UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice and request for public comment and hearing.

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

DATES:

Written Public Comment. Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 3, 2025. Written reply comments, which may only respond to issues raised during the original comment period, should be received by the Commission not later than March 18, 2025. Public comment regarding a proposed amendment received after the close of the comment period, and reply comment received on issues not raised during the original comment period, may not be considered.

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

ADDRESSES: There are two methods for submitting public comment.

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

Submission of Comments by Mail. Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle NE, Suite 2–500, Washington, DC 20002–8002, Attention: Public Affairs—Proposed Amendments.

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

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

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

The Commission published a notice of proposed amendments in the **Federal Register** on January 2, 2025 (*see* 90 FR 128). Those proposed amendments have a public comment period ending on February 3, 2025, and a reply comment period ending on February 18, 2025. The Commission is now considering promulgating additional amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth those proposed amendments.

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

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

(1) A two-part proposed amendment relating to supervised release, including (A) amendments to Chapter Five, Part D (Supervised Release) to provide courts greater discretion to impose a term of supervised release in the manner it determines is most appropriate based on an individualized assessment of the defendant and to ensure the provisions in this Chapter fulfill rehabilitative ends, distinct from those of incarceration, and related issues for comment; and (B) amendments to Chapter Seven (Violations of Probation and Supervised Release) to provide courts greater discretion to respond to a violation of a condition of supervised release and to ensure the provisions in this Chapter reflect the differences between probation and supervised release, and related issues for comment.

(2) A multi-part proposed amendment relating to drug offenses, including (A) (i) three options for amending § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to set the highest base offense level in the Drug Quantity Table at subsection (c) at a lower base offense level, and related issues for comment; and (ii) two options for amending § 2D1.1 to add a new specific offense characteristic providing for a reduction relating to low-level trafficking functions, and related issues for comment; (B) (i) amendments to § 2D1.1 to address offenses involving ''Ice,'' and related issues for comment; and (ii) two options for amending § 2D1.1 to address the purity distinction between methamphetamine in ''actual'' form and methamphetamine as part of a mixture, and related issues for comment; (C) amendments to § 2D1.1 to revise the enhancement for misrepresentation of fentanyl and fentanyl analogue at subsection (b)(13), and related issues for comment; (D) amendments to § 2D1.1 to address the application of subsection (b)(1) to machineguns, and a related issue for comment; and (E) amendments to the Commentary to § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) to address the manner by which a defendant may satisfy § 5C1.2(a)(5)'s requirement of providing truthful information and

evidence to the Government, and a related issue for comment.

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

The text of the proposed amendments and related issues for comment are set forth below. Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission's website at *www.ussc.gov.* In addition, as required by 5 U.S.C. 553(b)(4), plain-language summaries of the proposed amendments are available at *https://www.ussc.gov/guidelines/amendments/proposed-2025-amendments-federal-sentencing-guidelines-published-january-2025.*

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

Carlton W. Reeves,

Chair.

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

1. Supervised Release

Synopsis of Proposed Amendment: The Sentencing Reform Act of 1984 establishes a framework for courts to order supervised release to be served after a term of imprisonment. *See* 18 U.S.C. 3583. For certain offenses, the court is statutorily required to impose a term of supervised release. *See id.* This framework aims to ''assure that [those] who will need post-release supervision will receive it'' while ''prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them.'' *See* S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983); *see also Johnson* v. *United States,* 529 U.S. 694, 701 (2000) (''Supervised release departed from the parole system it replaced by giving district courts the freedom to provide postrelease supervision for those, and only those, who needed it.'').

The length of the term of supervised release that a court may select depends on the class of the offense of conviction. The term may be not more than five years for a Class A or Class B felony, not more than three years for a Class C or Class D felony, and not more than one year for a Class E felony or a misdemeanor (other than a petty offense). *See* 18 U.S.C. 3583(b). There is an exception for certain sex offenses and terrorism offenses, for which the term of supervised release may be up to life. *See* 18 U.S.C. 3583(j) and (k).

If a court imposes a term of supervised release, the court must order certain conditions of supervised release, such as that the defendant not commit another crime or unlawfully possess a controlled substance during the term, and that the defendant make restitution. *See* 18 U.S.C. 3583(d). The court may order other discretionary conditions it considers appropriate, as long as the condition meets certain criteria. *See id.* In determining whether to impose a term of supervised release and the length of the term and conditions of supervised release, the court must consider certain 18 U.S.C. 3553 factors. *See* 18 U.S.C. 3583(c).

Courts are authorized, under certain conditions, to extend or terminate a term of supervised release, or modify, enlarge, or reduce the conditions thereof. *See* 18 U.S.C. 3583(f). Before doing so, the court must consider the 18 U.S.C. 3553 factors listed above. *See id.* For certain violations, courts are required to revoke supervised release. *See* 18 U.S.C. 3583(g).

The Sentencing Commission's policies regarding supervised release are included in Part D (Supervised Release) of Chapter Five (Determining the Sentence) and Part B (Probation and Supervised Release Violations) of Chapter Seven (Probation and Supervised Release Violations) of the *Guidelines Manual.* This proposed amendment contains two parts revising those policies:

Part A would amend Part D of Chapter Five, which addresses the imposition of a term of supervised release. Issues for comment are also provided.

Part B would amend Chapter Seven, which addresses the procedures for handling a violation of the terms of probation and supervised release. Issues for comment are also provided.

The Commission is considering whether to implement one or both parts, as they are not mutually exclusive.

(A) Imposition of a Term of Supervised Release

Synopsis of Proposed Amendment: Chapter Five, Part D (Supervised Release) of the *Guidelines Manual* covers supervised release, including the imposition decision itself, the length of a term of supervised release, and the conditions of supervised release.

Section 5D1.1 (Imposition of a Term of Supervised Release) governs the imposition of a term of supervised release. Under § 5D1.1(a), a court shall order a term of supervised release (1) when it is required by statute or (2) when a sentence of more than one year is imposed. In any other case, § 5D1.1(b) treats the decision to impose a term of supervised release as discretionary. The commentary to § 5D1.1 describes the factors to consider in determining whether to impose a term of supervised release: (1) certain 18 U.S.C. 3553 factors, which the court is statutorily required to consider (*see* 18 U.S.C. 3583(c)); (2) an individual's criminal history; (3) whether an individual is an abuser of controlled substances or alcohol; and (4) whether an offense involved domestic violence or stalking. USSG § 5D1.1 comment. (n.3).

Section 5D1.1(c) provides an exception to the rule in § 5D1.1(a), directing that ''[t]he court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.'' However, Application Note 5 directs that a court should consider imposing a term of supervised release if ''it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.''

Section 5D1.2 (Term of Supervised Release) governs the length of a term of supervised release. First, § 5D1.2(a) sets forth the recommended terms of supervised release for each classification of offense: (1) two to five years for an individual convicted of a Class A or B felony; (2) one to three years for an individual convicted of a Class C or D felony; and (3) one year for an individual convicted of a Class E felony or a Class A misdemeanor. Second, for offenses involving terrorism or a sex offense, § 5D1.2(b) provides for a term of supervised release up to life, and a policy statement further directs that for a sex offense, as defined in Application Note 1, the statutory maximum term of supervised release is

recommended. Lastly, § 5D1.2(c) instructs that the term of supervised release shall not be less than any statutorily required term of supervised release.

The Commentary to § 5D1.2 provides further guidance for setting a term of supervised release. Application Note 4 directs that the factors to be considered in selecting the length of a term of supervised release are the same as those for determining whether to impose such a term. Application Note 5 states that courts have ''authority to terminate or extend a term of supervised release'' and encourages courts to ''exercise this authority in appropriate cases.''

Section 5D1.3 (Conditions of Supervised Release) sets forth the mandatory, ''standard,'' ''special,'' and additional conditions of supervised release. It provides a framework for courts to use when imposing the standard, special, and additional conditions—those considered ''discretionary.''

The Commission has received feedback from commenters that the guidelines should provide courts with greater discretion to make determinations regarding the imposition of supervised release that are based on an individualized assessment of the defendant. Additionally, a bipartisan coalition in Congress has sought to address similar concerns. *See, e.g.,* Safer Supervision Act of 2023, S.2681, 118th Cong. (2023) and H.R. 5005, 118th Cong. (1st Sess. 2023).

Part A of the proposed amendment seeks to revise Chapter Five, Part D to accomplish two goals. The first is to provide courts greater discretion to impose a term of supervised release in the manner it determines is most appropriate based on an individualized assessment of the defendant. The second is to ensure the provisions in Chapter Five ''fulfill[] rehabilitative ends, distinct from those of incarceration.'' *United States* v. *Johnson,* 529 U.S. 53, 59 (2000).

Part A of the proposed amendment would make a number of changes to the supervised release provisions in Chapters Five to serve these goals.

First, Part A of the proposed amendment would add introductory commentary to Part D of Chapter Five expressing the Commission's view that, when making determinations regarding supervised release, courts should assess a wide range of factors to ensure its decisions fulfill the rehabilitative needs of the defendant and protect the public from further crimes of the defendant.

Second, Part A of the proposed amendment would amend the provisions of § 5D1.1 addressing the imposition of a term of supervised release. It would remove the requirement that a court impose a term of supervised release when a sentence of imprisonment of more than one year is imposed, so a court would be required to impose supervised release only when required by statute. For cases in which the decision whether to impose supervised release is discretionary, the court may order a term of supervised release when warranted by an individualized assessment of the need for supervision. Additionally, the court should state the reason for its decision on the record.

Third, Part A of the proposed amendment would amend § 5D1.2, which addresses the length of the term of supervised release. The proposed amendment would remove the provisions requiring a minimum term of supervised release of two years for a Class A or B felony and one year for a Class C, D, or E felony or Class A misdemeanor. Instead, Part A of the proposed amendment would require the court to conduct an individualized assessment to determine the length of the term of supervised release, which must not exceed the maximum term allowed by statute. It would remove the policy statement recommending a supervised release term of life for sex offense cases and add a policy statement that the court should state on the record its reasons for selecting the length of the term of supervised release.

Fourth, Part A of the proposed amendment would amend § 5D1.3, which addresses the conditions of supervised release. It would add a provision stating that courts should conduct an individualized assessment to determine what discretionary conditions are warranted. It brackets the possibility of redesignating ''standard'' conditions as ''examples of common conditions'' and brackets either that such conditions may be warranted in some appropriate cases or may be modified, omitted, or expanded in appropriate cases. It would also add an example of a ''special'' condition that would require a defendant who has not obtained a high school or equivalent diploma to participate in a program to obtain such a diploma.

Finally, Part A of the proposed amendment would add a new policy statement at § 5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)) addressing a court's authority to extend or terminate a term of supervised release or modify the conditions thereof. It would encourage a court, as soon as practicable after a defendant's release from imprisonment, to conduct an individualized assessment to determine whether it is warranted to modify, reduce, or enlarge the conditions of supervised release. Additionally, any time after the expiration of one year of supervised release, it would encourage a court to terminate the remaining term of supervision and discharge the defendant if the court determines, following consultation with the government and the probation officer, that the termination is warranted by the conduct of the defendant and the interest of justice. Part A of the proposed amendment provides an option to list factors for a court to consider when determining whether to terminate supervised release. It would also provide that a court, any time before the expiration of a term of supervised release, may extend the term in a case in which the maximum term was not imposed.

Conforming changes are also made to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)), the Commentary to § 4B1.5 (Repeat and Dangerous Sex Offenders Against Minors), § 5B1.3 (Conditions of Probation), § 5H1.3 (Mental and Emotional Conditions (Policy Statement)), and § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)).

Issues for comment are also provided.

Proposed Amendment

Chapter Five, Part D is amended by inserting at the beginning the following new Introductory Commentary:

''Introductory Commentary

The Sentencing Reform Act of 1984 requires the court to assess a wide range of factors 'in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release.' 18 U.S.C. 3583(c). These determinations aim to make the imposition and scope of supervised release 'dependent on the needs of the defendant for supervision.' *See* S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983). In conducting such an individualized assessment, the court can 'assure that [those] who will need post-release supervision will receive it' while 'prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them.' *Id.* at 54; *see also Johnson* v. *United States,* 529 U.S. 694, 701 (2000) ('Supervised release departed from the parole system it replaced by giving district courts the freedom to

provide postrelease supervision for those, and only those, who needed it. . . . Congress aimed, then, to use the district courts' discretionary judgment to allocate supervision to those releasees who needed it most.'). Supervised release 'fulfills rehabilitative ends, distinct from those served by incarceration,' *United States* v. *Johnson,* 529 U.S. 53, 59 (2000). Accordingly, a court should consider whether the defendant needs supervision in order to ease transition into the community or to provide further rehabilitation and whether supervision will promote public safety. *See* 18 U.S.C. 3583(c), 3553(a)(2)(C)); *see also* S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983) (indicating that a 'primary goal of [a term of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release').''.

Section 5D1.1 is amended—

by striking subsections (a) and (b) as follows:

''(a) The court shall order a term of supervised release to follow imprisonment—

(1) when required by statute (*see* 18 U.S.C. 3583(a)); or

(2) except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed.

(b) The court may order a term of supervised release to follow imprisonment in any other case. *See* 18 U.S.C. 3583(a).'';

and inserting the following new subsections (a) and (b):

''(a) The court shall order a term of supervised release to follow imprisonment when required by statute (*see* 18 U.S.C. 3583(a)).

(b) When a term of supervised release is not required by statute, the court should order a term of supervised release to follow imprisonment when, and only when, warranted by an individualized assessment of the need for supervision.'';

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

''(d) The court should state on the record the reasons for imposing [or not imposing] a term of supervised release.''.

The Commentary to § 5D1.1 captioned ''Application Notes'' is amended—

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

''1. *Application of Subsection (a).*—Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment when supervised release is required by statute or, except as provided in subsection (c), when a sentence of imprisonment of more than one year is imposed. The court may depart from this guideline and not impose a term of supervised release if supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.

2. *Application of Subsection (b).*—Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment in any other case, after considering the factors set forth in Note 3.

3. *Factors to Be Considered.*—

(A) *Statutory Factors.*—In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:

(i) the nature and circumstances of the offense and the history and characteristics of the defendant;

(ii) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(iii) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(iv) the need to provide restitution to any victims of the offense.

See 18 U.S.C. 3583(c).

(B) *Criminal History.*—The court should give particular consideration to the defendant's criminal history (which is one aspect of the 'history and characteristics of the defendant' in subparagraph (A)(i), above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.

(C) *Substance Abuse.*—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. *See* § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

(D) *Domestic Violence.*—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. 3561(b), a term of supervised release is required by statute. *See* 18 U.S.C. 3583(a). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. *See* 18 U.S.C. 3583(d); § 5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.'';

by redesignating Notes 4 and 5 as Notes 5 and 6, respectively;

and by inserting at the beginning the following new Notes 1, 2, 3, and 4:

''1. *Individualized Assessment.*—The statutory framework of supervised release aims to 'assure that [those] who will need post-release supervision will receive it' while 'prevent[ing] probation system resources from being wasted on supervisory services for releasees who do not need them.' *See* S. Rep. No. 225, 98th Cong., 1st Sess. 54 (1983). To that end, 18 U.S.C. 3583(c) requires the court to, 'in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release,' consider the following:

(A) the nature and circumstances of the offense and the history and characteristics of the defendant (18 U.S.C. 3553(a)(1));

(B) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. 3553(a)(2)(B)–(D));

(C) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines (18 U.S.C. 3553(a)(4));

(D) any pertinent policy statement issued by the Sentencing Commission (18 U.S.C. 3553(a)(5));

(E) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (18 U.S.C. 3553(a)(6)); and

(F) the need to provide restitution to any victims of the offense (18 U.S.C. 3553(a)(7)).

See 18 U.S.C. 3583(c).

2. *Criminal History.*—The court should give particular consideration to the defendant's criminal history (which is one aspect of the 'history and characteristics of the defendant' in Application Note 1(A) above). In general, the more serious the defendant's criminal history, the greater the need for supervised release.

