subsection (c).**—In a case in which the defendant (A) was convicted of violating 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a); and (B) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction)

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

(A) ~~**Weapon Enhancement**~~**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).

5. **Chapters Three and Four.**—Except for those cases covered by subsection (c), do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. *See* §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2. In determining the guideline sentence for those cases covered by subsection (c): (A) the adjustment in §3E1.1 (Acceptance of Responsibility) may apply, as provided in §4B1.1(c); and (B) no other adjustments in Chapter Three and no provisions of Chapter Four, other than §§4B1.1 and 4B1.2, shall apply.

6. **Terms of Supervised Release.**—Imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release).

7. **Fines.**—Subsection (d) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a). This is required because the offense level for the underlying offense may be reduced when there is also a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) in that any specific offense characteristic for possession, brandishing, use, or discharge of a firearm is not applied (*see* Application Note 4). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571.

Background: Section 844(h) of title 18, United States Code, provides a mandatory term of imprisonment. Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment. A sentence imposed pursuant to any of these statutes must be imposed to run consecutively to any other term of imprisonment. To avoid double counting, when a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for explosive or firearm discharge, use, brandishing, or possession is not applied in respect to such underlying offense.

* * *

PROPOSED AMENDMENT: MISCELLANEOUS

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues. *See* U.S. Sent'g Comm'n, "Notice of Final Priorities," 88 FR 60536 (Sept. 1, 2023) (identifying as priorities "[i]mplementation of any legislation warranting Commission action" and "[c]onsideration of other miscellaneous issues coming to the Commission's attention"). The proposed amendment contains five parts (Parts A through E). The Commission is considering whether to promulgate any or all these parts, as they are not mutually exclusive.

Part A responds to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115–232 (Aug. 13, 2018), by amending Appendix A and the Commentary to §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism).

Part B responds to concerns raised by the Department of Justice relating to offenses under 31 U.S.C. §§ 5322 and 5336 and §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), by amending the specific offense characteristic at §2S1.3(b)(2)(B) to reflect the enhanced penalty applicable to offenses under those statutes.

Part C 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), by amending 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).

Part D addresses a miscellaneous issue regarding the application of the base offense levels at subsections (a)(1)–(a)(4) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

Part E responds to concerns raised by the Department of Justice relating to the scope of the definition of "sex offense" in subsection (b)(2) of §4C1.1 (Adjustment for Certain Zero-Point Offenders).

(A) Evasion of Export Controls

Synopsis of Proposed Amendment: Part A of the proposed amendment responds to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115–232 (Aug. 13, 2018).

The Export Control Reform Act of 2018 repealed the Export Administration Act of 1979 (previously codified at 50 U.S.C. § 4601–4623) regarding export controls of dual-use items. Dual-use items have both civilian and military applications and are subject to export licensing requirements. The Export Control Reform Act of 2018 also included new provisions, codified at 50 U.S.C. § 4801–4826, relating to export controls for national security and foreign policy purposes, to further the policy of the United States "to restrict the export of items which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States" and "to restrict the export of items if necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations." *See* 50 U.S.C. § 4811. These new provisions authorize the Department of Commerce to develop the Export Administration Regulations, which establish the export controls governing dual-use and other items. In addition, the Export Control Reform Act of 2018 is the first export control statute to explicitly consider the economic security of the United States as a component or element of national security.

The Export Control Reform Act of 2018 maintained much of the dual-use export controls previously established under the Export Administration Act of 1979, but in a process that is still ongoing, the agencies charged with administering and enforcing the Act are still making significant changes to what items are controlled and have increased the overall restrictions on export licensing. In addition to the items and services already controlled by the Export Administration Regulations, the Export Control Reform Act of 2018 requires the President to establish an interagency process to identify "emerging and foundational technologies that are 'essential to the national security of the United States' " but are not already included in the definition of "critical technologies" in the Foreign Investment Risk Review Modernization Act. *See* 50 U.S.C. § 4817(a). Examples of "emerging technologies" include artificial intelligence and machine learning; quantum information and sensing technology; robotics; and biotechnology. "Foundational technologies" are described as technologies that may warrant stricter controls if an application or capability of that technology poses a national security threat. The Export Control Reform Act of 2018 also requires the Department of Commerce to "establish and maintain a list" of controlled items, foreign persons, and end uses determined to be a threat to national security and foreign policy. *Id*. § 4813.

The Export Control Reform Act of 2018 includes a criminal offense at new section 4819 (replacing repealed 50 U.S.C. § 4610 (Violations)), which prohibits willfully committing, willfully attempting or conspiring to commit, or aiding and abetting a violation of the Act or of any regulation, order, license, or other authorization issued under the Act. Any such violation is punishable by a fine of not more than $1,000,000, a maximum term of imprisonment of 20 years, or both. *See* 50 U.S.C. § 4819(b). Offenses under repealed section 4610 are currently referenced in Appendix A (Statutory Index) to §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International

Terrorism), which also appears to be the most analogous guideline for the offenses under new section 4819. The maximum term of imprisonment at new section 4819(b) is greater than the maximum penalties of five and ten years provided in the repealed section 4610 but is within the maximum penalty range of ten to 20 years for other offenses referenced to §2M5.1.

Part A of the proposed amendment would amend Appendix A and the Commentary to §2M5.1 to reflect the new United States Code section numbers relating to export controls for national security and foreign policy.

Additionally, Part A of the proposed amendment would make technical changes to the Commentary to §2M5.1 by reorganizing the application notes and adding headings.

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

* * *

50 U.S.C. § 3937(e)	2X5.2
50 U.S.C. § ~~4610~~4819	2M5.1
52 U.S.C. § 10307(c)	2H2.1

* * *

2M5.1. Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism

(a) Base Offense Level (Apply the greater):

(1) **26**, if (A) national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; or (B) the offense involved a financial transaction with a country supporting international terrorism; or

(2) **14**, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. § 2332d; 22 U.S.C. § 8512; 50 U.S.C. §§ 1705, 4819~~; 50 U.S.C. §§ 4601–4623~~. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

[The proposed amendment would rearrange the order of the application notes as follows with the changes shown in revision marks.]

~~4~~1. **Definition.—**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)~~section 1754 of the Export Controls Act of 2018 (50 U.S.C. § 4813).

~~3~~2. **Additional Penalties.—**In addition to the provisions for imprisonment, 50 U.S.C. § ~~4610~~4819 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.~~

3. **Departure Provisions.—**

~~2.~~ (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).

~~1.~~ (B) **War or Armed Conflict.—**In the case of a violation during time of war or armed conflict, an upward departure may be warranted.

* * *

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

Synopsis of Proposed Amendment: Part B of the proposed amendment responds to concerns raised by the Department of Justice relating to enhanced penalties under 31 U.S.C. § 5322 (Criminal penalties) and covered by §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).

Section 5322 is a penalty provision for the substantive criminal offenses in subchapter II (Records and Reports on Monetary Instruments Transactions) of chapter 53 of title 31, United States Code. The provisions of this subchapter are the reporting requirements of the Bank Secrecy Act (BSA) and impose substantial compliance requirements on financial institutions. A simple violation of an offense in this subchapter is punishable by a five-year maximum term of imprisonment, a fine, or both under 31 U.S.C. § 5322(a). However, if the offense also involved "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," the maximum term of imprisonment increases to ten years as provided for at 31 U.S.C. § 5322(b). Notably, other penalty provisions in subchapter II of chapter 53 of title 31, United States Code, increase the maximum term of imprisonment if the offense involved "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." *See* 31 U.S.C. §§ 5324(d) and 5336(h).