3. *Substance Abuse.*—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is highly recommended that a term of supervised release also be imposed. *See* § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

4. *Domestic Violence.*—If the defendant is convicted for the first time of a domestic violence crime as defined in 18 U.S.C. 3561(b), a term of supervised release is required by statute. *See* 18 U.S.C. 3583(a). Such a defendant is also required by statute to attend an approved rehabilitation program, if available within a 50-mile radius of the legal residence of the defendant. *See* 18 U.S.C. 3583(d); § 5D1.3(a)(3). In any other case involving domestic violence or stalking in which the defendant is sentenced to imprisonment, it is highly recommended that a term of supervised release also be imposed.''.

Section 5D1.2 is amended—

by striking subsections (a) and (b) as follows:

''(a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:

(1) At least two years but not more than five years for a defendant convicted of a Class A or B felony. *See* 18 U.S.C. 3583(b)(1).

(2) At least one year but not more than three years for a defendant convicted of a Class C or D felony. *See* 18 U.S.C. 3583(b)(2).

(3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor. *See* 18 U.S.C. 3583(b)(3).

(b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—

(1) any offense listed in 18 U.S.C. 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or

(2) a sex offense.

(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.'';

by inserting at the beginning the following new subsection (a):

''(a) If a term of supervised release is ordered, the court shall conduct an individualized assessment to determine the length of the term, not to exceed the relevant statutory maximum term.'';

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

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

''(c) The court should state on the record the reasons for the length of the term imposed.''.

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

by striking Note 1 as follows:

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

'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. 1201; or (v) an offense under 18 U.S.C. 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. 2250 (Failure to register).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.'';

by redesignating Notes 2, 3, and 4 as Notes 1, 2, and 3, respectively;

in Note 1 (as so redesignated) by striking ''shall be'' and inserting ''is'';

in Note 2 (as so redesignated) by striking ''or the guidelines'';

in Note 3 (as so redesignated) by striking ''*Factors Considered.*—The factors to be considered in determining the length of a term of supervised release'' and inserting ''*Individualized Assessment.*—When conducting an individualized assessment to determine the length of a term of supervised release, the factors to be considered''; by striking ''Application Note 3'' and inserting ''Application Note 1''; and by striking ''long enough'' and inserting ''sufficient'';

by striking Notes 5 and 6 as follows:

''5. *Early Termination and Extension.*—The court has authority to terminate or extend a term of supervised release. *See* 18 U.S.C. 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.

6. *Application of Subsection (c).*—Subsection (c) specifies how a statutorily required minimum term of supervised release may affect the minimum term of supervised release provided by the guidelines.

For example, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of three years and a maximum term of life, the term of supervised release provided by the guidelines is restricted by subsection (c) to three years to five years. Similarly, if subsection (a) provides a range of two years to five years, but the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, the term of supervised release provided by the guidelines is five years.

The following example illustrates the interaction of subsections (a) and (c) when subsection (b) is also involved. In this example, subsection (a) provides a range of two years to five years; the relevant statute requires a minimum term of supervised release of five years and a maximum term of life; and the offense is a sex offense under subsection (b). The effect of subsection (b) is to raise the maximum term of supervised release from five years (as provided by subsection (a)) to life, yielding a range of two years to life. The term of supervised release provided by the guidelines is then restricted by subsection (c) to five years to life. In this example, a term of supervised release of more than five years would be a guideline sentence. In addition, subsection (b) contains a policy statement recommending that the maximum—a life term of supervised release—be imposed.'';

and by inserting at the end the following new Note 4:

''4. *Early Termination and Extension.*—The court has authority to terminate or extend a term of supervised release. *See* 18 U.S.C. 3583(e)(1), (2); § 5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)).''.

The Commentary to § 5D1.2 is amended by striking the Commentary captioned ''Background'' in its entirety as follows:

''*Background:* This section specifies the length of a term of supervised

release that is to be imposed. Subsection (c) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.''.

Section 5D1.3 is amended—

by striking subsections (b), (c), and (d) as follows:

''(b) *Discretionary Conditions*

The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

(c) *'Standard' Conditions (Policy Statement)*

The following 'standard' conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

(1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(4) The defendant shall answer truthfully the questions asked by the probation officer.

(5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

(7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.,* anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(11) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

(13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

(d) *'Special' Conditions (Policy Statement)*

The following 'special' conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) *Support of Dependents*

(A) If the defendant has one or more dependents—a condition specifying that the defendant shall support his or her dependents.

(B) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child—a condition specifying that the defendant shall make the payments and comply with the other terms of the order.

(2) *Debt Obligations*

If an installment schedule of payment of restitution or a fine is imposed—a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) *Access to Financial Information*

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine—a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) *Substance Abuse*

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol—(A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant shall not use or possess alcohol.

(5) *Mental Health Program Participation*

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment—a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) *Deportation*

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. 1228(c)(5)*); or

(B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable—a condition ordering deportation by a United States district court or a United States magistrate judge.

* So in original. Probably should be 8 U.S.C. 1228(d)(5).

(7) *Sex Offenses*

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to § 5D1.2 (Term of Supervised Release)—

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(8) *Unpaid Restitution, Fines, or Special Assessments*

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

(e) *Additional Conditions (Policy Statement)*

The following 'special conditions' may be appropriate on a case-by-case basis:

(1) *Community Confinement*

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. *See* § 5F1.1 (Community Confinement).

(2) *Home Detention*

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. *See* § 5F1.2 (Home Detention).

(3) *Community Service*

Community service may be imposed as a condition of supervised release. *See* § 5F1.3 (Community Service).

(4) *Occupational Restrictions*

Occupational restrictions may be imposed as a condition of supervised release. *See* § 5F1.5 (Occupational Restrictions).

(5) *Curfew*

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) *Intermittent Confinement*

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. 3583(e)(2) and only when facilities are available. *See* § 5F1.8 (Intermittent Confinement).'';

and inserting the following new subsection (b):

''(b) *Discretionary Conditions*

(1) *In General.*—The court should conduct an individualized assessment to determine what, if any, other conditions of supervised release are warranted.

Such conditions are warranted to the extent that they (A) are reasonably related to (i) the nature and circumstances of the offense and the history and characteristics of the defendant; (ii) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (iii) the need to protect the public from further crimes of the defendant; and (iv) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (B) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission. *See* 18 U.S.C. 3583(d).

(2) [*'Standard'*][*Examples of Common*] *Conditions (Policy Statement)*

The following are ['standard' conditions of supervised release, which the court may modify, expand, or omit in appropriate cases] [examples of common conditions of supervised release that may be warranted in appropriate cases][. Several of the conditions are expansions of the conditions required by statute]:

(A) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(B) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(C) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(D) The defendant shall answer truthfully the questions asked by the probation officer.

(E) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(F) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

(G) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(H) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not

knowingly communicate or interact with that person without first getting the permission of the probation officer.

(I) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(J) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (*i.e.,* anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(K) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(L) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

(M) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

(3) *'Special' Conditions (Policy Statement)*

One or more conditions from the following non-exhaustive list of 'special' conditions of supervised release may be appropriate in a particular case, including in the circumstances described:

(A) *Support of Dependents*

(i) If the defendant has one or more dependents—a condition specifying that the defendant shall support his or her dependents.

(ii) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child—a condition specifying that the defendant shall make the payments and comply with the other terms of the order.

(B) *Debt Obligations*

If an installment schedule of payment of restitution or a fine is imposed—a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(C) *Access to Financial Information*

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine—a condition requiring the defendant to provide the probation officer access to any requested financial information.

(D) *Substance Abuse*

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol—(i) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (ii) a condition specifying that the defendant shall not use or possess alcohol.

(E) *Mental Health Program Participation*

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment—a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(F) *Deportation*

If (i) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. 1228(c)(5)*); or (ii) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable—a condition ordering deportation by a United States district court or a United States magistrate judge.

* So in original. Probably should be 8 U.S.C. 1228(d)(5).

(G) *Sex Offenses*

If the instant offense of conviction is a sex offense—

(i) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(ii) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(iii) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(H) *Unpaid Restitution, Fines, or Special Assessments*

If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

(I) *High School or Equivalent Diploma*

If the defendant has not obtained a high school or equivalent diploma, a condition requiring the defendant to participate in a program to obtain such a diploma.

(J) *Community Confinement*

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. *See* § 5F1.1 (Community Confinement).

(K) *Home Detention*

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. *See* § 5F1.2 (Home Detention).

(L) *Community Service*

Community service may be imposed as a condition of supervised release. *See* § 5F1.3 (Community Service).

(M) *Occupational Restrictions*

Occupational restrictions may be imposed as a condition of supervised release. *See* § 5F1.5 (Occupational Restrictions).

(N) *Curfew*

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(O) *Intermittent Confinement*

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. 3583(e)(2) and only when facilities are available. *See* § 5F1.8 (Intermittent Confinement).''.

The Commentary to § 5D1.3 captioned ''Applications Notes'' is amended—

in the caption by striking ''Note'' and inserting ''Notes'';

by redesignating Note 1 as Note 2;

by inserting at the beginning the following new Note 1:

''1. *Individualized Assessment.*—When conducting an individualized assessment under this section, the court must consider the same factors used to determine whether to impose a term of

supervised release, and shall impose conditions of supervision not required by statute only to the extent such conditions meet the requirements listed at 18 U.S.C. 3583(d). *See* 18 U.S.C. 3583(c), (d); Application Note 1 to § 5D1.1 (Imposition of a Term of Supervised Release).'';

in Note 2 (as so redesignated) by striking ''(c)(4)'' both places it appears and inserting ''(b)(2)(D)'';

and by inserting at the end the following new Note 3:

''3. *Application of Subsection (b)(3)(G).*—For purposes of subsection (b)(3)(G):

'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. 1201; or (v) an offense under 18 U.S.C. 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. 2250 (Failure to register).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.''.

Chapter Five, Part D is amended by inserting at the end the following new § 5D1.4:

''§ 5D1.4. *Modification, Early Termination, and Extension of Supervised Release (Policy Statement)*

(a) *Modification of Conditions.*—At any time prior to the expiration or termination of the term of supervised release, the court [should][may] modify, reduce, or enlarge the conditions of supervised release whenever warranted by an individualized assessment of the appropriateness of existing conditions. *See* 18 U.S.C. 3583(e)(2). The court is encouraged to conduct such an assessment as soon as practicable after the defendant's release from imprisonment.

(b) *Early Termination.*—Any time after the expiration of one year of supervised release and after an individualized assessment of the need for ongoing supervision, the court [should][may] terminate the remaining term of supervision and discharge the defendant if the court determines, following consultation with the government and the probation officer, that the termination is warranted by the conduct of the defendant and the interest of justice. *See* 18 U.S.C. 3583(e)(1).

[In determining whether termination is warranted, the court should consider the following non-exhaustive list of factors:

(1) any history of court-reported violations over the term of supervision;

(2) the ability of the defendant to lawfully self-manage beyond the period of supervision;

(3) the defendant's substantial compliance with all conditions of supervision;

(4) the defendant's engagement in appropriate prosocial activities and the existence or lack of prosocial support to remain lawful beyond the period of supervision;

(5) a demonstrated reduction in risk level over the period of supervision; and

(6) whether termination will jeopardize public safety, as evidenced by the nature of the defendant's offense, the defendant's criminal history, the defendant's record while incarcerated, the defendant's efforts to reintegrate into the community and avoid recidivism, any statements or information provided by the victims of the offense, and other factors the court finds relevant.]

The court is encouraged to conduct such assessments upon the expiration of one year of supervision and periodically throughout the term of supervision thereafter.

(c) *Extending a Term of Supervised Release.*—The court may, at any time prior to the expiration or termination of a term of supervised release, extend the term of supervised release if less than the maximum authorized term of supervised release was previously imposed and the extension is warranted by an individualized assessment of the need for further supervision. *See* 18 U.S.C. 3583(e)(2).

Commentary

Application Notes:

1. *Individualized Assessment.*—When making an individualized assessment under this section, the factors to be considered are the same factors used to determine whether to impose a term of supervised release. *See* 18 U.S.C. 3583(c), (e); Application Note 1 to § 5D1.1 (Imposition of a Term of Supervised Release). [In particular, the court is encouraged to consider (A) the defendant's needs and risks and the conditions of supervised release imposed at the original sentencing; and (B) the defendant's conduct in custody, post-release circumstances, and the availability of resources required for compliance with conditions (*e.g.,* the availability of treatment facilities).]

2. *Extension or Modification of Conditions.*—In a case involving an extension of the term or a modification of the conditions of supervised release, the court shall comply with Rule 32.1 (Revoking or Modifying Probation or Supervised Release) of the Federal Rules of Criminal Procedure and the provisions applicable to the initial setting of the terms and conditions of post-release supervision. *See* 18 U.S.C. 3583(e)(2). In both situations, the Commission encourages the court to make its best effort to ensure that any victim of the offense [and of any violation of a condition of supervised release] is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified.

3. *Application of Subsection (c).*—Subsection (c) addresses a court's authority to extend a term of supervised release. In some cases, extending a term may be more appropriate than taking other measures, such as revoking the supervised release. For example, if a defendant violates a condition of supervised release, a court should determine whether extending the term would be more appropriate than revocation.''.

The Commentary to § 1B1.10 captioned ''Application Notes'' is amended in Note 8(B) by inserting after ''18 U.S.C. 3583(e)(1).'' the following: ''*See* § 5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)).''.

[The Commentary to § 4B1.5 captioned ''Application Notes'' is amended by striking Note 5 as follows:

''5. *Treatment and Monitoring.*—

(A) *Recommended Maximum Term of Supervised Release.*—The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.

(B) *Recommended Conditions of Probation and Supervised Release.*—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.''.]

[The Commentary to § 4B1.5 captioned ''Application Notes'' is amended in Note 5—

by striking the following:

''*Treatment and Monitoring.*—

(A) *Recommended Maximum Term of Supervised Release.*—The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.

(B) *Recommended Conditions of Probation and Supervised Release.*—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.'';

and by inserting the following:

''*Treatment and Monitoring.*—Treatment and monitoring are important tools for supervising offenders and may be considered as special conditions of any term of probation or supervised release that is imposed.''.]

Section 5B1.3(d)(7) is amended by striking '', as defined in Application Note 1 of the Commentary to § 5D1.2 (Term of Supervised Release)''.

The Commentary to § 5B1.3 captioned ''Application Note'' is amended—

in the caption by striking ''Note'' and inserting ''Notes'';

and by inserting at the end the following new Note 2:

''2. *Application of Subsection (d)(7).*—For purposes of subsection (d)(7):

'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (iv) an offense under 18 U.S.C. 1201; or (v) an offense under 18 U.S.C. 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (v) of this note. Such term does not include an offense under 18 U.S.C. 2250 (Failure to register).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.''.

Section 5H1.3 is amended in the paragraph that begins ''Mental and emotional conditions may be relevant in determining the conditions'' by striking ''5D1.3(d)(5)'' and inserting ''5D1.3(b)(3)(E)''.

Section 5H1.4 is amended in the paragraph that begins ''Drug or alcohol dependence'' by striking ''§ 5D1.3(d)(4)'' and inserting ''§ 5D1.3(b)(3)(D)''.

Issues for Comment

1. The Commission has received feedback that courts should be afforded more discretion to tailor their supervised release decisions based on an individualized assessment of the defendant. At the same time, the Commission has received feedback that courts and probation officers would benefit from more guidance concerning the imposition, length, and conditions of supervised release.

(A) Part A of the proposed amendment would add language throughout Chapter Five, Part D (Supervised Release) directing courts that supervised release decisions should be based on an ''individualized assessment'' of the statutory factors listed in 18 U.S.C. 3583(c)–(e) and remove recommended minimum terms of supervised release. The Commission seeks comment on whether the inclusion of an individualized assessment based on statutory factors is sufficient to provide both discretion and useful guidance.