The majority of the substantive criminal offenses in subchapter II of chapter 53 of title 31, United States Code, including 31 U.S.C. §§ 5322, 5324 and 5336, are referenced in Appendix A (Statutory Index) to §2S1.3. Relevant to this issue, §2S1.3(b)(2) provides for a 2-level enhancement if "the defendant (A) was convicted of an offense under subchapter II of chapter 53 of title 31, United States Code; and (B) committed the offense as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period." USSG §2S1.3(b)(2).

During the 2022–2023 amendment cycle, the Department of Justice, in its letter addressing a proposed crime legislation amendment, noted that when the Commission promulgated §2S1.3(b)(2) it did not include the additional factor set forth in 31 U.S.C. § 5322(b) that qualifies a defendant for the enhanced penalty, which is when an individual commits an offense under subchapter II of chapter 53 of title 31, United States Code, "while violating another law of the United States." At the time, the Commission expressed interest in addressing this miscellaneous issue during the 2023–2024 amendment cycle.

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

Proposed Amendment:

§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

(a) Base Offense Level:

(1) **8**, if the defendant was convicted under 31 U.S.C. § 5318 or § 5318A; or

(2) **6** plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds, if subsection (a)(1) does not apply.

(b) Specific Offense Characteristics

(1) If (A) the defendant knew or believed that the funds were proceeds of unlawful activity, or were intended to promote unlawful activity; or (B) the offense involved bulk cash smuggling, increase by **2** levels.

(2) If the defendant (A) was convicted of an offense under subchapter II of chapter 53 of title 31, United States Code; and (B) 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, increase by **2** levels.

(3) If (A) subsection (a)(2) applies and subsections (b)(1) and (b)(2) do not apply; (B) the defendant did not act with reckless disregard of the source of the funds; (C) the funds were the proceeds of lawful activity; and (D) the funds were to be used for a lawful purpose, decrease the offense level to level **6**.

(c) Cross Reference

(1) If the offense was committed for the purposes of violating the Internal Revenue laws, apply the most appropriate guideline from Chapter Two, Part T (Offenses Involving Taxation) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. § 1960(b)(1)(A) and (B)); 26 U.S.C. §§ 7203 (if a violation based upon 26 U.S.C. § 6050I), 7206 (if a violation based upon 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316,

5318, 5318A(b), 5322, 5324, 5326, 5331, 5332, 5335, 5336. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definition of "Value of the Funds".**—For purposes of this guideline, "***value of the funds***" means the amount of the funds involved in the structuring or reporting conduct. The relevant statutes require monetary reporting without regard to whether the funds were lawfully or unlawfully obtained.

2. **Bulk Cash Smuggling.**—For purposes of subsection (b)(1)(B), "***bulk cash smuggling***" means (A) knowingly concealing, with the intent to evade a currency reporting requirement under 31 U.S.C. § 5316, more than $10,000 in currency or other monetary instruments; and (B) transporting or transferring (or attempting to transport or transfer) such currency or monetary instruments into or outside of the United States. "United States" has the meaning given that term in Application Note 1 of the Commentary to §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).

3. **Enhancement for Pattern of Unlawful Activity.**—For purposes of subsection (b)(2), "***pattern of unlawful activity***" means at least two separate occasions of unlawful activity involving a total amount of more than $100,000 in a 12-month period, without regard to whether any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion.

Background: Some of the offenses covered by this guideline relate to records and reports of certain transactions involving currency and monetary instruments. These reports include Currency Transaction Reports, Currency and Monetary Instrument Reports, Reports of Foreign Bank and Financial Accounts, and Reports of Cash Payments Over $10,000 Received in a Trade or Business.

This guideline also covers offenses under 31 U.S.C. §§ 5318 and 5318A, pertaining to records, reporting and identification requirements, prohibited accounts involving certain foreign jurisdictions, foreign institutions, and foreign banks, and other types of transactions and types of accounts.

* * *

(C) Antitrust Offenses

Synopsis of Proposed Amendment: Part C of the proposed amendment responds to concerns raised by the Department of Justice relating to the statutes referenced in Appendix A (Statutory Index) to §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors).

Section 2R1.1 is intended to apply to antitrust offenses, particularly offenses relating to agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, "that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se*, *i.e.*, without any inquiry in individual cases as to their actual competitive effect." USSG §2R1.1, comment. (backg'd.).

In the original 1987 *Guidelines Manual*, the only statute referenced in Appendix A to §2R1.1 was 15 U.S.C. § 1 (Trusts, etc., in restraint of trade illegal; penalty), a provision of the Sherman Antitrust Act of 1890 that prohibits any contract or combination in the form of a trust or otherwise (or any such conspiracy) in restraint of trade or commerce among the several states or with foreign nations. In 1990, the Commission amended Appendix A to reference 18 U.S.C. § 1860 (Bids at land sales) to §2R1.1. *See* Appendix C, amendment 359 (effective Nov. 1, 1990). Section 1860 prohibits bargaining, contracting, or agreeing, or attempting to bargain, contract, or agree with another person that such person shall not bid upon or purchase any parcel of lands of the United States offered at public sale. It also prohibits using intimidation, combination, or unfair management, to hinder, prevent, or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale.

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, Pub. L. 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 subsection (a) and added a new criminal offense at a new subsection (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).

In 2003, the Commission amended Appendix A to reference 15 U.S.C. § 3(b) to §2R1.1 and the Commentary to §2R1.1 to reflect such reference. *See* Appendix C, amendment 661 (effective Nov. 1, 2003). The Commission did not include a reference in Appendix A to the then newly redesignated 15 U.S.C. § 3(a). Section 3(a) is not currently referenced in Appendix A to any guideline.

The Department of Justice has raised a concern that Appendix A and §2R1.1 contain inaccurate references to 15 U.S.C. § 3(b). According to the Department of Justice, both Appendix A and the Commentary to §2R1.1 lists 15 U.S.C. § 3(b) as a statutory provision covered by §2R1.1 when, in fact, the guideline should instead cover 15 U.S.C. § 3(a). The

Department of Justice indicates that, other than 15 U.S.C. § 3(b), the statutes currently referenced in Appendix A to §2R1.1 cover offenses relating to agreements or combinations in restraint of trade or commerce. Section 3(b) offenses address conduct relating to the acquisition or maintenance of monopoly power in a relevant market, which may be committed by a single entity and does not depend on agreement among competitors. According to the Department of Justice, these types of monopolization offenses are beyond the scope of §2R1.1, as described in the Background Commentary, thus maintaining the Appendix A reference to the guideline has the potential to sow confusion in antitrust prosecutions. The Department of Justice suggests that the Commission replace the reference to 15 U.S.C. § 3(b) in Appendix A and §2R1.1 with a reference to 15 U.S.C. § 3(a), which is the provision in section 3 that addresses offenses relating to agreements in restraint of trade or commerce and is more similar to the other offenses already covered by §2R1.1.

Part C of the proposed amendment would amendment 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). In addition, it would make technical changes to the Commentary to §2R1.1, including the addition of headings to some application notes.

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

* * *

15 U.S.C. § 1	2R1.1
15 U.S.C. § ~~3(b)~~3(a)	2R1.1
15 U.S.C. § 50	2B1.1, 2J1.1, 2J1.5

* * *

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

(a) Base Offense Level: **12**

(b) Specific Offense Characteristics

(1) If the conduct involved participation in an agreement to submit non-competitive bids, increase by **1** level.

(2) If the volume of commerce attributable to the defendant was more than $1,000,000, adjust the offense level as follows:

	VOLUME OF COMMERCE (APPLY THE GREATEST)	ADJUSTMENT TO OFFENSE LEVEL
(A)	More than $1,000,000	add **2**
(B)	More than $10,000,000	add **4**
(C)	More than $50,000,000	add **6**
(D)	More than $100,000,000	add **8**
(E)	More than $300,000,000	add **10**
(F)	More than $600,000,000	add **12**
(G)	More than $1,200,000,000	add **14**
(H)	More than $1,850,000,000	add **16**.

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

(c) Special Instruction for Fines

(1) For an individual, the guideline fine range shall be from one to five percent of the volume of commerce, but not less than $20,000.

(d) Special Instructions for Fines — Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce.

(2) When applying §8C2.6 (Minimum and Maximum Multipliers), neither the minimum nor maximum multiplier shall be less than 0.75.

(3) In a bid-rigging case in which the organization submitted one or more complementary bids, use as the organization's volume of commerce the greater of (A) the volume of commerce done by the organization in the goods or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy.

Commentary

Statutory Provisions: 15 U.S.C. §§ 1, ~~3(b)~~3(a). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Application of Chapter Three (Adjustments).**—Sections 3B1.1 (Aggravating Role), 3B1.2 (Mitigating Role), 3B1.3 (Abuse of Position of Trust or Use of Special Skill), and 3C1.1 (Obstructing or Impeding the Administration of Justice) may be relevant in determining the seriousness of the defendant's offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, the 4-level increase at §3B1.1(a) should be applied to reflect the defendant's aggravated role in the offense. For purposes of applying §3B1.2, an individual defendant should be considered for a mitigating role adjustment only if he were responsible in some minor way for his firm's participation in the conspiracy.

2. **Considerations in Setting Fine for Individuals.**—In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, the defendant's role, and the degree to which the defendant personally profited from the offense (including salary, bonuses, and career enhancement). If the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine. The community service should be equally as burdensome as a fine.

3. **Fines for Organizations.**—The fine for an organization is determined by applying Chapter Eight (Sentencing of Organizations). In selecting a fine for an organization within the guideline fine range, the court should consider both the gain to the organization from the offense and the loss caused by the organization. It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range.

4. **Another Consideration in Setting Fine.**—Another consideration in setting the fine is that the average level of mark-up due to price-fixing may tend to decline with the volume of commerce involved.

5. **Use of Alternatives Other Than Imprisonment.**—It is the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.

6. **Understatement of Seriousness.**—Understatement of seriousness is especially likely in cases involving complementary bids. If, for example, the defendant participated in an agreement not to submit a bid, or to submit an unreasonably high bid, on one occasion, in exchange for his being allowed to win a subsequent bid that he did not in fact win, his volume of commerce would be zero, although he would have contributed to harm that possibly was quite substantial. The court should consider sentences near the top of the guideline range in such cases.

7. **Defendant with Previous Antitrust Convictions.**—In the case of a defendant with previous antitrust convictions, a sentence at the maximum of the applicable guideline range, or an upward departure, may be warranted. *See* §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Background: ~~These guidelines apply~~This guideline applies to violations of the antitrust laws. Although they are not unlawful in all countries, there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm. There is no consensus, however, about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.

The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se*, *i.e.*, without any inquiry in individual cases as to their actual competitive effect.

Under the guidelines, prison terms for these offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice. Absent adjustments, the guidelines require some period of confinement in the great majority of cases that are prosecuted, including all bid-rigging cases. The court will have the discretion to impose considerably longer sentences within the guideline ranges. Adjustments from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, in very few cases will the guidelines not require that some confinement be imposed. Adjustments will not affect the level of fines.

Tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun. The offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute. The limited empirical data available as to pre-guidelines practice showed that fines increased with the volume of commerce and the term of imprisonment probably did as well.

The Commission believes that the volume of commerce is liable to be an understated measure of seriousness in some bid-rigging cases. For this reason, and consistent with pre-guidelines practice, the Commission has specified a 1-level increase for bid-rigging.

Substantial fines are an essential part of the sentence. For an individual, the guideline fine range is from one to five percent of the volume of commerce, but not less than $20,000. For an organization, the guideline fine range is determined under Chapter Eight (Sentencing of Organizations), but pursuant to subsection (d)(2), the minimum multiplier is at least 0.75. This multiplier, which requires a minimum fine of 15 percent of the volume of commerce for the least serious case, was selected to provide an effective deterrent to antitrust offenses. At the same time, this minimum multiplier maintains incentives for desired organizational behavior. Because the Department of Justice has a well-established amnesty program for organizations that self-report antitrust offenses, no lower minimum multiplier is needed as an incentive for self-reporting. A minimum multiplier of at least 0.75 ensures that fines imposed in antitrust cases will exceed the average monopoly overcharge.

The Commission believes that most antitrust defendants have the resources and earning capacity to pay the fines called for by this guideline, at least over time on an installment basis.

* * *

(D) Enhanced Penalties for Drug Offenders

Synopsis of Proposed Amendment: Part D of the proposed amendment addresses a miscellaneous issue regarding the application of the enhanced base offense levels at subsections (a)(1)–(a)(4) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

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

Section 2D1.1 provides specific base offense levels to reflect this enhanced penalty structure at §2D1.1(a)(1)–(a)(4). Section 2D1.1(a)(1)(A) provides for a base offense level of 43 if "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." Similarly, §2D1.1(a)(1)(B) provides for a base offense level of 43 if "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." Each of the six statutory provisions enumerated within §2D1.1(a)(1)(A) and (B) require a mandatory term of life imprisonment for any defendant who has a qualifying prior offense and whose instant offense involved a substance that resulted in death or serious bodily injury.

Section 2D1.1(a)(2) provides for a base offense level of 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." Each of the six statutory provisions enumerated within §2D1.1(a)(2) provides for a mandatory minimum term of imprisonment of not less than 20 years for a defendant whose instant offense involved a substance that resulted in death or serious bodily injury.

Section 2D1.1(a)(3) provides for a base offense level of 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." Both statutory provisions enumerated within §2D1.1(a)(3) provide for an increased statutory maximum term of imprisonment of 30 years for any defendant who has a qualifying prior offense and whose instant offense involved a substance that resulted in death or serious bodily injury.

Section 2D1.1(a)(4) provides for a base offense level of 26 if "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." Both statutory provisions enumerated within §2D1.1(a)(4) provide for an increased statutory maximum term of imprisonment of 15 years for any defendant whose instant offense involved a substance that resulted in death or serious bodily injury.

The Commission has heard concerns that it is not clear whether the enhanced base offense levels at §2D1.1(a)(1)–(a)(4) apply only when the defendant was convicted under the enhanced penalty provision of 21 U.S.C. § 841 or 21 U.S.C. § 960 because each statutory element was established, or whether they also apply whenever a defendant meets the applicable requirements, regardless of whether the defendant was in fact convicted under the enhanced penalty provision.