(B) Part A of the proposed amendment would maintain the Commentary to § 5D1.1 (Imposition of a Term of Supervised Release) that directs courts to pay particular attention to a defendant's criminal or substance abuse history. In addition, new proposed policy statement at § 5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)) includes as a bracketed option a non-exhaustive list of factors that a court should consider in determining whether early termination of supervised release is warranted. The Commission seeks comment on whether such guidance should be retained or deleted and whether similar guidance should be included elsewhere. If the Commission provides further guidance, what should that guidance be?

(C) Is there any other approach the Commission should consider to provide courts with appropriate discretion while also including useful guidance, either throughout Chapter Five, Part D, or for certain guideline provisions?

2. Section 5D1.1(c) instructs that ''[t]he court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.'' The Commission has received feedback that imposition of a term of supervised release in such cases varies substantially by jurisdiction, may be excessive, and may divert resources. Should the Commission amend § 5D1.1(c) to further discourage the imposition of supervised release for individuals who are likely to be deported?

3. In § 5D1.4, Part A of the proposed amendment provides an option to include a non-exhaustive list of factors for courts to consider when determining whether early termination is warranted. These factors are drawn from the Post-Conviction Supervision Policies in the *Guide to Judiciary Policy* (Vol. 8E, Ch. 3, § 360.20, *available at https://www.uscourts.gov/file/78805/download*) and the Safer Supervision Act—a bipartisan bill introduced in the Senate and House of Representatives in the 118th Congress that would have amended 18 U.S.C. 3583. *See* S. 2861, H.R. 5005. Are the listed factors appropriate? Should the Commission omit or amend any of the listed factors, or should it include other specific factors?

4. The First Step Act of 2018 (FSA), Public Law 115—391, allows individuals in custody who successfully complete evidence-based recidivism reduction programming or productive activities to earn time credits. *See* 18 U.S.C. 3632(d)(4)(A). How those time credits are applied may depend on whether the defendant's sentence includes a term of supervised release. Specifically, the FSA provides ''[i]f the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment pursuant to [18 U.S.C. 3583], the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits under [18 U.S.C. 3632].'' 18 U.S.C. 3624(g)(3).

The Commission seeks comment on whether and how the changes to supervised release set forth in Part A of the proposed amendment may impact defendants' eligibility to benefit from the FSA earned time credits. Should the Commission make any additional or different changes to Chapter Five to avoid any unintended consequences that would impact a defendant's eligibility? If so, what changes should be made?

5. At § 5D1.3 (Conditions of Supervised Release), Part A of the proposed amendment retains two general categories of discretionary conditions of supervised release without amending their substance—''standard'' and ''special'' conditions. In doing so, the Commission brackets language that would alternatively refer to ''standard'' conditions as ''examples of common conditions that may be warranted in appropriate cases.'' Part A of the proposed amendment also includes in

its listing of ''special'' conditions those conditions that currently are labeled as ''Additional Conditions.'' The Commission seeks comment on these proposals and on whether another approach is warranted.

6. Part A of the proposed amendment would establish a new policy statement at § 5D1.4 (Modification, Early Termination, and Extension of Supervised Release (Policy Statement)), which, among other things, addresses a court's determination whether to terminate a term of supervised release. The Commission seeks comment on whether it should provide that the completion of reentry programs (more information available at *https://www.ussc.gov/education/problem-solving-court-resources*), such as the Supervision to Aid Reentry Program in the Eastern District of Pennsylvania, should be considered by a court when determining whether to terminate the supervision.

7. Furthermore, the Commission seeks comment on whether the new policy statement at § 5D1.4 should provide guidance to courts on the appropriate procedures to employ when determining whether to terminate a term of supervised release. For example, should the Commission recommend that courts make the determination pursuant to a full public proceeding, or is a more informal proceeding sufficient? In either case, should the Commission encourage courts to appoint counsel to represent the defendant? How might the Commission encourage courts to ensure that any victim of the offense (or of any violation of a condition of supervised release) is notified of the early termination consideration and afforded a reasonable opportunity to be heard? Are there other appropriate approaches the Commission should recommend?

(B) Revocation of Supervised Release

Synopsis of Proposed Amendment: Chapter Seven (Violations of Probation and Supervised Release) of the *Guidelines Manual* addresses violations of probation and supervised release by means of an introductory framework and a series of policy statements. The introduction to Chapter Seven, Part A (Introduction to Chapter Seven) explains the framework the *Guidelines Manual* uses to address violations of probation and supervised release. It describes the Commission's resolution of several issues. First, the Commission decided in 1990 to promulgate policy statements rather than guidelines because of the flexibility of this option. *See generally* USSG Ch.7, Pt.A. Next, ''[a]fter lengthy consideration,'' the Commission adopted a ''breach of trust'' framework for violations of supervised release; the alternative option would have sanctioned individuals who committed new criminal conduct by applying the offense guidelines in Chapters Two and Three to the criminal conduct that formed the basis of the new violation, along with a recalculated criminal history score. *Id.* Under this approach, the ''sentence imposed upon revocation [is] intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision, leaving the punishment for any new criminal conduct to the court responsible for imposing the sentence for that offense.'' *Id.* Finally, despite some debate, the Commission opted to ''develop a single set of policy statements for revocation of both probation and supervised release.'' *Id.* The Commission signaled that it intended ultimately to issue ''revocation guidelines,'' but it has not done so. *Id.*

Section 7B1.1 (Classification of Violations (Policy Statement)) governs the classification of violations of supervised release. Grade A Violations consist of conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years. USSG § 7B1.1(a)(1). Grade B Violations involve conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding on year. USSG § 7B1.1(a)(2). Grade C Violations involve conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision. USSG § 7B1.1(a)(3). In cases with more than one violation of the conditions of supervision, or a single violation with conduct constituting more than one offense, the grade of the violation is determined by the violation having the most serious grade. USSG § 7B1.1(b).

Section 7B1.2 (Reporting of Violations of Probation and Supervised Release (Policy Statement)) concerns the reporting of violations of supervised release to the court. In cases of Grade A or B violations, § 7B1.2(a) directs that the probation officer ''shall'' promptly report them to the court. For Grade C violations, the probation officer also ''shall'' promptly report them to the court unless the officer determines that (1) the violation is minor and not part of a continuing pattern, and (2) non-reporting will not present an undue risk to the individual or the public or be inconsistent with any directive of the court. USSG § 7B1.2(b).

Section 7B1.3 (Revocation of Probation or Supervised Release (Policy Statement)) governs a court's options when it finds that a violation of the terms of supervised release have occurred. Upon the finding of a Grade A or B violation, the court shall revoke an individual's supervised release; upon the finding of a Grade C violation, the court may either revoke supervised release, or it may extend the term of supervision and/or modify the conditions of supervision. USSG § 7B1.3(a). When a court does revoke supervised release, § 7B1.3(b) directs that the applicable range of imprisonment is the one set forth in § 7B1.4. Section 7B1.3(c) provides that in the case of a Grade B or C violation, certain community confinement or home detention sentences are available to satisfy at least a portion of the sentence. Section 7B1.3(f) directs that any term of imprisonment imposed upon revocation shall be ordered to be served consecutively to any sentence of imprisonment the individual is serving, regardless of whether that other sentence resulted from the conduct that is the basis for the revocation. If supervised release is revoked, the court may also include an additional term of supervised release to be imposed upon release from imprisonment, but that term may not exceed statutory limits. USSG § 7B1.3(g).

Section 7B1.4 (Term of Imprisonment (Policy Statement)) contains the revocation table, which sets forth recommended ranges of imprisonment based on the grade of violation and an individual's criminal history category. Increased sentencing ranges apply where the individual has committed a Grade A violation while also on supervised release following imprisonment for a Class A felony. USSG § 7B1.4(a)(2). An asterisked note to the revocation table notes that the criminal history category to be applied is the one ''applicable at the time the defendant originally was sentenced to a term of supervision.'' USSG § 7B1.4(a)(2). Trumping mechanisms apply if the terms of imprisonment required by statute exceed or fall below the suggested range. USSG § 7B1.4(b).

Subsection (b) of 7B1.5 (No Credit for Time Under Supervision (Policy Statement)) directs that upon revocation of supervised release, ''no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.'' An exception applies for individuals serving a period

of supervised release on a foreign sentence under the provisions of 18 U.S.C. 4106A. USSG § 7B1.5(c).

Part B of the proposed amendment seeks to revise Chapter Seven to accomplish two goals. The first is to provide courts greater discretion to respond to a violation of a condition of supervised release. The second is to ensure the provisions in Chapter Seven reflect the differences between probation and supervised release.

Part B of the proposed amendment revises the introductory commentary in Part A of Chapter Seven. It would add commentary explaining that the Commission has updated the policy statements addressing violations of supervised release in response to feedback from stakeholders identifying the need for more flexible, individualized responses to such violations. It would also add commentary highlighting the differences between probation and supervised release and how those differences have led the Commission to recommend different approaches to handling violations of probation, which serves a punitive function, and supervised release, a primary function of which is to ''fulfill[] rehabilitative ends, distinct from those served by incarceration.'' *United States* v. *Johnson,* 529 U.S. 53, 59 (2000).

Part B of the proposed amendment separates the provisions addressing violations of probation from those addressing violations of supervised release by removing all references to supervised release from Part B of Chapter Seven. It then duplicates the provisions of Part B as they pertain to supervised release in a new Part C.

Part B of the proposed amendment would create a new Part C in Chapter Seven to address supervised release violations. Part C would begin with introductory commentary explaining that—in responding to an allegation that a supervisee has violated the terms of supervision, addressing a violation found during revocation proceedings, or imposing a sentence upon revocation—the court should conduct the same kind of individualized assessment used throughout the process of imposing a term of supervised release. It would also express the Commission's view that courts should consider a wide array of options to address violations of supervised release.

The specific policy statements of Part C would duplicate the provisions of Part B as they pertain to supervised release, with a number of changes. Under the new § 7C1.1 (Classification of Violations (Policy Statement)), which duplicates § 7B1.1, there would be a fourth classification of violation: Grade D, which would include ''a violation of any other condition of supervised release,'' which is currently classified as a Grade C violation.

Part B of the proposed amendment would duplicate § 7B1.2, which addresses a probation officer's duty to report violations, in the new § 7C1.2.

Part B of the proposed amendment would create a new § 7C1.3 (Responses to Violations of Supervised Release (Policy Statement)), establishing the actions a court may take in response to an allegation of non-compliance with supervised release. Under the policy statement, upon an allegation of non-compliance, the court would be instructed to conduct an individualized assessment to determine the appropriate response. Part B of the proposed amendment brackets the possibility of creating in the guideline a non-exhaustive list of possible responses and brackets the possibility of including a list of other possible responses in an Application Note. It provides two options for addressing a court's response to a finding of a violation. Under Option 1, upon a finding of a violation for which revocation is not required, the court would be authorized, subject to an individualized assessment, to continue the term of supervised release without modification, extend the term of supervised release or modify the conditions, terminate the term, or revoke supervised release. Upon a finding of a violation for which revocation is required by statute, the court would be required to revoke supervised release. Under Option 2, the court would be required to revoke supervised release upon a finding of a violation for which revocation is required by statute or for a Grade A or B violation. Upon a finding of any other violation, the court would be authorized, subject to an individualized assessment, to continue the term of supervised release without modification, extend the term of supervised release or modify the conditions, terminate the term, or revoke supervised release.

Section 7C1.4 (Revocation of Supervised Release (Policy Statement)) would address instances of revocation. In such a case, the court would be required to conduct an individualized assessment to determine the appropriate length of the term of imprisonment. Part B of the proposed amendment provides two options, Option 1 and Option 2, for addressing whether such a term should be served concurrently or consecutively to any sentence of imprisonment the defendant is serving. Under Option 1, the court would be instructed to conduct an individualized assessment to determine whether that term should be served concurrently, partially concurrently, or consecutively to any sentence of imprisonment the defendant is serving. Option 2 would maintain the current provision requiring the term to be served consecutively. Part B of the proposed amendment would also continue to recognize the court's authority to include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment.

Section 7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)), which duplicates § 7B1.4, would set forth the Supervised Release Revocation Table. The Supervised Release Revocation Table would include recommended ranges of imprisonment, which would be subject to an individualized assessment conducted by the court. The Table would also include recommended ranges for Grade D violations. It would also remove the guidance addressing statutory maximum and minimum terms of imprisonment.

Finally, § 7C1.6 (No Credit for Time Under Supervision (Policy Statement)) would duplicate § 7B1.5, which provides that, upon revocation of supervised release, no credit shall be given for time previously served on post-release supervision.

Issues for comment are also provided.

Proposed Amendment

Chapter Seven, Part A is amended—

in Subpart 1 by striking ''Under 28 U.S.C. 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. At this time, the Commission has chosen to promulgate policy statements only. These policy statements will provide guidance while allowing for the identification of any substantive or procedural issues that require further review. The Commission views these policy statements as evolutionary and will review relevant data and materials concerning revocation determinations under these policy statements. Revocation guidelines will be issued after federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment on these policy statements.'' and inserting ''Under 28 U.S.C. 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. Initially, the Commission chose to promulgate policy statements only. These policy

statements were intended to provide guidance and allow for the identification of any substantive or procedural issues that require further review. The Commission viewed these policy statements as evolutionary and intended to review relevant data and materials concerning revocation determinations under these policy statements. Updated policies would be issued after federal judges, probation officers, practitioners, and others had the opportunity to evaluate and comment on these policy statements.'';

in Subpart 3(a), in the paragraph that begins ''Moreover, the Commission'' by striking ''anticipates'' and inserting ''anticipated''; by striking ''will provide'' and inserting ''would provide''; by striking ''represent'' and inserting ''represented''; and by striking ''intends to promulgate revocation guidelines'' and inserting ''intended to promulgate updated revocation policies'';

in Subpart 3(b)—

in the paragraph that begins ''The Commission debated'' by inserting after ''the Commission'' the following: ''initially'';

in the paragraph that begins ''After lengthy consideration'' by inserting after ''the Commission'' the following: ''initially'';

in the paragraph that begins ''Given the relatively narrow'' by inserting after ''the Commission'' the following: ''initially'';

and in the paragraph that begins ''Accordingly, the Commission'' by inserting after ''the Commission'' the following: ''initially'';

in Subpart 4—

in the paragraph that begins ''The revocation policy'' by striking ''categorize'' and inserting ''initially categorized''; and by striking ''fix'' and inserting ''fixed'';

and in the paragraph that begins ''The Commission'' by striking ''has elected'' and inserting ''initially elected''; by striking ''the Commission determined'' and inserting ''the Commission had determined''; and by striking ''the Commission has initially concluded'' and inserting ''the Commission initially concluded'';

by striking Subpart 5 as follows:

''*5. A Concluding Note*

The Commission views these policy statements for revocation of probation and supervised release as the first step in an evolutionary process. The Commission expects to issue revocation guidelines after judges, probation officers, and practitioners have had an opportunity to apply and comment on the policy statements.

In developing these policy statements, the Commission assembled two outside working groups of experienced probation officers representing every circuit in the nation, officials from the Probation Division of the Administrative Office of the U.S. Courts, the General Counsel's office at the Administrative Office of the U.S. Courts, and the U.S. Parole Commission. In addition, a number of federal judges, members of the Criminal Law and Probation Administration Committee of the Judicial Conference, and representatives from the Department of Justice and federal and community defenders provided considerable input into this effort.'';

and by inserting at the end the following new Subpart 5:

''*5. Updating the Approach*

The Commission viewed the original policy statements for revocation of probation and supervised release as the first step in an evolutionary process. The Commission intended to revise its approach after judges, probation officers, and practitioners have had an opportunity to apply and comment on the policy statements. In the three decades since the promulgation of those policy statements, a broad array of stakeholders has identified the need for more flexible, individualized responses to violations of supervised release.

In response, the Commission updated the policy statements in this Chapter to ensure judges have the discretion necessary to properly manage supervised release. The revised policy statements encourage judges to take an individualized approach in: (1) responding to allegations of non-compliance before initiating revocation proceedings; (2) addressing violations found during revocation proceedings; and (3) imposing a sentence of imprisonment upon revocation. These changes are intended to better allocate taxpayer dollars and probation resources, encourage compliance and improve public safety, and facilitate the reentry and rehabilitation of defendants.

This Chapter proceeds in two parts: Part B addresses violations of probation, and Part C addresses violations of supervised release. Both parts maintain an approach in which the court addresses primarily the defendant's failure to comply with court-ordered conditions, while reflecting, to a limited degree, the seriousness of the underlying violation and the criminal history of the individual. The Commission determined that violations of probation and supervised release should be addressed separately to reflect their different purposes. While probation serves a punitive function, supervised release 'fulfills rehabilitative ends, distinct from those served by incarceration,' *United States* v. *Johnson,* 529 U.S. 53, 59 (2000). In light of these differences, Part B continues to recommend revocation for most probation violations. Part C encourages courts to consider a graduated response to a violation of supervised release, including considering all available options focused on facilitating a defendant's transition into the community and promoting public safety. Parts B and C both recognize the important role of the court, which is best situated to consider the individual defendant's risks and needs and respond accordingly within its broad discretion.''.

Chapter Seven, Part B is amended in the Introductory Commentary—

in the paragraph that begins ''The policy statements'' by striking ''chapter'' and inserting ''part''; and by striking ''supervision'' and inserting ''probation'';

by striking the following paragraph:

''Because these policy statements focus on the violation of the court-ordered supervision, this chapter, to the extent permitted by law, treats violations of the conditions of probation and supervised release as functionally equivalent.'';

by striking the last paragraph as follows:

''This chapter is applicable in the case of a defendant under supervision for a felony or Class A misdemeanor. Consistent with § 1B1.9 (Class B or C Misdemeanors and Infractions), this chapter does not apply in the case of a defendant under supervision for a Class B or C misdemeanor or an infraction.''

and by inserting at the end the following new paragraph:

''This part is applicable in the case of a defendant on probation for a felony or Class A misdemeanor. Consistent with § 1B1.9 (Class B or C Misdemeanors and Infractions), this part does not apply in the case of a defendant on probation for a Class B or C misdemeanor or an infraction.''.

Section 7B1.1 is amended—

in subsection (a) by striking ''and supervised release'';

in subsection (a)(3) by striking ''supervision'' and inserting ''probation'';

and in subsection (b) by striking ''supervision'' and inserting ''probation''.

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

in Note 1 by striking ''18 U.S.C. 3563(a)(1) and 3583(d), a mandatory condition of probation and supervised release'' and inserting ''18 U.S.C.

3563(a)(1), a mandatory condition of probation'';

and in Note 5 by striking ''under supervision'' and inserting ''on probation''.

Section 7B1.2 is amended in the heading by striking ''and Supervised Release''.

Section 7B1.3 is amended—

in the heading by striking ''or Supervised Release'';

in subsection (a)(1) by striking ''or supervised release'';

in subsection (a)(2) by striking ''revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision'' and inserting ''revoke probation; or (B) extend the term of probation and/or modify the conditions thereof'';

in subsection (b) by striking ''or supervised release'';

in subsection (e) by striking ''or supervised release'' both places such phrase appears;

in subsection (f) by striking ''or supervised release'' both places such phrase appears;

in subsection (g) by striking the following:

''(1) If probation is revoked and a term of imprisonment is imposed, the provisions of §§ 5D1.1–1.3 shall apply to the imposition of a term of supervised release.

(2) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. 3583(h).'';

and inserting the following:

''If probation is revoked and a term of imprisonment is imposed, the provisions of §§ 5D1.1–1.3 shall apply to the imposition of a term of supervised release.''.

The Commentary to § 7B1.3 captioned ''Application Notes'' is amended—

in Note 1 by striking ''or supervised release''; and by striking ''supervision'' both places such term appears and inserting ''probation'';

by striking Note 2 as follows:

''2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. 3583(e), (g)–(i). Under 18 U.S.C. 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release, may order an additional period of supervised release to follow imprisonment.'';

by redesignating Notes 3, 4, and 5 as Notes 2, 3, and 4, respectively;

in Note 2 (as so redesignated) by striking ''or supervised release''; and by striking ''Bureau of Prisons'' and inserting ''Federal Bureau of Prisons'';

in Note 3 (as so redesignated) by striking ''or supervised release'' both places such phrase appears;

and in Note 4 (as so redesignated) by striking ''. Intermittent confinement is authorized as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. 3583(e)(2) and only when facilities are available. *See*'' and inserting ''; *see also*''.

Section 7B1.4 is amended in the heading by striking ''*Imprisonment*'' and inserting ''*Imprisonment—Probation*'';

Section 7B1.4(a) is amended in the Table—

in the heading by striking ''*Revocation Table*'' and inserting ''*Probation Revocation Table*'';

by striking the following:

''*Grade A (1)* Except as provided in subdivision (2) below:

12–18 15–21 18–24 24–30 30–37 33–41

(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:

24–30 27–33 30–37 37–46 46–57 51–63.

* The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision.'';

and by inserting at the end the following:

''*Grade A* 12–18 15–21 18–24 24–30 30–37 33–41.

* The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of probation.''.

The Commentary to § 7B1.4 captioned ''Application Notes'' is amended—

in Note 1 by striking ''supervision'' each place such term appears and inserting ''probation'';

in Note 2 by striking ''Revocation Table'' and inserting ''Probation Revocation Table''; and by striking ''supervision'' both places such term appears and inserting ''probation'';

in Note 3 by striking ''under supervision'' and inserting ''on probation'';

in Note 5 by striking ''or supervised release'' both places such phrase appears; and by striking ''18 U.S.C. 3565(b), 3583(g)'' and inserting ''18 U.S.C. 3565(b)'';

and in Note 6 by striking ''18 U.S.C. 3565(b) and 3583(g). 18 U.S.C. 3563(a), 3583(d)'' and inserting ''18 U.S.C. 3565(b). 18 U.S.C. 3563(a)''.

Section 7B1.5 is amended—

in the heading by striking ''*Under Supervision*'' and inserting ''*on Probation*'';

by striking subsections (a), (b), and (c) as follows:

''(a) Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.

(b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.

(c) *Provided,* that in the case of a person serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. 4106A, credit shall be given for time on supervision prior to revocation, except that no credit shall be given for any time in escape or absconder status.'';

and inserting the following:

''Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.''.

The Commentary to § 7B1.5 is amended by striking the Commentary captioned ''Application Note'' in its entirety as follows:

''*Application Note:*

1. Subsection (c) implements 18 U.S.C. 4106A(b)(1)(C), which provides that the combined periods of imprisonment and supervised release in transfer treaty cases shall not exceed the term of imprisonment imposed by the foreign court.''.

The Commentary to § 7B1.5 captioned ''Background'' is amended by striking ''or supervised release''; by striking ''with supervision'' and inserting ''with probation''; and by striking ''under supervision'' and inserting ''on probation''.

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

''*Part C—Supervised Release Violations*

Introductory Commentary

At the time of original sentencing, the court may impose a term of supervised release to follow the sentence of imprisonment. *See* 18 U.S.C. 3583(a). During that term, the court may receive allegations that the supervisee has violated a term of supervision. In

responding to such allegations, addressing a violation found during revocation proceedings, and imposing a sentence upon revocation, the court should conduct the same kind of individualized assessment used 'in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release.' *See* 18 U.S.C. 3583(c), (e); Application Note 1 to § 5D1.1 (Imposition of a Term of Supervised Release).

If the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release under existing conditions, modify the conditions, extend the term, or revoke supervised release and impose a term of imprisonment. *See* 18 U.S.C. 3583(e)(3). The court also has authority to terminate a term of supervised release and discharge the defendant at any time after the expiration of one year of supervised release if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice. 18 U.S.C. 3583(e)(1).

Because supervised release is intended to promote rehabilitation and ease the defendant's transition back into the community, the Commission encourages courts—where possible—to consider a wide array of options to respond to non-compliant behavior and violations of the conditions of supervised release. These interim steps before revocation are intended to allow courts to address the defendant's failure to comply with court-imposed conditions and to better address the needs of the defendant while also maintaining public safety. If revocation is mandated by statute or the court otherwise determines revocation to be necessary, the sentence imposed upon revocation should be tailored to address the failure to abide by the conditions of the court-ordered supervision; imposition of an appropriate punishment for new criminal conduct is not the primary goal of a revocation sentence. The determination of the appropriate sentence on any new criminal conviction that is also a basis of the violation should be a separate determination for the court having jurisdiction over such conviction.

§ 7C1.1. Classification of Violations (Policy Statement)

(a) There are four grades of supervised release violations:

(1) *Grade A Violations*—conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;

(2) *Grade B Violations*—conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;

(3) *Grade C Violations*—conduct constituting a federal, state, or local offense punishable by a term of imprisonment of one year or less;

(4) *Grade D Violations*—a violation of any other condition of supervised release.

(b) Where there is more than one violation of the conditions of supervised release, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

Commentary

Application Notes:

1. Under 18 U.S.C. 3583(d), a mandatory condition of supervised release is that the defendant not commit another federal, state, or local crime. A violation of this condition may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct. The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct.

2. 'Crime of violence' is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.

3. 'Controlled substance offense' is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). *See* § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2.

4. A 'firearm or destructive device of a type described in 26 U.S.C. 5845(a)' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or a weapon made from a rifle, with a barrel or barrels of less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain large bore weapons.

5. Where the defendant is on supervised release in connection with a felony conviction, or has a prior felony conviction, possession of a firearm (other than a firearm of a type described in 26 U.S.C. 5845(a)) will generally constitute a Grade B violation, because 18 U.S.C. 922(g) prohibits a convicted felon from possessing a firearm. The term 'generally' is used in the preceding sentence, however, because there are certain limited exceptions to the applicability of 18 U.S.C. 922(g). *See, e.g.,* 18 U.S.C. 925(c).

§ 7C1.2. Reporting of Violations of Supervised Release (Policy Statement)

(a) The probation officer shall promptly report to the court any alleged Grade A or B violation.

(b) The probation officer shall promptly report to the court any alleged Grade C or D violation unless the officer determines: (1) that such violation is minor, and not part of a continuing pattern of violations; and (2) that non-reporting will not present an undue risk to an individual or the public or be inconsistent with any directive of the court relative to the reporting of violations.

Commentary

Application Note:

1. Under subsection (b), a Grade C or D violation must be promptly reported to the court unless the probation officer makes an affirmative determination that the alleged violation meets the criteria for non-reporting. For example, an isolated failure to file a monthly report or a minor traffic infraction generally would not require reporting.

§ 7C1.3. Responses to Violations of Supervised Release (Policy Statement)

(a) *Allegation of Non-Compliance.*—Upon receiving an allegation that the defendant is in non-compliance with a condition of supervised release, the court should conduct an individualized assessment to determine what response, if any, is appropriate. [When warranted by an individualized assessment, the court may, for example:

(1) Continue the term of supervised release without modification;

(2) Extend the term of supervised release and/or modify the conditions thereof;

(3) Terminate the term of supervised release, if more than one year of the term of supervised release has expired; or

(4) Initiate revocation proceedings.]

[Option 1 (Mandatory Revocation only when Statutorily Required):

(b) *Finding of a Violation.*—Upon a finding of a violation for which revocation is not required by statute, the court should conduct an individualized

assessment to determine what response, if any, is appropriate. When warranted by an individualized assessment, the court may:

(1) Continue the term of supervised release without modification;

(2) Extend the term of supervised release and/or modify the conditions thereof;

(3) Terminate the term of supervised release, if more than one year of the term of supervised release has expired; or

(4) Revoke supervised release.

(c) Upon a finding of a violation for which revocation is required by statute, the court shall revoke supervised release. *See* 18 U.S.C. 3583(g).]

[Option 2 (Mandatory Revocation when Statutorily Required and for Grade A and B Violations):

(b) *Finding of a Violation.*—Upon a finding of a violation for which revocation is required by statute (*see* 18 U.S.C. 3583(g)) or a Grade A or B violation, the court shall revoke supervised release.

(c) Upon a finding of any other violation, the court should conduct an individualized assessment to determine what response, if any, is appropriate. When warranted by an individualized assessment, the court may:

(1) Continue the term of supervised release without modification;

(2) Extend the term of supervised release and/or modify the conditions thereof;

(3) Terminate the term of supervised release, if more than one year of the term of supervised release has expired; or

(4) Revoke supervised release.]

Commentary

Application Notes:

1. *Individualized Assessment.*—When making an individualized assessment under this section, the factors to be considered are the same as the factors considered in determining whether to impose a term of supervised release. *See* 18 U.S.C. 3583(c), (e); Application Note 2 to § 5D1.1 (Imposition of a Term of Supervised Release).

[2. *Application of Subsection (a).*—Examples of responses to an allegation of non-compliance with a condition of supervised release include continuing a violation hearing to provide the defendant time to come into compliance or directing the defendant to additional resources needed to come into compliance.]

§ 7C1.4. Revocation of Supervised Release (Policy Statement)

[Option 1 (Concurrent or Consecutive Sentences):

(a) In the case of a revocation of supervised release, the court shall conduct an individualized assessment to determine:

(1) the appropriate length of the term of imprisonment, given the recommended range of imprisonment set forth in § 7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)); and

(2) whether that term should be served concurrently, partially concurrently, or consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of supervised release.]

[Option 2 (Consecutive Sentences Only):

(a) In the case of a revocation of supervised release, the court shall conduct an individualized assessment to determine the appropriate length of the term of imprisonment, given the recommended range of imprisonment set forth in § 7C1.5 (Term of Imprisonment—Supervised Release (Policy Statement)).

(b) Any term of imprisonment imposed upon the revocation of supervised release should be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of supervised release.]

([b][c]) If supervised release is revoked, the court may include a requirement that the defendant be placed on a term of supervised release upon release from imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. 18 U.S.C. 3583(h).

Commentary

Application Notes:

1. *Individualized Assessment.*—When making an individualized assessment under subsection (a), the factors to be considered are the same as the factors considered in determining whether to impose a term of supervised release. *See* 18 U.S.C. 3583(c), (e); Application Note 1 to § 5D1.1 (Imposition of a Term of Supervised Release).

2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. 3583(e), (g)–(i). Under 18 U.S.C. 3583(h) (effective September 13, 1994), the court, in the case of revocation of supervised release, may order an additional period of supervised release to follow imprisonment.

3. In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.

4. Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under § 7C1.5 (Term of Imprisonment—Supervised Release), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.

§ 7C1.5. Term of Imprisonment—Supervised Release (Policy Statement)

Unless otherwise required by statute, and subject to an individualized assessment, the recommended range of imprisonment applicable upon revocation is set forth in the following table:

SUPERVISED RELEASE REVOCATION TABLE

[In months of imprisonment]

	Criminal history category *					
Grade of violation	I	II	III	IV	V	VI
Grade D	Up to 7	2–8	3–9	4–10	5–11	6–12
Grade C	3–9	4–10	5–11	6–12	7–13	8–14

SUPERVISED RELEASE REVOCATION TABLE—Continued

[In months of imprisonment]

Grade of violation	Criminal history category *					
	I	II	III	IV	V	VI
Grade B	4–10	6–12	8–14	12–18	18–24	21–27
Grade A	*(1)* Except as provided in subdivision (2) below:					
	12–18	15–21	18–24	24–30	30–37	33–41
	(2) Where the defendant was on supervised release as a result of a sentence for a Class A felony:					
	24–30	27–33	30–37	37–46	46–57	51–63

* The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervised release.

Commentary

Application Notes:

1. The criminal history category to be used in determining the applicable range of imprisonment in the Supervised Release Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Supervised Release Revocation Table have been designed to take into account that the defendant violated supervision. In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of supervision being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of supervision. (*See* the criminal history provisions of §§ 4A1.1–4B1.4.)

2. In the case of a Grade D violation and a criminal history category of I, the recommended range of imprisonment in the Supervised Release Revocation Table is up to 7 months. This range allows for a sentence of less than 1 month.

3. Departure from the applicable range of imprisonment in the Supervised Release Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in § 4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in supervised release. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in supervised release, has been sentenced for an offense that is not the basis of the violation proceeding.