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

In addition, Part D of the proposed amendment would make changes to the Commentary to §2D1.1 to add an application note explaining the applicable statutory provisions and enhanced penalties.

Proposed Amendment:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(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~~

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), ~~and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or~~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)~~, 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~~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**, (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)~~, and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or~~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

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a), decrease to level **32**.

* * *

Commentary

* * *

Application Notes:

1. ~~Definitions~~**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).

~~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. **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 20 years applies because death or serious bodily injury resulted from the use of the 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 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.

~~2~~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.

~~3~~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 C.F.R. § 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 C.F.R. § 1308.13–15 is the appropriate classification.

~~4~~(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.

* * *

(E) "Sex Offense" Definition in §4C1.1

Synopsis of Proposed Amendment: Part E of the proposed amendment responds to concerns raised by the Department of Justice relating to the scope of the definition of "sex offense" in subsection (b)(2) of §4C1.1 (Adjustment for Certain Zero-Point Offenders).

In 2023, the Commission added a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for "zero-point" offenders who meet certain criteria. *See* USSG App. C, amendment 821 (effective Nov. 1, 2023). The 2-level adjustment for defendants with zero criminal history points at §4C1.1 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) defines "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 Department of Justice has raised a concern that the current definition of "sex offense" is too restrictive because it applies only to offenses perpetrated against minors. The Department of Justice first raised this issue during the 2022–2023 amendment cycle. In its letter addressing the proposed amendment on sexual abuse offenses, the Department of Justice noted that the restrictive definition of "sex offense" in the then-proposed §4C1.1 would run counter to the Commission's then-proposed amendment to increase the base offense level from level 14 to level 18 at §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts; Criminal Sexual Abuse of an Individual in Federal Custody).

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

Proposed Amendment:

---

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

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

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

(2) the defendant did not receive an adjustment under §3A1.4 (Terrorism);

(3) the defendant did not use violence or credible threats of violence in connection with the offense;

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

(5) the instant offense of conviction is not a sex offense;

(6) the defendant did not personally cause substantial financial hardship;

(7) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(8) the instant offense of conviction is not covered by §2H1.1 (Offenses Involving Individual Rights);

(9) the defendant did not receive an adjustment under §3A1.1 (Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense); and

(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;

decrease the offense level determined under Chapters Two and Three by **2** levels.

(b) DEFINITIONS AND ADDITIONAL CONSIDERATIONS.—

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

(2) "***Sex offense***" means (A) ~~an offense, perpetrated against a minor,~~an offense 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.

(3) In determining whether the defendant's acts or omissions resulted in "***substantial financial hardship***" to a victim, the court shall consider, among other things, the non-exhaustive list of factors

provided in Application Note 4(F) of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

Commentary

Application Notes:

1. **Application of Subsection (a)(6).**—The application of subsection (a)(6) is to be determined independently of the application of subsection (b)(2) of §2B1.1 (Theft, Property Destruction, and Fraud).

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

* * *

PROPOSED AMENDMENT: TECHNICAL

Synopsis of Proposed Amendment: This proposed amendment would make technical and other non-substantive changes to the *Guidelines Manual*. The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both parts, as they are not mutually exclusive.

Technical and Conforming Changes Relating to §4C1.1

In 2023, the Commission added a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for "zero-point" offenders who meet certain criteria. *See* USSG App. C, amendment 821 (effective Nov. 1, 2023). Part A of the proposed amendment would make technical and conforming changes relating to §4C1.1.

First, Part A of the proposed amendment would amend §4C1.1. The 2-level adjustment for defendants with zero criminal history points at §4C1.1 applies only if none of exclusionary criteria set forth in subsections (a)(1) through (a)(10) applies. Among the exclusionary criteria is 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." Several provisions in §4C1.1 track similar language found in the safety valve criteria at 18 U.S.C. § 3553(f). In particular, §4C1.1(a)(10) mirrors 18 U.S.C. § 3553(f)(4), which provides as a requirement that "the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act."

Historically, courts have generally interpreted 18 U.S.C. § 3553(f)(4) as excluding a defendant from safety valve eligibility if such defendant had either an aggravating role or were engaged in a continuing criminal enterprise, given the otherwise exclusionary language beginning each phrase of subsection (f)(4) (*i.e.*, "the defendant was not . . ." and ". . . was not engaged in"). The Sixth and the Seventh Circuits have squarely addressed this issue and held that defendants are ineligible for safety valve relief if they either have an aggravating role or engaged in a continuing criminal enterprise, but that 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).

The Commission intended §4C1.1(b)(10) to track the safety valve criteria at 18 U.S.C. § 3553(f)(4) and be applied by courts in the same way—namely, that a defendant is ineligible for the adjustment if the defendant meets either of the disqualifying conditions in the provision. Nevertheless, since promulgation of new §4C1.1, several stakeholders have raised the question of whether the "and" in the subsection (a)(10) is conjunctive or disjunctive.

To address the confusion caused by the use of the word "and" in that provision, Part A of the proposed amendment would make technical changes to §4C1.1 to divide subsection (a)(10) into two separate provisions, clarifying the Commission's intention that a

defendant is ineligible for the adjustment if the defendant meets either of the disqualifying conditions listed in the provision.

Finally, Part A of the proposed amendment would make conforming changes relating to §4C1.1 by adding necessary references to new Chapter Four, Part C (Adjustment for Certain Zero-Point Offenders) in subsection (a)(6) of §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 chapters of the *Guidelines Manual* should be applied.

Additional Technical and Clerical Changes

Part B of the proposed amendment would make technical and clerical changes to—

(1) 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;

(2) §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";

(3) the Commentary to §2B1.6 (Aggravated Identity Theft), to correct some typographical errors and provide stylistic consistency in how subdivisions are designated;

(4) §2B3.1 (Robbery), to provide stylistic consistency in how subdivisions are designated and add headings to the application notes in the Commentary;

(5) §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;

(6) §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;

(7) §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 substances 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;

(8) 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;

(9) 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;

(10) §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;

(11) §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;

(12) §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;

(13) §2K1.4 (Arson; Property Damage by Use of Explosives), to provide stylistic consistency in how subdivisions are designated;

(14) the Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), to correct some typographical errors;

(15) 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;

(16) §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;

(17) the Commentary to §3D1.1 (Procedure for Determining Offense Level on Multiple Counts), to add a heading to an application note;

(18) §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;

(19) §4A1.2 (Definitions and Instructions for Computing Criminal History), to provide stylistic consistency in how subdivisions are designated;

(20) 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 (2018));

(21) the Commentary to §5K1.1 (Substantial Assistance to Authorities (Policy Statement)), to add headings to application notes and correct a typographical error;

(22) §5K2.0 (Grounds for Departure (Policy Statement)), to correct a typographical error and provide stylistic consistency in how subdivisions are designated;

(23) §5E1.2 (Fines for Individual Defendants), to provide stylistic consistency in how subdivisions are designated;

(24) §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;

(25) §6A1.5 (Crime Victims' Rights (Policy Statement)), to provide consistency in the use of capitalization; and

(26) the Commentary to §8B2.1 (Effective Compliance and Ethics Program), to provide consistency in the use of capitalization.