4. In the case of a Grade C or D violation that is associated with a high risk of new felonious conduct (*e.g.,* a defendant, under supervised release for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.

5. Where the original sentence was the result of a downward departure (*e.g.,* as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.

6. Upon a finding that a defendant violated a condition of supervised release by being in possession of a controlled substance or firearm or by refusing to comply with a condition requiring drug testing, the court is required to revoke supervised release and impose a sentence that includes a term of imprisonment. 18 U.S.C. 3583(g).

7. The availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, may warrant an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. 3583(g). 18 U.S.C. 3583(d).

§ 7C1.6. No Credit for Time Under Supervision (Policy Statement)

(a) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision. *See* 18 U.S.C. 3583(e)(3).

(b) *Provided,* that in the case of a person serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. 4106A, credit shall be given for time on supervision prior to revocation, except that no credit shall be given for any time in escape or absconder status.

Commentary

Application Note:

1. Subsection (b) implements 18 U.S.C. 4106A(b)(1)(C), which provides that the combined periods of imprisonment and supervised release in transfer treaty cases shall not exceed the term of imprisonment imposed by the foreign court.

Background: This section provides that time served on supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation. Other aspects of the defendant's conduct, such as compliance with supervision conditions and adjustment while under supervision, appropriately may be considered by the court in the determination of the sentence to be imposed within the applicable revocation range.''.

Issues for Comment

1. Part B of the proposed amendment adds language to address feedback indicating both that courts and probation officers should be afforded more discretion in their ability to address a defendant's non-compliant behavior while on supervised release and that they would benefit from more guidance concerning revocations of supervised release.

(A) Part B would include throughout Chapter Seven, Part C (Supervised Release Violations) a recommendation that courts use an ''individualized assessment'' based on the statutory factors listed in 18 U.S.C. 3583(e) when addressing non-compliant behavior. The Commission seeks comment on whether the recommendation of an individualized assessment based on statutory factors is sufficient to provide both discretion and useful guidance.

(B) New policy statement § 7C1.3 (Responses to Violations of Supervised Release (Policy Statement)) includes in the Commentary examples of how a court might address allegations of non-

compliant behavior short of the more formal options listed in 18 U.S.C. 3583(e). In addition, Part B maintains instructions on violations related to community confinement conditions in the Commentary to new policy statement § 7C1.4 (Revocation of Supervised Release (Policy Statement)). The Commission seeks comment on whether such guidance should be retained or deleted and whether similar guidance should be included elsewhere. If the Commission provides further guidance, what should that guidance be?

(C) Is there any other approach the Commission should consider to provide courts with appropriate discretion while also providing useful guidance, either throughout Chapter Seven, Part C, or for certain guideline provisions?

2. Part B of the proposed amendment includes two options to address when revocation is required or appropriate under new § 7C1.3 (Responses to Violations of Supervised Release (Policy Statement)). Option 1 would remove the language indicating that revocation is mandatory in all cases of Grade A or B violations and provide that the court should conduct an individualized assessment to determine whether to revoke in any cases that revocation is not required by statute. Option 2 would duplicate the language in § 7B1.3(a) that provides that ''the court shall revoke'' supervised release upon a finding of a Grade A or B violation and may revoke in other cases. Should the Commission continue to provide guidance tying whether revocation is required to the grade of the violation, or should the Commission remove this instruction and permit courts to make revocation determinations based on an individualized assessment in all cases? If the latter, should the Commission provide further guidance about when revocation is appropriate?

3. Given the proposed amendment's goal of promoting judicial discretion at revocation, the Commission seeks comment on whether it should replace the Supervised Release Revocation Table set forth in proposed § 7C1.4 (Term of Imprisonment—Supervised Release) with guidance indicating that courts abide by the statutory limits regarding maximum and minimum terms. If the Commission decides to retain the Revocation Table, would any further changes beyond those set forth in Part B of the proposed amendment be appropriate? For example, should the Commission recommend a sentence range that begins at less than one month in all cases, not just those involving Grade D violations for individuals in Criminal History Category I? Should it eliminate the higher set of ranges for cases in which the defendant is on supervised release as a result of a sentence for a Class A felony?

4. The Commission further seeks comment on whether and how a retained Supervised Release Revocation Table should make recommendations to courts regarding their consideration of criminal history. Should the defendant's criminal history category be recalculated at the time of revocation for a violation of supervised release? For example, should a court recalculate a defendant's criminal history score to exclude prior sentences that are no longer countable under the rules in § 4A1.2 (Definitions and Instructions for Computing Criminal History) or to account for new offenses a defendant may have been sentenced for after commission of the offense for which probation or supervised release is being revoked?

5. The Commission seeks comment on whether it should issue more specific guidance on the appropriate response to Grade D violations. Should the Commission state that revocation is not ordinarily appropriate for such violations, unless revocation is required under 18 U.S.C. 3583(g)? Should the Commission further state that revocation may be appropriate for Grade D violations if there have been multiple violations or if the court determines that revocation is necessary for protection of the public? Would such statements imply that revocation is ordinarily appropriate for Grade A, B, and C violations?

6. The recommended ranges of imprisonment set forth in the Revocation Tables at § 7B1.4 (Term of Imprisonment—Probation) and § 7C1.4 (Term of Imprisonment—Supervised Release) are determined, in part, by the defendant's criminal history category. For both tables, the criminal history category ''is the category applicable at the time the defendant originally was sentenced'' to a term of probation or supervised release. The Commission seeks comment on whether a defendant's criminal history score should be recalculated at the time of revocation to reflect changes made by amendments listed in subsection (d) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) if one or more of those amendments have the effect of lowering the defendant's criminal history category. For example, Part A of Amendment 821, which is applied retroactively, limits the overall criminal history impact of ''status points,'' potentially resulting in a defendant's criminal history being lowered (*e.g.,* a defendant assigned criminal history category IV at the time of original sentencing may have that category reduced to III). Should the Revocation Tables at § 7B1.4 (Term of Imprisonment—Probation) and § 7C1.4 (Term of Imprisonment—Supervised Release) allow for a defendant to benefit from these types of retroactive changes? Should these changes apply equally to both tables or, given the different purposes of probation and supervised release, should the Commission adopt different rules for each table?

2. Drug Offenses

Synopsis of Proposed Amendment: This proposed amendment contains five parts (Parts A through E). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.

Part A of the proposed amendment includes two subparts to address concerns that the Drug Quantity Table at subsection (c) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) overly relies on drug type and quantity as a measure of offense culpability and results in sentences greater than necessary to accomplish the purposes of sentencing. Subpart 1 sets forth three options for amending § 2D1.1 to set the highest base offense level in the Drug Quantity Table at a lower base offense level. Subpart 2 sets forth two options for amending § 2D1.1 to add a new specific offense characteristic providing for a reduction relating to low-level trafficking functions. Both subparts include issues for comment.

Part B of the proposed amendment includes two subparts. Subpart 1 would amend § 2D1.1 to address offenses involving ''Ice.'' Subpart 2 sets forth two options for amending § 2D1.1 to address the purity distinction in § 2D1.1 between methamphetamine in ''actual'' form and methamphetamine as part of a mixture. Both subparts include issues for comment.

Part C of the proposed amendment would amend § 2D1.1 to revise the enhancement for misrepresentation of fentanyl and fentanyl analogue at subsection (b)(13). Issues for comment are also provided.

Part D of the proposed amendment addresses the application of § 2D1.1(b)(1) to machineguns. An issue for comment is also provided.

Part E of the proposed amendment would amend the Commentary to § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) to address the manner by

which a defendant may satisfy § 5C1.2(a)(5)'s requirement of providing truthful information and evidence to the Government. An issue for comment is also provided.

(A) Recalibrating the Use of Drug Weight in § 2D1.1

Synopsis of Proposed Amendment: Part A of the proposed amendment contains two subparts (Subpart 1 and Subpart 2). The Commission is considering whether to promulgate one or both of these subparts, as they are not mutually exclusive.

Subpart 1 sets forth three options for amending § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to set the highest base offense level in the Drug Quantity Table at subsection (c) at a lower base offense level.

Subpart 2 sets forth two options for amending § 2D1.1 to add a new specific offense characteristic providing for a reduction relating to low-level trafficking functions.

Drug Penalties in General

The most commonly prosecuted federal drug statutes prohibit the manufacture, distribution, importation, and exportation of controlled substances. The statutory penalties for these offenses vary based on (1) the quantity of the drug, (2) the defendant's prior commission of certain felony offenses, and (3) any serious bodily injury or death that resulted from using the drug. Section 2D1.1 applies to violations of 21 U.S.C. 841 and 960, among other drug statutes. This guideline provides five alternative base offense levels, 18 specific offense characteristics, and two cross references.

The first four base offense levels, set out in § 2D1.1(a)(1)–(a)(4), apply when the defendant was convicted of an offense under 21 U.S.C. 841(b) or § 960(b) to which the applicable enhanced statutory minimum or maximum term of imprisonment applies or when the parties have stipulated to such an offense or such base offense level. The fifth base offense level, at § 2D1.1(a)(5), applies in any other case and sets forth as the base offense level ''the offense level specified in the Drug Quantity Table,'' subject to special provisions that apply when a defendant receives a mitigating role adjustment under § 3B1.2 (Mitigating Role).

The Drug Quantity Table at § 2D1.1(c) applies in the overwhelming majority of drug cases. The penalty structure of the Drug Quantity Table is based on the penalty structure of federal drug laws for most major drug types. That penalty structure generally establishes several tiers of penalties for manufacturing and trafficking in controlled substances, each based on the type and quantity of controlled substances involved. *See generally* 21 U.S.C. 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3). Thus, the offense levels set forth in the Drug Quantity Table depend primarily on drug type and drug quantity. For most drugs listed in the Drug Quantity Table, quantity is determined by the drug's weight. The Drug Quantity Table also includes ''Converted Drug Weight,'' which is used to determine the base offense level in two circumstances: (1) when the defendant's relevant conduct involves two or more controlled substances (and not merely a single mixture of two substances); and (2) when the defendant's relevant conduct involves a controlled substance not specifically listed on the Drug Quantity Table. In either situation, the weight of the controlled substances is converted into a Converted Drug Weight using the Drug Conversion Tables set forth in Application Note 8(D) of the Commentary to § 2D1.1.

Section 2D1.1 generally incorporates the statutory mandatory minimum sentences into the guidelines and extrapolates upward and downward to set offense levels for all drug quantities. Under the original guidelines, the quantity thresholds in the Drug Quantity Table were set to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that triggered a five-year statutory minimum were assigned a base offense level of 26, corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses that triggered a ten-year statutory minimum were assigned a base offense level of 32, corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month).

In 2014, the Commission determined that setting the base offense levels slightly above the mandatory minimum penalties was no longer necessary and instead set the base offense levels to straddle the mandatory minimum penalties. *See* USSG App. C, amend. 782 (effective Nov. 1, 2014). Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense level of 24, corresponding to a sentencing guideline range of 51 to 63 months for a defendant in Criminal History Category I (a guideline range that straddles the five-year statutory minimum). Similarly, offenses that trigger a ten-year statutory minimum are assigned a base offense level of 30, corresponding to a sentencing guideline range of 97 to 121 months for a defendant in Criminal History Category I (a guideline range that straddles the ten-year statutory minimum).

Feedback From Stakeholders

The Commission has received comment over the years indicating that § 2D1.1 overly relies on drug type and quantity as a measure of offense culpability and results in sentences greater than necessary to accomplish the purposes of sentencing. Some commenters have suggested that the Commission should again lower penalties in § 2D1.1, citing Commission data indicating that judges impose sentences below the guideline range in most drug trafficking cases. Commission data reflects that the difference between the average guideline minimum and average sentence imposed varies depending on the base offense level, with the greatest difference occurring at the highest offense levels on the Drug Quantity Table. In addition, commenters have raised concerns that the mitigating role adjustment from Chapter Three, Part B (Role in the Offense) is applied inconsistently in drug trafficking cases and does not adequately reflect individuals' roles in drug trafficking offenses.

Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table)

Subpart 1 of Part A of the proposed amendment sets forth three options for amending § 2D1.1 to set the highest base offense level in the Drug Quantity Table at subsection (c) at a lower base offense level.

Option 1 would set the highest base offense level in the Drug Quantity Table at level 34. Accordingly, it would delete subsections (c)(1) and (c)(2) of the table, redesignate subsection (c)(3) as subsection (c)(1), and renumber the remainder of the provisions of the table accordingly.

Option 2 would set the highest base offense level in the Drug Quantity Table at level 32. Accordingly, it would delete subsections (c)(1) through (c)(3) of the table, redesignate subsection (c)(4) as subsection (c)(1), and renumber the

remainder of the provisions of the table accordingly.

Option 3 would set the highest base offense level in the Drug Quantity Table at level 30. Accordingly, it would delete subsections (c)(1) through (c)(4) of the table, redesignate subsection (c)(5) as subsection (c)(1), and renumber the remainder of the provisions of the table accordingly.

Subpart 1 brackets § 2D1.1(a)(5) to indicate that all three options would require changes to the special provisions that apply when a defendant receives a mitigating role adjustment under § 3B1.2. The third issue for comment below provides some background information on § 2D1.1(a)(5) and sets forth a request for comment on the changes that should be made to this provision in light of the revisions proposed by the three options described above.

Additional issues for comment are also provided.

Subpart 2 (New Trafficking Functions Adjustment)

Subpart 2 of Part A of the proposed amendment would add a new specific offense characteristic providing for a [2][4][6]-level reduction relating to low-level trafficking functions. It provides two options for this new reduction.

Option 1 would make the reduction applicable if § 2D1.1(b)(2) (relating to use of violence) does not apply, [the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense,] and [the defendant's most serious conduct in the offense was limited to][the defendant's primary function in the offense was] performing any of the low-level trafficking functions listed in the new provision.

Option 2, like Option 1, would make the reduction applicable if § 2D1.1(b)(2) does not apply, [the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense,] and [the defendant's most serious conduct in the offense was limited to][the defendant's primary function in the offense was] a low-level trafficking function. However, unlike Option 1, Option 2 would not list low-level trafficking functions to which the reduction would necessarily apply. Instead, Option 2 would list functions that may qualify for the reduction as examples.

Both options would include a provision indicating that the reduction at proposed § 2D1.1(b)(17) shall apply regardless of whether the defendant acted alone or in concert with others. In addition, Options 1 and 2 would add a special instruction to § 2D1.1 providing that § 3B1.2 does not apply to cases where the defendant's offense level is determined under § 2D1.1. It would also include a new application note in the Commentary to § 2D1.1 relating to the new low-level trafficking functions adjustment. The new application note would provide guidance taken from the Commentary to § 3B1.2. Options 1 and 2 would also make conforming changes in § 2D1.1 to replace all references to § 3B1.2 with references to the new low-level trafficking functions reduction. These conforming changes include tying the additional decreases and mitigating role cap at § 2D1.1(a)(5) to the application of the proposed reduction at new § 2D1.1(b)(17) for low-level trafficking functions.

Issues for comment are also provided.

Subpart 1 (Setting a New Highest Base Offense Level in Drug Quantity Table)

Proposed Amendment

[Options 1, 2, and 3 set forth in this subpart would require changes to § 2D1.1(a)(5). See the third issue for comment below on possible changes that should be made to § 2D1.1(a)(5) in light of the revisions proposed by these three options.]

[Option 1 (Highest Base Offense Level at Level 34):

Section 2D1.1(c) is amended—

by striking paragraphs (1), (2), and (3) as follows:

''(1) • 90 KG or more of Heroin; Level 38

• 450 KG or more of Cocaine;

• 25.2 KG or more of Cocaine Base;

• 90 KG or more of PCP, or 9 KG or more of PCP (actual);

• 45 KG or more of Methamphetamine, or

4.5 KG or more of Methamphetamine (actual), or

4.5 KG or more of 'Ice';

• 45 KG or more of Amphetamine, or

4.5 KG or more of Amphetamine (actual);

• 900 G or more of LSD;

• 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);

• 9 KG or more of a Fentanyl Analogue;

• 90,000 KG or more of Marihuana;

• 18,000 KG or more of Hashish;

• 1,800 KG or more of Hashish Oil;

• 90,000,000 units or more of Ketamine;

• 90,000,000 units or more of Schedule I or II Depressants;

• 5,625,000 units or more of Flunitrazepam;

• 90,000 KG or more of Converted Drug Weight.

(2) • At least 30 KG but less than 90 KG of Heroin; Level 36

• At least 150 KG but less than 450 KG of Cocaine;

• At least 8.4 KG but less than 25.2 KG of Cocaine Base;

• At least 30 KG but less than 90 KG of PCP, or

at least 3 KG but less than 9 KG of PCP (actual);

• At least 15 KG but less than 45 KG of Methamphetamine, or

at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or

at least 1.5 KG but less than 4.5 KG of 'Ice';

• At least 15 KG but less than 45 KG of Amphetamine, or

at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);

• At least 300 G but less than 900 G of LSD;

• At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);

• At least 3 KG but less than 9 KG of a Fentanyl Analogue;

• At least 30,000 KG but less than 90,000 KG of Marihuana;

• At least 6,000 KG but less than 18,000 KG of Hashish;

• At least 600 KG but less than 1,800 KG of Hashish Oil;

• At least 30,000,000 units but less than 90,000,000 units of Ketamine;

• At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;

• At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam;

• At least 30,000 KG but less than 90,000 KG of *Converted Drug Weight.*

(3) • At least 10 KG but less than 30 KG of Heroin; Level 34

• At least 50 KG but less than 150 KG of Cocaine;

• At least 2.8 KG but less than 8.4 KG of Cocaine Base;

• At least 10 KG but less than 30 KG of PCP, or

at least 1 KG but less than 3 KG of PCP (actual);

• At least 5 KG but less than 15 KG of Methamphetamine, or

at least 500 G but less than 1.5 KG of Methamphetamine (actual), or

at least 500 G but less than 1.5 KG of 'Ice';

• At least 5 KG but less than 15 KG of Amphetamine, or

at least 500 G but less than 1.5 KG of Amphetamine (actual);

• At least 100 G but less than 300 G of LSD;

• At least 4 KG but less than 12 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);

• At least 1 KG but less than 3 KG of a Fentanyl Analogue;
• At least 10,000 KG but less than 30,000 KG of Marihuana;
• At least 2,000 KG but less than 6,000 KG of Hashish;
• At least 200 KG but less than 600 KG of Hashish Oil;
• At least 10,000,000 but less than 30,000,000 units of Ketamine;
• At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
• At least 625,000 but less than 1,875,000 units of Flunitrazepam;
• At least 10,000 KG but less than 30,000 KG of Converted Drug Weight.'';
by inserting the following new paragraph (1):
''(1) • 10 KG or more of Heroin; Level 34
• 50 KG or more of Cocaine;
• 2.8 KG or more of Cocaine Base;
• 10 KG or more of PCP, or
1 KG or more of PCP (actual);
• 5 KG or more of Methamphetamine, or
500 G or more of Methamphetamine (actual), or
500 G or more of 'Ice';
• 5 KG or more of Amphetamine, or
500 G or more of Amphetamine (actual);
• 100 G or more of LSD;
• 4 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
• 1 KG or more of a Fentanyl Analogue;
• 10,000 KG or more of Marihuana;
• 2,000 KG or more of Hashish;
• 200 KG or more of Hashish Oil;
• 10,000,000 units or more of Ketamine;
• 10,000,000 units or more of Schedule I or II Depressants;
• 625,000 units or more of Flunitrazepam;
• 10,000 KG or more of Converted Drug Weight.'';
and by redesignating paragraphs (4) through (17) as paragraphs (2) through (15), respectively.
The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 27(B) by striking ''level 38'' each place such term appears and inserting ''level 34''.]
[Option 2 (Highest Base Offense Level at Level 32):
Section 2D1.1(c) is amended—
by striking paragraphs (1), (2), (3), and (4) as follows:
''(1) • 90 KG or more of Heroin; Level 38
• 450 KG or more of Cocaine;
• 25.2 KG or more of Cocaine Base;
• 90 KG or more of PCP, or 9 KG or more of PCP (actual);
• 45 KG or more of Methamphetamine, or
4.5 KG or more of Methamphetamine (actual), or
4.5 KG or more of 'Ice';
• 45 KG or more of Amphetamine, or
4.5 KG or more of Amphetamine (actual);
• 900 G or more of LSD;
• 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
• 9 KG or more of a Fentanyl Analogue;
• 90,000 KG or more of Marihuana;
• 18,000 KG or more of Hashish;
• 1,800 KG or more of Hashish Oil;
• 90,000,000 units or more of Ketamine;
• 90,000,000 units or more of Schedule I or II Depressants;
• 5,625,000 units or more of Flunitrazepam;
• 90,000 KG or more of Converted Drug Weight.
(2) • At least 30 KG but less than 90 KG of Heroin; Level 36
• At least 150 KG but less than 450 KG of Cocaine;
• At least 8.4 KG but less than 25.2 KG of Cocaine Base;
• At least 30 KG but less than 90 KG of PCP, or
at least 3 KG but less than 9 KG of PCP (actual);
• At least 15 KG but less than 45 KG of Methamphetamine, or
at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or
at least 1.5 KG but less than 4.5 KG of 'Ice';
• At least 15 KG but less than 45 KG of Amphetamine, or
at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);
• At least 300 G but less than 900 G of LSD;
• At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
• At least 3 KG but less than 9 KG of a Fentanyl Analogue;
• At least 30,000 KG but less than 90,000 KG of Marihuana;
• At least 6,000 KG but less than 18,000 KG of Hashish;
• At least 600 KG but less than 1,800 KG of Hashish Oil;
• At least 30,000,000 units but less than 90,000,000 units of Ketamine;
• At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;
• At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam;
• At least 30,000 KG but less than 90,000 KG of *Converted Drug Weight.*
(3) • At least 10 KG but less than 30 KG of Heroin; Level 34
• At least 50 KG but less than 150 KG of Cocaine;
• At least 2.8 KG but less than 8.4 KG of Cocaine Base;
• At least 10 KG but less than 30 KG of PCP, or
at least 1 KG but less than 3 KG of PCP (actual);
• At least 5 KG but less than 15 KG of Methamphetamine, or
at least 500 G but less than 1.5 KG of Methamphetamine (actual), or
at least 500 G but less than 1.5 KG of 'Ice';
• At least 5 KG but less than 15 KG of Amphetamine, or
at least 500 G but less than 1.5 KG of Amphetamine (actual);
• At least 100 G but less than 300 G of LSD;
• At least 4 KG but less than 12 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
• At least 1 KG but less than 3 KG of a Fentanyl Analogue;
• At least 10,000 KG but less than 30,000 KG of Marihuana;
• At least 2,000 KG but less than 6,000 KG of Hashish;
• At least 200 KG but less than 600 KG of Hashish Oil;
• At least 10,000,000 but less than 30,000,000 units of Ketamine;
• At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
• At least 625,000 but less than 1,875,000 units of Flunitrazepam;
• At least 10,000 KG but less than 30,000 KG of Converted Drug Weight.
(4) • At least 3 KG but less than 10 KG of Heroin; Level 32
• At least 15 KG but less than 50 KG of Cocaine;
• At least 840 G but less than 2.8 KG of Cocaine Base;
• At least 3 KG but less than 10 KG of PCP, or
at least 300 G but less than 1 KG of PCP (actual);
• At least 1.5 KG but less than 5 KG of Methamphetamine, or
at least 150 G but less than 500 G of Methamphetamine (actual), or
at least 150 G but less than 500 G of 'Ice';
• At least 1.5 KG but less than 5 KG of Amphetamine, or
at least 150 G but less than 500 G of Amphetamine (actual);
• At least 30 G but less than 100 G of LSD;
• At least 1.2 KG but less than 4 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
• At least 300 G but less than 1 KG of a Fentanyl Analogue;

• At least 3,000 KG but less than 10,000 KG of Marihuana;
• At least 600 KG but less than 2,000 KG of Hashish;
• At least 60 KG but less than 200 KG of Hashish Oil;
• At least 3,000,000 but less than 10,000,000 units of Ketamine;
• At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
• At least 187,500 but less than 625,000 units of Flunitrazepam;
• At least 3,000 KG but less than 10,000 KG of Converted Drug Weight.'';

by inserting the following new paragraph (1):

''(1) • 3 KG or more of Heroin; Level 32
• 15 KG or more of Cocaine;
• 840 G or more of Cocaine Base;
• 3 KG or more of PCP, or
300 G or more of PCP (actual);
• 1.5 KG or more of Methamphetamine, or
150 G or more of Methamphetamine (actual), or
150 G or more of 'Ice';
• 1.5 KG or more of Amphetamine, or
150 G or more of Amphetamine (actual);
• 30 G or more of LSD;
• 1.2 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
• 300 G or more of a Fentanyl Analogue;
• 3,000 KG or more of Marihuana;
• 600 KG or more of Hashish;
• 60 KG or more of Hashish Oil;
• 3,000,000 units or more of Ketamine;
• 3,000,000 units or more of Schedule I or II Depressants;
• 187,500 units or more of Flunitrazepam;
• 3,000 KG or more of Converted Drug Weight.'';

and by redesignating paragraphs (5) through (17) as paragraphs (2) through (14), respectively.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 27(B) by striking ''level 38'' each place such term appears and inserting ''level 32''.]

[Option 3 (Highest Base Offense Level at Level 30):

Section 2D1.1(c) is amended—

by striking paragraphs (1), (2), (3), (4), and (5) as follows:

''(1) • 90 KG or more of Heroin; Level 38
• 450 KG or more of Cocaine;
• 25.2 KG or more of Cocaine Base;
• 90 KG or more of PCP, or 9 KG or more of PCP (actual);
• 45 KG or more of Methamphetamine, or
4.5 KG or more of Methamphetamine (actual), or
4.5 KG or more of 'Ice';
• 45 KG or more of Amphetamine, or
4.5 KG or more of Amphetamine (actual);
• 900 G or more of LSD;
• 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
• 9 KG or more of a Fentanyl Analogue;
• 90,000 KG or more of Marihuana;
• 18,000 KG or more of Hashish;
• 1,800 KG or more of Hashish Oil;
• 90,000,000 units or more of Ketamine;
• 90,000,000 units or more of Schedule I or II Depressants;
• 5,625,000 units or more of Flunitrazepam;
• 90,000 KG or more of Converted Drug Weight.
(2) • At least 30 KG but less than 90 KG of Heroin; Level 36
• At least 150 KG but less than 450 KG of Cocaine;
• At least 8.4 KG but less than 25.2 KG of Cocaine Base;
• At least 30 KG but less than 90 KG of PCP, or
at least 3 KG but less than 9 KG of PCP (actual);
• At least 15 KG but less than 45 KG of Methamphetamine, or
at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or
at least 1.5 KG but less than 4.5 KG of 'Ice';
• At least 15 KG but less than 45 KG of Amphetamine, or
at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);
• At least 300 G but less than 900 G of LSD;
• At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
• At least 3 KG but less than 9 KG of a Fentanyl Analogue;
• At least 30,000 KG but less than 90,000 KG of Marihuana;
• At least 6,000 KG but less than 18,000 KG of Hashish;
• At least 600 KG but less than 1,800 KG of Hashish Oil;
• At least 30,000,000 units but less than 90,000,000 units of Ketamine;
• At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;
• At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam;
• At least 30,000 KG but less than 90,000 KG of *Converted Drug Weight.*
(3) • At least 10 KG but less than 30 KG of Heroin; Level 34
• At least 50 KG but less than 150 KG of Cocaine;
• At least 2.8 KG but less than 8.4 KG of Cocaine Base;
• At least 10 KG but less than 30 KG of PCP, or
at least 1 KG but less than 3 KG of PCP (actual);
• At least 5 KG but less than 15 KG of Methamphetamine, or
at least 500 G but less than 1.5 KG of Methamphetamine (actual), or
at least 500 G but less than 1.5 KG of 'Ice';
• At least 5 KG but less than 15 KG of Amphetamine, or
at least 500 G but less than 1.5 KG of Amphetamine (actual);
• At least 100 G but less than 300 G of LSD;
• At least 4 KG but less than 12 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
• At least 1 KG but less than 3 KG of a Fentanyl Analogue;
• At least 10,000 KG but less than 30,000 KG of Marihuana;
• At least 2,000 KG but less than 6,000 KG of Hashish;
• At least 200 KG but less than 600 KG of Hashish Oil;
• At least 10,000,000 but less than 30,000,000 units of Ketamine;
• At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
• At least 625,000 but less than 1,875,000 units of Flunitrazepam;
• At least 10,000 KG but less than 30,000 KG of Converted Drug Weight.
(4) • At least 3 KG but less than 10 KG of Heroin; Level 32
• At least 15 KG but less than 50 KG of Cocaine;
• At least 840 G but less than 2.8 KG of Cocaine Base;
• At least 3 KG but less than 10 KG of PCP, or
at least 300 G but less than 1 KG of PCP (actual);
• At least 1.5 KG but less than 5 KG of Methamphetamine, or
at least 150 G but less than 500 G of Methamphetamine (actual), or
at least 150 G but less than 500 G of 'Ice';
• At least 1.5 KG but less than 5 KG of Amphetamine, or
at least 150 G but less than 500 G of Amphetamine (actual);
• At least 30 G but less than 100 G of LSD;
• At least 1.2 KG but less than 4 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
• At least 300 G but less than 1 KG of a Fentanyl Analogue;
• At least 3,000 KG but less than 10,000 KG of Marihuana;

• At least 600 KG but less than 2,000 KG of Hashish;
• At least 60 KG but less than 200 KG of Hashish Oil;
• At least 3,000,000 but less than 10,000,000 units of Ketamine;
• At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
• At least 187,500 but less than 625,000 units of Flunitrazepam;
• At least 3,000 KG but less than 10,000 KG of Converted Drug Weight.

(5) • At least 1 KG but less than 3 KG of Heroin; Level 30
• At least 5 KG but less than 15 KG of Cocaine;
• At least 280 G but less than 840 G of Cocaine Base;
• At least 1 KG but less than 3 KG of PCP, or
at least 100 G but less than 300 G of PCP (actual);
• At least 500 G but less than 1.5 KG of Methamphetamine, or
at least 50 G but less than 150 G of Methamphetamine (actual), or
at least 50 G but less than 150 G of 'Ice';
• At least 500 G but less than 1.5 KG of Amphetamine, or
at least 50 G but less than 150 G of Amphetamine (actual);
• At least 10 G but less than 30 G of LSD;
• At least 400 G but less than 1.2 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
• At least 100 G but less than 300 G of a Fentanyl Analogue;
• At least 1,000 KG but less than 3,000 KG of Marihuana;
• At least 200 KG but less than 600 KG of Hashish;
• At least 20 KG but less than 60 KG of Hashish Oil;
• At least 1,000,000 but less than 3,000,000 units of Ketamine;
• At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
• At least 62,500 but less than 187,500 units of Flunitrazepam;
• At least 1,000 KG but less than 3,000 KG of Converted Drug Weight.'';

by inserting the following new paragraph (1):

''(1) • 1 KG or more of Heroin; Level 30
• 5 KG or more of Cocaine;
• 280 G or more of Cocaine Base;
• 1 KG or more of PCP, or
100 G or more of PCP (actual);
• 500 G or more of Methamphetamine, or
50 G or more of Methamphetamine (actual), or
50 G or more of 'Ice';
• 500 G or more of Amphetamine, or
50 G or more of Amphetamine (actual);
• 10 G or more of LSD;
• 400 G or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);
• 100 G or more of a Fentanyl Analogue;
• 1,000 KG or more of Marihuana;
• 200 KG or more of Hashish;
• 20 KG or more of Hashish Oil;
• 1,000,000 units or more of Ketamine;
• 1,000,000 units or more of Schedule I or II Depressants;
• 62,500 units or more of Flunitrazepam;
• 1,000 KG or more of Converted Drug Weight.'';

and by redesignating paragraphs (6) through (17) as paragraphs (2) through (13), respectively.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 27(B) by striking ''level 38'' each place such term appears and inserting ''level 30''.]