Proposed Amendment:

(A) Technical and Conforming Changes Relating to §4C1.1

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

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

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

(2) the defendant did not receive an adjustment under §3A1.4 (Terrorism);

(3) the defendant did not use violence or credible threats of violence in connection with the offense;

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

(5) the instant offense of conviction is not a sex offense;

(6) the defendant did not personally cause substantial financial hardship;

(7) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(8) the instant offense of conviction is not covered by §2H1.1 (Offenses Involving Individual Rights);

(9) the defendant did not receive an adjustment under §3A1.1 (Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense); ~~and~~

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

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

decrease the offense level determined under Chapters Two and Three by **2** levels.

(b) DEFINITIONS AND ADDITIONAL CONSIDERATIONS.—

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

(2) "***Sex offense***" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including 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.

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

Commentary

Application Notes:

1. **Application of Subsection (a)(6).**—The application of subsection (a)(6) is to be determined independently of the application of subsection (b)(2) of §2B1.1 (Theft, Property Destruction, and Fraud).

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

* * *

§1B1.1. Application Instructions

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:

* * *

(6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from ~~Part B~~Parts B and C of Chapter Four any other applicable adjustments.

* * *

CHAPTER TWO

OFFENSE CONDUCT

Introductory Commentary

Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward. Certain factors relevant to the offense that are not covered in specific guidelines in Chapter Two are set forth in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction and Related Adjustments); Chapter Four, ~~Part~~Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders); and Chapter Five, Part K (Departures).

* * *

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

* * *

Commentary

* * *

Background: This section outlines the procedure to be used for determining the combined offense level. After any adjustments from Chapter Three, Part E (Acceptance of Responsibility) and Chapter Four, ~~Part~~Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders) are made, this combined offense level is used to determine the guideline sentence range. Chapter Five (Determining the Sentence) discusses how to determine the sentence from the (combined) offense level; §5G1.2 deals specifically with determining the sentence of imprisonment when convictions on multiple counts are involved. References in Chapter Five (Determining the Sentence) to the "offense level" should be treated as referring to the combined offense level after all subsequent adjustments have been made.

* * *

3D1.5. Determining the Total Punishment

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

Commentary

This section refers the court to Chapter Five (Determining the Sentence) in order to determine the total punishment to be imposed based upon the combined offense level. The combined offense level is subject to adjustments from Chapter Three, Part E (Acceptance of Responsibility) and Chapter Four, ~~Part~~Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders).

* * *

(B) Additional Technical and Clerical Changes

§1B1.1. Application Instructions

* * *

Commentary

Application Notes:

1. **Frequently Used Terms Defined.—**The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

* * *

(F) "***Departure***" means (i) for purposes other than those specified in ~~subdivision~~clause (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "***Depart***" means grant a departure.

* * *

2. **Definition of Additional Terms.—**Definitions of terms also may appear in other sections. Such definitions are not designed for general applicability; therefore, their applicability to sections other than those expressly referenced must be determined on a ~~case by case~~case-by-case basis.

The term "***includes***" is not exhaustive; the term "***e.g.***" is merely illustrative.

3. **List of Statutory Provisions.—**The list of "Statutory Provisions" in the Commentary to each offense guideline does not necessarily include every statute covered by that guideline. In addition, some statutes may be covered by more than one guideline.

4. **Cumulative Application of Multiple Adjustments.—**

(A) **Cumulative Application of Multiple Adjustments within One Guideline.—**The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic ~~subsection~~, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (~~subdivisions~~subparagraphs (A) – (E)) are not added together.

(B) **Cumulative Application of Multiple Adjustments from Multiple Guidelines.—**Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may

be triggered by the same conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under §2B3.1(b)(3) and an official victim adjustment under §3A1.2, even though the enhancement and the adjustment both are triggered by the shooting of the officer.

5. **Two or More Guideline Provisions Equally Applicable.**—Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level. *E.g.*, in §2A2.2(b)(2), if a firearm is both discharged and brandished, the provision applicable to the discharge of the firearm would be used.

* * *

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

* * *

(7) If (A) the defendant was convicted of a ~~Federal~~federal health care offense involving a ~~Government~~government health care program; and (B) the loss under subsection (b)(1) to the ~~Government~~government health care program was (i) more than $1,000,000, increase by **2** levels; (ii) more than $7,000,000, increase by **3** levels; or (iii) more than $20,000,000, increase by **4** levels.

* * *

(17) (Apply the greater) If—

* * *

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed **8** levels, except as provided in ~~subdivision~~subparagraph (D).

(D) If the resulting offense level determined under ~~subdivision~~subparagraph (A) or (B) is less than level **24**, increase to level **24**.

* * *

(19) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

(B) If ~~subdivision~~subparagraph (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

* * *

(c) Cross References

* * *

(3) If (A) neither ~~subdivision~~paragraph (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (*e.g.*, 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

* * *

Commentary

* * *

Application Notes:

1. **Definitions.**—For purposes of this guideline:

* * *

"***Equity ~~securities~~security***" has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).

* * *

3. **Loss Under Subsection (b)(1).**—This application note applies to the determination of loss under subsection (b)(1).

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

* * *

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

* * *

(F) **Special Rules.**—Notwithstanding ~~subdivision~~subparagraph (A), the following special rules shall be used to assist in determining loss in the cases indicated:

(i) **Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.**—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this ~~subdivision~~clause, "***counterfeit access device***" and "***unauthorized access device***" have the meaning given those terms in Application Note 10(A).

* * *

(viii) **Federal Health Care Offenses Involving Government Health Care Programs.**—In a case in which the defendant is convicted of a ~~Federal~~federal health care offense involving a ~~Government~~government health care program, the aggregate dollar amount of fraudulent bills submitted to the ~~Government~~government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted.

* * *

4. **Application of Subsection (b)(2).—**

* * *

(C) **Undelivered United States Mail.—**

* * *

(ii) **Special Rule.**—A case described in ~~subdivision~~subparagraph (C)(i) of this note that involved—

(I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 10 victims.

(II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.

* * *

§2B1.6. Aggravated Identity Theft

* * *

Commentary

* * *

Application Notes:

1. **Imposition of Sentence.—**

(A) **In General.**—Section 1028A of title 18, United ~~State~~States Code, provides a mandatory term of imprisonment. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 1028A is the term required by that statute. Except as provided in ~~subdivision~~subparagraph (B), 18 U.S.C. § 1028A also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

(B) **Multiple Convictions Under Section 1028A.**—Section 1028A(b)(4) of title 18, United ~~State~~States Code, provides that in the case of multiple convictions under 18 U.S.C. § 1028A, the terms of imprisonment imposed on such counts may, in the discretion of the court, run concurrently, in whole or in part, with each other. *See* the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance regarding imposition of sentence on multiple counts of 18 U.S.C. § 1028A.

* * *

§2B3.1. Robbery

* * *

(b) Specific Offense Characteristics

* * *

(3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	DEGREE OF BODILY INJURY	INCREASE IN LEVEL
(A)	Bodily Injury	add **2**
(B)	Serious Bodily Injury	add **4**
(C)	Permanent or Life-Threatening Bodily Injury	add **6**
(D)	If the degree of injury is between that specified in ~~subdivisions~~subparagraphs (A) and (B),	add **3** levels; or
(E)	If the degree of injury is between that specified in ~~subdivisions~~subparagraphs (B) and (C),	add **5** levels.

Provided, however, that the cumulative adjustments from application of paragraphs (2) and (3) shall not exceed **11** levels.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1951, 2113, 2114, 2118(a), 2119. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. **Definitions.—**"***Firearm***," "***destructive device***," "***dangerous weapon***," "***otherwise used***," "***brandished***," "***bodily injury***," "***serious bodily injury***," "***permanent or life-threatening bodily injury***," "***abducted***," and "***physically restrained***" are defined in the Commentary to §1B1.1 (Application Instructions).

   "***Carjacking***" means the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation.

2. **Dangerous Weapon.—**Consistent with Application Note 1(E)(ii) of §1B1.1 (Application Instructions), an object shall be considered to be a dangerous weapon for purposes of subsection (b)(2)(E) if (A) the object closely resembles an instrument capable of inflicting death or serious bodily injury; or (B) the defendant used the object in a manner that created the impression that the object was an instrument capable of inflicting death or serious bodily injury (*e.g.*, a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

3. **Definition of "Loss".—"*Loss***" means the value of the property taken, damaged, or destroyed.

4. **Cumulative Application of Subsections (b)(2) and (b)(3).—**The combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 11 levels.

5. **Upward Departure Provision.—**If the defendant intended to murder the victim, an upward departure may be warranted; *see* §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).

6. **"A Threat of Death".—**"A threat of death," as used in subsection (b)(2)(F), may be in the form of an oral or written statement, act, gesture, or combination thereof. Accordingly, the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply. For example, an oral or written demand using words such as "Give me the money or I will kill you", "Give me the money or I will pull the pin on the grenade I have in my pocket",

"Give me the money or I will shoot you", "Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)", or "Give me the money or you are dead" would constitute a threat of death. The court should consider that the intent of this provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, a fear of death.

* * *

§2B3.2. Extortion by Force or Threat of Injury or Serious Damage

* * *

(b) Specific Offense Characteristics

* * *

(3) (A)(i) If a firearm was discharged, increase by **7** levels; (ii) if a firearm was otherwise used, increase by **6** levels; (iii) if a firearm was brandished or possessed, increase by **5** levels; (iv) if a dangerous weapon was otherwise used, increase by **4** levels; or (v) if a dangerous weapon was brandished or possessed, increase by **3** levels; or

(B) If (i) the offense involved preparation to carry out a threat of (I) death; (II) serious bodily injury; (III) kidnapping; (IV) product tampering; or (V) damage to a computer system used to maintain or operate a critical infrastructure, or by or for a government entity in furtherance of the administration of justice, national defense, or national security; or (ii) the participant(s) otherwise demonstrated the ability to carry out a threat described in any of ~~subdivisions~~ clauses (i)(I) through (i)(V), increase by **3** levels.

(4) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	DEGREE OF BODILY INJURY	INCREASE IN LEVEL
(A)	Bodily Injury	add **2**
(B)	Serious Bodily Injury	add **4**
(C)	Permanent or Life-Threatening Bodily Injury	add **6**
(D)	If the degree of injury is between that specified in ~~subdivisions~~subparagraphs (A) and (B),	add **3** levels; or
(E)	If the degree of injury is between that specified in ~~subdivisions~~subparagraphs (B) and (C),	add **5** levels.

Provided, however, that the cumulative adjustments from application of paragraphs (3) and (4) shall not exceed **11** levels.

* * *

Commentary

* * *

Application Notes:

* * *

2. **Threat of Injury or Serious Damage.—**This guideline applies if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, such as to drive an enterprise out of business. Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous threat, such as "pay up or else," or a threat to cause labor problems, ordinarily should be treated under this section.

3. **Offenses Involving Public Officials and Other Extortion Offenses.—**Guidelines for bribery involving public officials are found in Part C, Offenses Involving Public Officials. "Extortion under color of official right," which usually is solicitation of a bribe by a public official, is covered under §2C1.1 unless there is use of force or a threat that qualifies for treatment under this section. Certain other extortion offenses are covered under the provisions of Part E, Offenses Involving Criminal Enterprises and Racketeering.

4. **Cumulative Application of Subsections (b)(3) and (b)(4).—**The combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 11 levels.

5. **Definition of "Loss to the Victim".—**"***Loss to the victim***," as used in subsection (b)(2), means any demand paid plus any additional consequential loss from the offense (*e.g.*, the cost of defensive measures taken in direct response to the offense).

6. **Defendant's Preparation or Ability to Carry Out a Threat.—**In certain cases, an extortionate demand may be accompanied by conduct that does not qualify as a display of a dangerous weapon under subsection (b)(3)(A)(v) but is nonetheless similar in seriousness, demonstrating the defendant's preparation or ability to carry out the threatened harm (*e.g.*, an extortionate demand containing a threat to tamper with a consumer product accompanied by a workable plan showing how the product's tamper-resistant seals could be defeated, or a threat to kidnap a person accompanied by information showing study of that person's daily routine). Subsection (b)(3)(B) addresses such cases.

7. **Upward Departure Based on Threat of Death or Serious Bodily Injury to Numerous Victims.—**If the offense involved the threat of death or serious bodily injury to numerous victims (*e.g.*, in the case of a plan to derail a passenger train or poison consumer products), an upward departure may be warranted.

8. **Upward Departure Based on Organized Criminal Activity or Threat to Family Member of Victim.—**If the offense involved organized criminal activity, or a threat to a family member of the victim, an upward departure may be warranted.

* * *

§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

* * *

(b) Specific Offense Characteristics

* * *

(3) If (A) the offense involved the contribution, donation, solicitation, expenditure, disbursement, or receipt of governmental funds; or (B) the defendant committed the offense for the purpose of obtaining a specific, identifiable non-monetary ~~Federal~~federal benefit, increase by **2** levels.

* * *

Commentary

* * *

Application Notes:

* * *

2. **Application of Subsection (b)(3)(B).**—Subsection (b)(3)(B) provides an enhancement for a defendant who commits the offense for the purpose of achieving a specific, identifiable non-monetary ~~Federal~~federal benefit that does not rise to the level of a bribe or a gratuity. Subsection (b)(3)(B) is not intended to apply to offenses under this guideline in which the defendant's only motivation for commission of the offense is generally to achieve increased visibility with, or heightened access to, public officials. Rather, subsection (b)(3)(B) is intended to apply to defendants who commit the offense to obtain a specific, identifiable non-monetary ~~Federal~~federal benefit, such as a ~~Presidential~~presidential pardon or information proprietary to the government.