Issues for Comment

1. Commission data reflects that the difference between the average guideline minimum and average sentence imposed varies depending on the base offense level, with the greatest difference occurring at the highest base offense levels. Subpart 1 sets forth three options for amending the Drug Quantity Table at subsection (c) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to set the highest base offense level at [34][32][30]. Should the Commission consider setting the highest base offense level at another level? If so, what is the appropriate highest base offense level for the Drug Quantity Table?

2. Subpart 1 of Part A of the proposed amendment would amend § 2D1.1 to reduce the highest base offense level in the Drug Quantity Table. The Commission seeks comment on whether it should instead consider reducing all base offense levels in the Drug Quantity Table. If so, to what extent? Should this reduction apply to all drug types and at all offense levels? Are there drug types for which the base offense levels should not be reduced or for which there should be a different base offense level reduction?

3. The mitigating role cap at § 2D1.1(a)(5) provides a decrease for base offense levels of 32 or greater when the mitigating role adjustment at § 3B1.2 applies. The mitigating role cap also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction (''minimal participant'') at § 3B1.2(a). Subpart 1 sets forth three options to decrease the highest base offense level of the Drug Quantity Table to level [34][32][30]. If the Commission adopts any of these options, it will require changes to the mitigating role cap at § 2D1.1(a)(5). The Commission seeks comment on how it should address the interaction between the options set forth in Subpart 1 and the mitigating role cap. Specifically, should the Commission retain some or all clauses in the mitigating role cap if it sets a highest base offense level at or below the current mitigating role cap? If so, what base offense levels should trigger the mitigating role cap? What is the appropriate decrease from those base offense levels?

4. Section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) includes two chemical quantity tables at subsections (d) and (e). Section 2D1.11 is generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in § 2D1.1 for offenses involving the same substance. If the Commission were to promulgate Option 1, 2, or 3 from Subpart 1, should the Commission amend the chemical quantity tables at § 2D1.11?

5. Subpart 1 of Part A of the Proposed Amendment sets forth three options to decrease the highest base offense level of the Drug Quantity Table from level 38 to level [34][32][30]. Part B of the proposed amendment would revise the Drug Quantity Table with respect to methamphetamine, which is the most common drug type in federal drug trafficking offenses. The Commission seeks comment on the interaction between these parts of the proposed amendment. If the Commission were to amend the Drug Quantity Table relating to methamphetamine, should that affect the Commission's consideration of a reduction of the highest base offense level in the Drug Quantity Table? If so, how?

Subpart 2 (New Trafficking Functions Adjustment)

Proposed Amendment

Section 2D1.1(a)(5) is amended by striking ''an adjustment under § 3B1.2 (Mitigating Role)'' and inserting ''a reduction under subsection (b)(17)'', and by striking ''the 4-level ('minimal participant') reduction in § 3B1.2(a)'' and inserting ''a reduction under subsection (b)(17)''.

Section 2D1.1(b) is amended—

in paragraph (5) by striking ''an adjustment under § 3B1.2 (Mitigating Role)'' and inserting ''a reduction under subsection (b)(17)'';

by redesignating paragraphs (17) and (18) as paragraphs (18) and (19), respectively;

by inserting the following new paragraph (17):

[Option 1 (Specifying functions that trigger reduction):

''(17) If—

(A) subsection (b)(2) does not apply;

[(B) the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;] and

(C) [the defendant's most serious conduct in the offense was limited to performing any of the following low-level trafficking functions][the defendant's primary function in the offense was performing any of the following low-level trafficking functions]—

(i) carried one or more controlled substances (regardless of the quantity of the controlled substance involved) on their person, vehicle, vessel, or aircraft for purposes of transporting the controlled substance, without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense;

(ii) performed any low-level function in the offense other than the selling of controlled substances (such as running errands, sending or receiving phone calls or messages, scouting, receiving packages, packaging controlled substances, acting as a lookout, storing controlled substances, or acting as a deckhand or crew member on a vessel or aircraft used to transport controlled substances), without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense; or

(iii) distributed retail or user-level quantities of controlled substances to end users [or similarly situated distributors] and [one or more of the following factors is][two or more of the following factors are] present: (I) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense; (II) the defendant was motivated primarily by a substance abuse disorder; (III) the defendant was engaged in the distribution of controlled substances infrequently or for brief duration; (IV) the defendant received little or no compensation from the distribution of the controlled substance involved in the offense; [or (V) the defendant had limited knowledge of the distribution network and an additional factor similar to any of the factors described in subclauses (I) through (IV) is present];

decrease by [2][4][6] levels. This reduction shall apply regardless of whether the defendant acted alone or in concert with others.'';]

[Option 2 (Functions listed as examples):

''(17) If—

(A) subsection (b)(2) does not apply;

[(B) the defendant did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;] and

(C) [the defendant's most serious conduct in the offense was limited to performing a low-level trafficking function][the defendant's primary function in the offense was performing a low-level trafficking function]; decrease by [2][4][6] levels. This reduction shall apply regardless of whether the defendant acted alone or in concert with others.

Examples:

Functions that may qualify as low-level trafficking functions, depending on the scope and structure of the criminal activity, include where the defendant:

(A) carried one or more controlled substances (regardless of the quantity of the controlled substance involved) on their person, vehicle, vessel, or aircraft for purposes of transporting the controlled substance, without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense;

(B) performed any low-level function in the offense other than the selling of controlled substances (such as running errands, sending or receiving phone calls or messages, scouting, receiving packages, packaging controlled substances, acting as a lookout, storing controlled substances, or acting as a deckhand or crew member on a vessel or aircraft used to transport controlled substances), without holding an ownership interest in the controlled substance or claiming a significant share of profits from the offense; or

(C) distributed retail or user-level quantities of controlled substances to end users [or similarly situated distributors] and [one or more of the following factors is][two or more of the following factors are] present: (i) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense; (ii) the defendant was motivated primarily by a substance abuse disorder; (iii) the defendant was engaged in the distribution of controlled substances infrequently or for brief duration; (iv) the defendant received little or no compensation from the distribution of the controlled substance involved in the offense; [or (v) the defendant had limited knowledge of the distribution network and an additional factor similar to any of the factors described in clauses (i) through (iv) is present].'';]

and in paragraph (18) (as so redesignated) by striking ''the 4-level ('minimal participant') reduction in § 3B1.2(a)'' and inserting ''a reduction under subsection (b)(17)''.

Section 2D1.1(e) is amended—

in the heading by striking ''Instruction'' and inserting ''Instructions'';

and by inserting at the end the following new paragraph (2):

''(2) If the defendant's offense level is determined under this guideline, do not apply § 3B1.2 (Mitigating Role).''.

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

by redesignating Notes 21 through 27 as Notes 22 through 28, respectively;

by inserting the following new Note 21:

''21. *Application of Subsection (b)(17).*—

(A) A defendant who is accountable under § 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a low-level trafficking function may receive an adjustment under subsection (b)(17). For example, a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs, and who is accountable under § 1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under subsection (b)(17).

(B) If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by the defendant's actual criminal conduct, a reduction under subsection (b)(17) ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense.'';

and in Note 22 (as so redesignated) by striking ''(b)(18)'' both places it appears and inserting ''(b)(19)''.

The Commentary to § 2D1.1 captioned ''Background'' is amended by striking ''(b)(17)'' and inserting ''(b)(18)''.

Section 2D1.14(a)(1) is amended by striking ''(b)(18)'' and inserting ''(b)(19)''.

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

in Note 3(A) by striking the following:

''A defendant who is accountable under § 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs and who is accountable under § 1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline.

Likewise, a defendant who is accountable under § 1B1.3 for a loss amount under § 2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.'',

and inserting the following:

''A defendant who is accountable under § 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline. For example, a defendant who is accountable under § 1B1.3 for a loss amount under § 2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.'';

and in Note 6 by striking the following:

''*Application of Role Adjustment in Certain Drug Cases.*—In a case in which the court applied § 2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in § 2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.'',

and inserting the following:

''*Non-Applicability of Role Adjustment to Cases Where Offense Level is Determined under § 2D1.1.*—In accordance with subsection (e)(2) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), § 3B1.2 does not apply to a defendant whose offense level is determined under § 2D1.1.''.

Issues for Comment

1. Subpart 2 of Part A of the proposed amendment would add a new specific offense characteristic at subsection (b) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) relating to low-level trafficking functions in drug offenses. The Commission has proposed that this specific offense characteristic decrease the offense levels by [2][4][6] levels. Should the adjustment be greater or lesser? Should the reduction be the same for all low-level trafficking functions?

2. The Commission seeks comment on whether the new specific offense characteristic at § 2D1.1(b)(17) properly captures low-level trafficking functions. Are there other factors that this provision should capture? Are there factors included in the proposed amendment that should not be included?

3. One of the low-level trafficking functions listed in proposed § 2D1.1(b)(17) is the distribution of retail or user-level quantities of controlled substances when certain mitigating circumstances are present. The Commission seeks comment on whether the distribution of retail or user-level quantities of controlled substances, when certain mitigating circumstances are present, merits a reduction. If so, what mitigating circumstances should the Commission provide?

4. Section 2D1.1(a)(5) provides an additional decrease to the base offense level based on the application of the mitigating role adjustment at § 3B1.2 (Mitigating Role). How should the Commission amend § 2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?

5. Section 2D1.1(a)(5) also sets forth a maximum base offense level of 32 based on the application of the 4-level reduction (''minimal participant'') at § 3B1.2(a). How should the Commission amend § 2D1.1(a)(5) to account for the new low-level trafficking functions adjustment?

6. Subpart 2 of Part A of the proposed amendment includes a special instruction providing that § 3B1.2 (Mitigating Role) does not apply to cases where the defendant's offense level is determined under § 2D1.1. The Commission seeks comment on whether this special instruction is appropriate.

7. Some guidelines provide an instruction to use the offense level from another Chapter Two offense guideline, which generally refers to the entire offense guideline (*i.e.,* the base offense level, specific offense characteristics, cross references, and special instructions). This can result in a case in which the defendant is sentenced under a guideline other than § 2D1.1 but the offense level is determined under § 2D1.1. In such a case, the defendant could qualify for both a low-level trafficking functions adjustment under § 2D1.1 and a role adjustment under Chapter Three, Part B. The Commission seeks comment on how it should address this issue.

8. Subpart 2 of Part A of the proposed amendment would add Commentary to § 2D1.1 that closely tracks certain provisions currently contained in Application Note 3 of the Commentary to § 3B1.2. The proposed Commentary would provide that a low-level trafficking functions reduction applies even when the defendant's relevant conduct is limited to conduct in which the defendant was personally involved. Additionally, the proposed Commentary would state that a reduction ordinarily is not warranted when the defendant received a lower offense level by virtue of being convicted of a significantly less serious offense than warranted by the defendant's actual criminal conduct. The Commission seeks comment on whether including this guidance in the Commentary to § 2D1.1 is appropriate. Is the guidance provided in these provisions applicable in the context of the new low-level trafficking functions adjustment at § 2D1.1? If appropriate, should the Commission alternatively consider incorporating the prohibition and guidance by reference to the Commentary to § 3B1.2?

(B) Methamphetamine

Synopsis of Proposed Amendment: Part B of the proposed amendment contains two subparts (Subpart 1 and Subpart 2). The Commission is considering whether to promulgate one or both of these subparts, as they are not mutually exclusive.

Subpart 1 addresses offenses involving ''Ice'' under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

Subpart 2 addresses the purity distinction in § 2D1.1 between

methamphetamine in ''actual'' form and methamphetamine as part of a mixture.

Methamphetamine in General

The statutory provisions and penalties associated with the trafficking of methamphetamine are found at 21 U.S.C. 841 and 960. While the statutory penalties for most drug types are based solely on drug quantity, the statutory penalties for methamphetamine are also based on the purity of the substance involved in the offense. Sections 841 and 960 contain quantity threshold triggers for five- and ten-year mandatory minimums for methamphetamine (actual) (*i.e.,* ''pure'' methamphetamine) and methamphetamine (mixture) (*i.e.,* ''a mixture or substance containing a detectable amount of methamphetamine''). *See* 21 U.S.C. 841(b)(1)(A)(viii), (B)(viii), 960(b)(1)(H), & 960(b)(2)(H). Two different 10-to-1 quantity ratios set the mandatory minimum penalties for methamphetamine trafficking offenses. First, the quantity of substance triggering the ten-year minimum is ten times the quantity triggering the five-year minimum. Second, the quantity of methamphetamine mixture triggering each mandatory minimum is set at ten times the quantity of methamphetamine actual triggering the same statutory minimum penalty.

Under § 2D1.1, the base offense level for offenses involving methamphetamine varies based on the purity of the substance. Specifically, the Drug Quantity Table at § 2D1.1(c) contains three different entries relating to methamphetamine: (1) ''Methamphetamine,'' which refers to the entire weight of a mixture or substance containing a detectable amount of methamphetamine; (2) ''Methamphetamine (actual),'' which refers to the weight of methamphetamine itself contained in a mixture or substance; and (3) ''Ice,'' which is defined as ''a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity'' (*see* USSG § 2D1.1(c) (Note C)). The Drug Quantity Table sets base offense levels for methamphetamine mixture and methamphetamine (actual) in a manner that reflects the 10:1 quantity ratio of the applicable statutory provisions, such that it takes ten times more methamphetamine mixture than methamphetamine (actual) to trigger the same base offense level.

Although ''Ice'' is included in the guidelines, the term ''Ice'' does not appear in the statutory provisions setting penalties for methamphetamine offenses. ''Ice'' was added to the guidelines in response to the 1990 Crime Control Act, which directed the Commission to amend the guidelines ''for offenses involving smokable crystal methamphetamine . . . so that convictions for [such offenses] will be assigned an offense level . . . two levels above that which would have been assigned to the same offense involving other forms of methamphetamine.'' *See* Public Law 101–67, 2701 (1990). The 1990 Crime Control Act did not, however, define ''smokable crystal methamphetamine,'' and the Commission and commenters struggled to determine its meaning. Ultimately, the Commission responded to the Act by adding ''Ice'' to the Drug Quantity Table—even though the 1990 Crime Control Act did not use that term—and developed a definition of ''Ice'' based on the type and purity of methamphetamine. *See* USSG App. C, amend. 370 (effective Nov. 1, 1991). The Commission set the base offense levels for quantities of ''Ice'' equal to the base offense levels for the same quantities of methamphetamine (actual).

Commission Data

Commission data shows that, since fiscal year 2002, the number of offenses involving methamphetamine mixture has remained relatively steady, but the number of offenses involving methamphetamine (actual) and ''Ice'' has risen substantially. Offenses involving methamphetamine (actual) increased 299 percent from 910 offenses in fiscal year 2002 to 3,634 offenses in fiscal year 2022. As a result, in fiscal year 2022, methamphetamine (actual) accounted for more than half (52.2%) of all methamphetamine cases. Offenses involving ''Ice'' also have risen during the past 20 years. In fiscal year 2002, there were 88 offenses involving ''Ice'' in the federal case load; that number rose by 881 percent to 863 offenses in fiscal year 2022. Offenses involving ''Ice'' now make up more than ten percent (12.4%) of all methamphetamine cases. Offenses involving methamphetamine mixture comprise roughly a third (35.4%) of all methamphetamine cases.