* * *

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

(b) Specific Offense Characteristics

(14) (Apply the greatest):

* * *

(C) If—

* * *

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in ~~subdivision~~subparagraph (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

* * *

Commentary

* * *

Application Notes:

* * *

8. **Use of Drug Conversion Tables.—**

* * *

(D) **Drug Conversion Tables.—**

* * *

LSD, PCP, AND OTHER SCHEDULE I AND II HALLUCINOGENS (AND THEIR IMMEDIATE PRECURSORS)*	CONVERTED DRUG WEIGHT
1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) =	680 gm
~~1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =~~	~~2.5 kg~~
1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) =	1.67 kg
1 gm of 3,4-Methylenedioxyamphetamine (MDA) =	500 gm
1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) =	500 gm
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) =	500 gm
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) =	2.5 kg
1 gm of Bufotenine =	70 gm
1 gm of D-Lysergic Acid Diethylamide/Lysergide (LSD) =	100 kg
1 gm of Diethyltryptamine (DET) =	80 gm
1 gm of Dimethyltryptamine (DM) =	100 gm
1 gm of Mescaline =	10 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (dry) =	1 gm
1 gm of Mushrooms containing Psilocin and/or Psilocybin (wet) =	0.1 gm
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg
1 gm of Paramethoxymethamphetamine (PMA) =	500 gm
1 gm of Peyote (dry) =	0.5 gm
1 gm of Peyote (wet) =	0.05 gm
1 gm of Phencyclidine (PCP) =	1 kg
1 gm of Phencyclidine (PCP) (actual) =	10 kg
1 gm of Psilocin =	500 gm
1 gm of Psilocybin =	500 gm
1 gm of Pyrrolidine Analog of Phencyclidine (PHP) =	1 kg
1 gm of Thiophene Analog of Phencyclidine (TCP) =	1 kg

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

* * *

SCHEDULE III SUBSTANCES (EXCEPT KETAMINE)***	CONVERTED DRUG WEIGHT
1 unit of a Schedule III Substance (except Ketamine) =	1 gm

******Provided*, that the combined converted weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of converted drug weight.

* * *

9. **Determining Quantity Based on Doses, Pills, or Capsules.**—If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (*e.g.*, 100 doses of Mescaline at 500 milligrams per dose = 50 grams of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

HALLUCINOGENS	
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
Peyote (dry)	12 gm
Peyote (wet)	120 gm
Psilocin*	10 mg
Psilocybe mushrooms (dry)	5 gm
Psilocybe mushrooms (wet)	50 gm
Psilocybin*	10 mg

* * *

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment 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 (b)(3) is derived from ~~Section~~section 6453 of ~~the Anti-Drug Abuse Act of 1988~~Public Law 100–690.

* * *

§2D1.2. Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

* * *

Commentary

* * *

Background: This section implements the direction to the Commission in ~~Section~~section 6454 of ~~the Anti-Drug Abuse Act of 1988~~Public Law 100–690.

* * *

§2D1.5. Continuing Criminal Enterprise; Attempt or Conspiracy

* * *

Commentary

* * *

Application Notes:

1. **Inapplicability of Chapter Three Adjustment.—**Do not apply any adjustment from Chapter Three, Part B (Role in the Offense).

2. **Upward Departure Provision.—**If as part of the enterprise the defendant sanctioned the use of violence, or if the number of persons managed by the defendant was extremely large, an upward departure may be warranted.

3. **"Continuing Series of Violations".—**Under 21 U.S.C. § 848, certain conduct for which the defendant has previously been sentenced may be charged as part of the instant offense to establish a "continuing series of violations." A sentence resulting from a conviction sustained prior to the last overt act of the instant offense is to be considered a prior sentence under §4A1.2(a)(1) and not part of the instant offense.

4. **Multiple Counts.—**Violations of 21 U.S.C. § 848 will be grouped with other drug offenses for the purpose of applying Chapter Three, Part D (Multiple Counts).

Background: Because a conviction under 21 U.S.C. § 848 establishes that a defendant controlled and exercised authority over one of the most serious types of ongoing criminal activity, this guideline provides a minimum base offense level of 38. An adjustment from Chapter Three, Part B is not authorized because the offense level of this guideline already reflects an adjustment for role in the offense.

~~Title 21 U.S.C. § 848~~Section 848 of title 21, United States Code, provides a 20-year minimum mandatory penalty for the first conviction, a 30-year minimum mandatory penalty for a second conviction, and a mandatory life sentence for principal administrators of extremely large enterprises. If the application of the guidelines results in a sentence below the minimum sentence required by statute, the statutory minimum shall be the guideline sentence. *See* §5G1.1(b).

* * *

§2E2.1. Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means

* * *

(b) Specific Offense Characteristics

* * *

(2) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	DEGREE OF BODILY INJURY	INCREASE IN LEVEL
(A)	Bodily Injury	add **2**
(B)	Serious Bodily Injury	add **4**
(C)	Permanent or Life-Threatening Bodily Injury	add **6**
(D)	If the degree of injury is between that specified in ~~subdivisions~~subparagraphs (A) and (B),	add **3** levels; or
(E)	If the degree of injury is between that specified in ~~subdivisions~~subparagraphs (B) and (C),	add **5** levels.

Provided, however, that the combined increase from application of paragraphs (1) and (2) shall not exceed **9** levels.

* * *

Commentary

* * *

Application Notes:

1. **Definitions.—**Definitions of "***firearm***," "***dangerous weapon***," "***otherwise used***," "***brandished***," "***bodily injury***," "***serious bodily injury***," "***permanent or life-threatening bodily injury***," "***abducted***," and "***physically restrained***" are found in the Commentary to §1B1.1 (Application Instructions).

2. **Interpretation of Specific Offense Characteristics.—***See also* Commentary to §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) regarding the interpretation of the specific offense characteristics.

* * *

§2E3.1. Gambling Offenses; Animal Fighting Offenses

(a) Base Offense Level: (Apply the greatest)

(1) **16**, if the offense involved an animal fighting venture, except as provided in ~~subdivision~~paragraph (3) below;

* * *

Commentary

* * *

Application Notes:

1. **Definition.**—For purposes of this guideline, "***animal fighting venture***" has the meaning given that term in 7 U.S.C. § 2156~~(g)~~(f).

* * *

§2H2.1. Obstructing an Election or Registration

(a) Base Offense Level (Apply the greatest):

* * *

(2) **12**, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in paragraph (3) below; or

* * *

Commentary

* * *

Application Note:

1. **Upward Departure Provision.**—If the offense resulted in bodily injury or significant property damage, or involved corrupting a public official, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).

* * *

§2K1.4. Arson; Property Damage by Use of Explosives

* * *

(b) Specific Offense Characteristics

* * *

(2) If the base offense level is not determined under subsection (a)(4), and the offense occurred on a national cemetery, increase by **2** levels.

* * *

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), (o), 924(c), 929(a).

Application Notes:

1. **Application of Subsection (a).**—Section 844(h) of title 18, United ~~State~~States Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by that statute. Section 844(h) of title 18, United ~~State~~States Code, also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.

* * *

§2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

* * *

Commentary

* * *

Application Notes:

1. **Definitions.**—For purposes of this guideline:

* * *

"***Criminally derived funds***" means any funds derived, or represented by a law enforcement officer, or by another person at the direction or approval of an authorized ~~Federal~~federal official, to be derived from conduct constituting a criminal offense.

* * *

4. **Enhancement for Business of Laundering Funds.—**

* * *

(B) **Factors to Consider.**—The following is a non-exhaustive list of factors that may indicate the defendant was in the business of laundering funds for purposes of subsection (b)(2)(C):

* * *

(vi) During the course of an undercover government investigation, the defendant made statements that the defendant engaged in any of the conduct described in ~~subdivisions~~clauses (i) through (iv).

* * *

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

* * *

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in subsection (a) or (b), increase by **2** levels.

* * *

Commentary

Application Notes:

1. **Definition of "Participant".**—A "***participant***" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (*e.g.*, an undercover law enforcement officer) is not a participant.

2. **Organizer, Leader, Manager, or Supervisor of One or More Participants.**—To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

3. **"Otherwise Extensive".**—In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. **Factors to Consider.**—In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of ~~decision making~~decision-making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

* * *

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

* * *

Commentary

Application Notes:

1. **In General.**—For purposes of sentencing multiple counts of conviction, counts can be (A) contained in the same indictment or information; or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

2. **Application of Subsection (b).**—Subsection (b)(1) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.*, 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, to run consecutively). The multiple count rules set out under this part do not apply to a count of conviction covered by subsection (b). However, a count covered by subsection (b)(1) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory minimum five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. *See* §5G1.2(a).

   Unless specifically instructed, subsection (b)(1) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (*i.e.*, the statute does not otherwise require a term of imprisonment to be imposed). *See, e.g.*, 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 924(a)(4) (regarding penalty for 18 U.S.C. § 922(q) (possession or discharge of a firearm in a school zone)); 18 U.S.C. § 1791(c) (penalty for providing or possessing a controlled substance in prison). Accordingly, the multiple count rules set out under this part do apply to a count of conviction under this type of statute.

* * *

§4A1.1. Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

* * *

(b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in subsection (a).

(c) Add **1** point for each prior sentence not counted in subsection (a) or (b), up to a total of **4** points for this subsection.

(d) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under subsection (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of **3** points for this subsection.

* * *

Commentary

* * *

Application Notes:

1. **§4A1.1(a).**—Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this subsection. The term "***prior sentence***" is defined at §4A1.2(a). The term "***sentence of imprisonment***" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

* * *

2. **§4A1.1(b).**—Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term "***prior sentence***" is defined at §4A1.2(a). The term "***sentence of imprisonment***" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, *see* §4A1.2(k).

* * *

3. **§4A1.1(c).**—One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this subsection. The term "***prior sentence***" is defined at §4A1.2(a).

* * *

4. **§4A1.1(d).**—In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as a single sentence (*see* §4A1.2(a)(2)), one point is added under §4A1.1(d) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(d). For purposes of this guideline, "***crime of violence***" has the meaning given that term in §4B1.2(a). *See* §4A1.2(p).

* * *

5. **§4A1.1(e).**—One point is added if the defendant (1) receives 7 or more points under §4A1.1(a) through (d), and (2) committed any part of the instant offense (*i.e.*, any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. *See* §4A1.2(n). For the purposes of this subsection, a "***criminal justice sentence***" means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or

supervisory component, although active supervision is not required for this subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (*e.g.*, a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. *See* §4A1.2(m).

* * *

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) PRIOR SENTENCE

* * *

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by subparagraph (A) or (B) as a single sentence. *See also* §4A1.1(d).

* * *

(d) OFFENSES COMMITTED PRIOR TO AGE EIGHTEEN

* * *

(2) In any other case,

* * *

(B) add **1** point under §4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in subparagraph (A).

* * *

§5E1.2. Fines for Individual Defendants

* * *

(c) (1) The minimum of the fine guideline range is the amount shown in column A of the table below.

(2) Except as specified in paragraph (4) below, the maximum of the fine guideline range is the amount shown in column B of the table below.

* * *

§5F1.6. Denial of Federal Benefits to Drug Traffickers and Possessors

The court, pursuant to 21 U.S.C. § 862, may deny the eligibility for certain ~~Federal~~federal benefits of any individual convicted of distribution or possession of a controlled substance.

Commentary

Application Note:

1. **Definition of "Federal Benefit".—**"***Federal benefit***" is defined in 21 U.S.C. § 862(d) to mean "any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States" but "does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility."

* * *

§5G1.2. Sentencing on Multiple Counts of Conviction

* * *

Commentary

Application Notes:

1. **In General.—**This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ("total punishment") is determined by the court after determining the adjusted combined offense level and the Criminal History Category and determining the defendant's guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table).

   Note that the defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* §5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. *See* Application Note 3, below.

* * *

2. **Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Subsection (e)).—**

(A) **In General.**—Subsection (a) applies if a statute (i) specifies a term of imprisonment to be imposed; and (ii) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.*, 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment) and 18 U.S.C. § 1028A (requiring a mandatory term of imprisonment of either two or five years, based on the conduct involved, and also requiring, except in the circumstances described in ~~subdivision~~subparagraph (B), the sentence imposed to run consecutively to any other term of imprisonment). Except for certain career offender situations in which subsection (c) of §4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is the minimum required by the statute of conviction and is independent of the guideline sentence on any other count. *See, e.g.*, the Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding the determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. *See, e.g.*, Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

* * *

4. **Career Offenders Covered under Subsection (e).—**

* * *

(B) **Examples.**—The following examples illustrate the application of subsection (e) in a multiple count situation:

(i) The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of 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). Applying §4B1.1(c), the court determines that a sentence of 300 months is appropriate (applicable guideline range of 262–327). The court then imposes a sentence of 60 months on the 18 U.S.C. § 924(c) count, subtracts that 60 months from the total punishment of 300 months and imposes the remainder of 240 months on the 21 U.S.C. § 841 count. As required by statute, the sentence on the 18 U.S.C. § 924(c) count is imposed to run consecutively.

(ii) The defendant is convicted of 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). Applying §4B1.1(c), the court determines that a sentence of 327 months is appropriate (applicable guideline range of 262–327). The court then imposes a sentence of 240 months on the 21 U.S.C. § 841 count and a sentence of 87 months on the 18 U.S.C. § 924(c) count to run consecutively to the sentence on the 21 U.S.C. § 841 count.

(iii) 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~~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 ~~460~~262 months is appropriate (applicable guideline range of ~~460–485~~262–327 months). The court then imposes (I) a sentence of ~~60~~82 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of ~~300~~60 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of ~~100~~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.

* * *

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

* * *

Commentary

Application Notes:

1. **Sentence Below Statutorily Required Minimum Sentence.—**Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

2. **Interaction with Acceptance of Responsibility Reduction.—**The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.

3. **Government's Evaluation of Extent of Defendant's Assistance.—**Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Background: A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant ~~*in camera*~~in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

* * *

§5K2.0. Grounds for Departure (Policy Statement)

* * *

(e) REQUIREMENT OF SPECIFIC WRITTEN REASONS FOR DEPARTURE.—If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of

statements received ~~*in camera*~~in camera, shall state those reasons with specificity in the statement of reasons form.

Commentary

Application Notes:

* * *

3. **Kinds and Expected Frequency of Departures under Subsection (a).**—As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.

* * *

(C) **Departures Based on Circumstances Identified as Not Ordinarily Relevant.**—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (*see, e.g.*, Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

In addition, as required by subsection (e), each circumstance forming the basis for a departure described in this ~~subdivision~~subparagraph shall be stated with specificity in the statement of reasons form.

* * *

§6A1.5. Crime Victims' Rights (Policy Statement)

In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of ~~Federal~~federal law pertaining to the treatment of crime victims.

* * *

§8B2.1. Effective Compliance and Ethics Program

* * *

Commentary

Application Notes:

* * *

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

(A) **Consistency with Other Law.—**Nothing in subsection (b)(3) is intended to require conduct inconsistent with any ~~Federal~~federal, ~~State~~state, or local law, including any law governing employment or hiring practices.

* * *