In addition, data published by the Commission in a recent report shows that methamphetamine today is highly and uniformly pure, with an average purity of 93.2 percent and a median purity of 98.0 percent. The methamphetamine tested in fiscal year 2022 was uniformly highly pure regardless of whether it was sentenced as methamphetamine mixture (91.0% pure on average), methamphetamine actual (92.6%), or ''Ice'' (97.6%). *See* U.S. Sent'g Comm'n, Methamphetamine Trafficking Offenses in the Federal Criminal Justice System 4 (June 2024) at *https://www.ussc.gov/research/research-reports/methamphetamine-trafficking-offenses-federal-criminal-justice-system.*

Feedback From Stakeholders

The Commission has received significant comment regarding § 2D1.1's methamphetamine purity distinction. Some commenters suggest that the Commission should revisit or eliminate the disparity in § 2D1.1's treatment of methamphetamine mixture, on the one hand, and methamphetamine (actual) and ''Ice,'' on the other. Most of these commenters state that purity is no longer an accurate measure of offense culpability because methamphetamine today is highly and uniformly pure and that ''Ice'' cases do not involve a higher level of purity than other forms of methamphetamine. Some of these commenters also point to disparities in testing practices across judicial districts, which, in turn, have yielded disparate sentences.

Subpart 1 (''Ice'')

Subpart 1 of Part B of the proposed amendment would amend the Drug Quantity Table at § 2D1.1(c) and the Drug Equivalency Tables at Application Note 8(D) of the Commentary to § 2D1.1 to delete all references to ''Ice.'' In addition, it brackets the possibility of adding a new specific offense characteristic at subsection (b)(19) that would provide a 2-level reduction if the offense involved methamphetamine in a non-smokable, non-crystalline form, which would continue to ensure that ''convictions for offenses involving smokable crystal methamphetamine will be assigned an offense level under the guidelines which is two levels above'' other forms of methamphetamine.

Issues for comment are also provided.

Subpart 2 (Methamphetamine Purity Distinction)

Subpart 2 of Part B of the proposed amendment would address the 10:1 quantity ratio for methamphetamine mixture and methamphetamine (actual) by deleting all references to ''methamphetamine (actual)'' from the Drug Quantity Table at § 2D1.1(c) and the Drug Conversion Tables at Application Note 8(D). The weight of methamphetamine in the tables would then be the entire weight of any mixture or substance containing a detectable amount of methamphetamine. Subpart 2 of Part B of the proposed amendment provides two options for setting the quantity thresholds applicable to methamphetamine.

Option 1 would set the quantity thresholds for methamphetamine at the current level for methamphetamine mixture.

Option 2 would set the quantity thresholds for methamphetamine at the current level of methamphetamine (actual).

Issues for comment are also provided.

Subpart 1 (''Ice'')

Proposed Amendment

[Section 2D1.1(b) is amended by inserting at the end the following new paragraph (19):

''(19) If the offense involved methamphetamine in a non-smokable, non-crystalline form, decrease by [2] levels.''.]

Section 2D1.1(c)(1) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''4.5 KG or more of 'Ice';''.

Section 2D1.1(c)(2) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''at least 1.5 KG but less than 4.5 KG of 'Ice';''.

Section 2D1.1(c)(3) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''at least 500 G but less than 1.5 KG of 'Ice';''.

Section 2D1.1(c)(4) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''at least 150 G but less than 500 G of 'Ice';''.

Section 2D1.1(c)(5) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''at least 50 G but less than 150 G of 'Ice';''.

Section 2D1.1(c)(6) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''at least 35 G but less than 50 G of 'Ice';''.

Section 2D1.1(c)(7) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''at least 20 G but less than 35 G of 'Ice';''.

Section 2D1.1(c)(8) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''at least 5 G but less than 20 G of 'Ice';''.

Section 2D1.1(c)(9) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''at least 4 G but less than 5 G of 'Ice';''.

Section 2D1.1(c)(10) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''at least 3 G but less than 4 G of 'Ice';''.

Section 2D1.1(c)(11) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''at least 2 G but less than 3 G of 'Ice';''.

Section 2D1.1(c)(12) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''at least 1 G but less than 2 G of 'Ice';''.

Section 2D1.1(c)(13) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''at least 500 MG but less than 1 G of 'Ice';''.

Section 2D1.1(c)(14) is amended in the line referenced to Methamphetamine (actual) by striking '', or'' and inserting a semicolon; and by striking the line referenced to ''Ice'' as follows: ''less than 500 MG of 'Ice';''.

The annotation to § 2D1.1(c) captioned ''Notes to Drug Quantity Table'' is amended—

in Note (B) by striking the following:

''The terms 'Hydrocodone (actual)' and 'Oxycodone (actual)' refer to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.'';

by striking Note (C) as follows:

''(C) 'Ice,' for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.'';

and by inserting the following new Note (C):

''(C) The terms 'Hydrocodone (actual)' and 'Oxycodone (actual)' refer to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 8(D), under the heading relating to Cocaine and Other Scheduled I and II Stimulants (and their immediate precursors), by striking the line referenced to ''Ice'' as follows:

''1 gm of 'Ice' = 20 kg''.

Issues for Comment:

1. Subpart 1 of Part B of the proposed amendment would amend the Drug Quantity Table at subsection (c) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and the Drug Conversion Tables at Application Note 8(D) of the Commentary to § 2D1.1 to delete all references to ''Ice.'' The Commission invites comment on whether deleting all references to ''Ice'' in § 2D1.1 is consistent with the 1990 congressional directive (Pub. L. 101–67, 2701 (1990)) and other provisions of federal law.

2. Subpart 1 of Part B of the proposed amendment brackets the possibility of adding a new specific offense characteristic at § 2D1.1(b)(19) that provides a 2-level reduction if the offense involved methamphetamine in a non-smokable, non-crystalline form. The Commission invites comment on whether deleting all references to ''Ice,'' while adding a new specific offense characteristic addressing methamphetamine in a non-smokable, non-crystalline form, is consistent with the 1990 congressional directive (Pub. L. 101–67, 2701 (1990)) and other provisions of federal law.

In addition, the Commission invites general comment on methamphetamine in a non-smokable, non-crystalline form, particularly on its pharmacological effects, potential for addiction and abuse, the patterns of abuse and harms associated with their abuse, and the patterns of trafficking and harms associated with its trafficking. How is non-smokable, non-crystalline methamphetamine manufactured, distributed, possessed, and used? What are the characteristics of the individuals involved in these various criminal activities? What harms are posed by these activities? How do these harms differ from those associated with other forms of methamphetamine?

Subpart 2 (Methamphetamine Purity Distinction)

Proposed Amendment

[Option 1 (Using methamphetamine mixture quantity thresholds):

Section 2D1.1(c)(1) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''4.5 KG or more of Methamphetamine (actual), or''.

Section 2D1.1(c)(2) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or''.

Section 2D1.1(c)(3) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''at least 500 G but less than 1.5 KG of Methamphetamine (actual), or''.

Section 2D1.1(c)(4) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''at least 150 G but less than 500 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(5) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''at least 50 G but less than 150 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(6) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''at least 35 G but less than 50 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(7) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''at least 20 G but less than 35 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(8) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''at least 5 G but less than 20 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(9) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''at least 4 G but less than 5 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(10) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''at least 3 G but less than 4 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(11) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''at least 2 G but less than 3 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(12) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''at least 1 G but less than 2 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(13) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''at least 500 MG but less than 1 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(14) is amended by striking the line referenced to Methamphetamine (actual) as follows: ''less than 500 MG of Methamphetamine (actual), or''.

The annotation to § 2D1.1(c) captioned ''Notes to Drug Quantity Table'' is amended in Note (B) by striking the following:

''The terms 'PCP (actual)', 'Amphetamine (actual)', and 'Methamphetamine (actual)' refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.'',

and inserting the following:

''The terms 'PCP (actual)' and 'Amphetamine (actual)' refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP or amphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual) or amphetamine (actual), whichever is greater.''.

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

in Note 8(D), under the heading relating to Cocaine and Other Scheduled I and II Stimulants (and their immediate precursors), by striking the line referenced to Methamphetamine (actual) as follows:

''1 gm of Methamphetamine (actual) = 20 kg'';

and in Note 27(C) by striking ''methamphetamine,''.]

[Option 2 (Using methamphetamine (actual) quantity thresholds):

Section 2D1.1(c)(1) is amended in the line referenced to Methamphetamine by striking ''45 KG'' and inserting ''4.5 KG''; and by striking the line referenced to Methamphetamine (actual) as follows: ''4.5 KG or more of Methamphetamine (actual), or''.

Section 2D1.1(c)(2) is amended in the line referenced to Methamphetamine by striking ''15 KG but less than 45 KG'' and inserting ''1.5 KG but less than 4.5 KG''; and by striking the line referenced to Methamphetamine (actual) as follows: ''at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or''.

Section 2D1.1(c)(3) is amended in the line referenced to Methamphetamine by striking ''5 KG but less than 15 KG'' and inserting ''500 G but less than 1.5 KG''; and by striking the line referenced to Methamphetamine (actual) as follows: ''at least 500 G but less than 1.5 KG of Methamphetamine (actual), or''.

Section 2D1.1(c)(4) is amended in the line referenced to Methamphetamine by striking ''1.5 KG but less than 5 KG'' and inserting ''150 G but less than 500 G''; and by striking the line referenced to Methamphetamine (actual) as follows: ''at least 150 G but less than 500 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(5) is amended in the line referenced to Methamphetamine by striking ''500 G but less than 1.5 KG'' and inserting ''50 G but less than 150 G''; and by striking the line referenced to Methamphetamine (actual) as follows: ''at least 50 G but less than 150 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(6) is amended in the line referenced to Methamphetamine by striking ''350 G but less than 500 G'' and inserting ''35 G but less than 50 G''; and by striking the line referenced to Methamphetamine (actual) as follows: ''at least 35 G but less than 50 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(7) is amended in the line referenced to Methamphetamine by striking ''200 G but less than 350 G'' and inserting ''20 G but less than 35 G''; and by striking the line referenced to Methamphetamine (actual) as follows: ''at least 20 G but less than 35 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(8) is amended in the line referenced to Methamphetamine by striking ''50 G but less than 200 G'' and inserting ''5 G but less than 20 G''; and by striking the line referenced to Methamphetamine (actual) as follows: ''at least 5 G but less than 20 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(9) is amended in the line referenced to Methamphetamine by striking ''40 G but less than 50 G'' and inserting ''4 G but less than 5 G''; and by striking the line referenced to Methamphetamine (actual) as follows: ''at least 4 G but less than 5 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(10) is amended in the line referenced to Methamphetamine by striking ''30 G but less than 40 G'' and inserting ''3 G but less than 4 G''; and by striking the line referenced to Methamphetamine (actual) as follows: ''at least 3 G but less than 4 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(11) is amended in the line referenced to Methamphetamine by striking ''20 G but less than 30 G'' and inserting ''2 G but less than 3 G''; and by striking the line referenced to Methamphetamine (actual) as follows: ''at least 2 G but less than 3 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(12) is amended in the line referenced to Methamphetamine by striking ''10 G but less than 20 G'' and inserting ''1 G but less than 2 G''; and by striking the line referenced to Methamphetamine (actual) as follows: ''at least 1 G but less than 2 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(13) is amended in the line referenced to Methamphetamine by striking ''5 G but

less than 10 G'' and inserting ''500 MG but less than 1 G''; and by striking the line referenced to Methamphetamine (actual) as follows: ''at least 500 MG but less than 1 G of Methamphetamine (actual), or''.

Section 2D1.1(c)(14) is amended in the line referenced to Methamphetamine by striking ''5 G'' and inserting ''500 MG''; and by striking the line referenced to Methamphetamine (actual) as follows: ''less than 500 MG of Methamphetamine (actual), or''.

The annotation to § 2D1.1(c) captioned ''Notes to Drug Quantity Table'' is amended in Note (B) by striking the following:

''The terms 'PCP (actual)', 'Amphetamine (actual)', and 'Methamphetamine (actual)' refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.'',

and inserting the following:

''The terms 'PCP (actual)' and 'Amphetamine (actual)' refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP or amphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual) or amphetamine (actual), whichever is greater.''.

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

in Note 8(D), under the heading relating to Cocaine and Other Scheduled I and II Stimulants (and their immediate precursors)—

in the line referenced to Methamphetamine by striking ''2 kg'' and inserting ''20 kg'';

and by striking the line referenced to Methamphetamine (actual) as follows:

''1 gm of Methamphetamine (actual) = 20 kg'';

and in Note 27(C) by striking ''methamphetamine,''.]

Issues for Comment:

1. The Commission seeks comment on how, if at all, the guidelines should be amended to address the 10:1 quantity ratio between methamphetamine mixture and methamphetamine (actual). Should the Commission adopt either of the above options or neither? Should the Commission equalize the treatment of methamphetamine mixture and methamphetamine (actual) but at some level other than the current quantity thresholds for methamphetamine mixture or methamphetamine (actual)? Should the Commission retain references to both methamphetamine mixture and methamphetamine (actual) and set a quantity ratio between these substances but at some level other than the current 10:1 ratio? If so, what ratio should the Commission establish, and what is the basis for such ratio?

2. Option 2 in Subpart 2 of Part B of the proposed amendment would amend § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to establish a 1:1 quantity ratio for methamphetamine (actual) and methamphetamine mixture by setting the quantity thresholds for all methamphetamine at the level of methamphetamine (actual). However, this change may result in an increased offense level for some cases involving methamphetamine (actual). For example, under the current § 2D1.1, 5 grams of a mixture or substance containing 80 percent methamphetamine is treated as 4 grams of methamphetamine (actual), which triggers a base offense level of 22. By contrast, under Option 2, 5 grams of a mixture or substance containing 80 percent methamphetamine would be treated as 5 grams of methamphetamine, which would trigger a base offense level of 24. Is this an appropriate outcome? Why or why not? If not, how should the Commission revise § 2D1.1 to avoid this outcome?

3. Section 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) includes a chemical quantity table specifically for ephedrine, pseudoephedrine, and phenylpropanolamine at subsection (d). The table ties the base offense levels for these chemicals to the base offense levels for methamphetamine (actual) set forth in § 2D1.1, assuming a 50 percent actual yield of the controlled substance from the chemicals.

As provided above, Option 1 in Subpart 2 of Part B of the proposed amendment would amend the Drug Quantity Table at § 2D1.1(c) and the Drug Equivalency Tables at Application Note 8(D) of the Commentary to § 2D1.1 to set the quantity thresholds for methamphetamine (actual) at the same level as methamphetamine mixture. If the Commission were to promulgate Option 1, should the Commission amend the table at § 2D1.11(d) and make conforming changes to the quantity thresholds? Should the Commission revise the quantity thresholds in § 2D1.11(d) in a different way? If so, what quantity thresholds should the Commission set and on what basis?

4. Subpart 2 of Part B of the proposed amendment addresses the quantity ratio between methamphetamine mixture and methamphetamine (actual) in § 2D1.1. In addition to comment on the methamphetamine purity distinction, the Commission has received comment suggesting that the Commission should reconsider the different treatment between cocaine (*i.e.,* ''powder cocaine'') and cocaine base (*i.e.,* ''crack cocaine'') in the Drug Quantity Table at § 2D1.1(c). Section 2D1.1 provides base offense levels for offenses involving powder cocaine and crack cocaine that reflect an 18:1 quantity ratio, which tracks the statutory penalty structure for those substances. *See* 21 U.S.C. 841(b)(1)(A) & (B); 960(b)(1) & (2). The Commission has examined this issue for many years and seeks comment on whether to take action in a future amendment cycle. If so, what action should the Commission take?

(C) Misrepresentation of Fentanyl and Fentanyl Analogues

Synopsis of Proposed Amendment: In 2018, the Commission amended § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to add a new specific offense characteristic at subsection (b)(13) providing a 4-level increase whenever the defendant knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl or a fentanyl analogue. *See* USSG, App. C. amend. 807 (effective Nov. 1, 2018). To address the increase in cases involving the distribution of fentanyl and fentanyl analogues and the seizure of fake prescription pills containing fentanyl, the Commission revised § 2D1.1(b)(13) in 2023 to add a new subparagraph (B) with an alternative 2-level enhancement for offenses where the defendant represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the

legitimately manufactured drug. *See* USSG, App. C. amend. 818 (effective Nov. 1, 2023). In doing so, the Commission cited data showing that, of the fake pills seized containing fentanyl, most contained a potentially lethal dose of the substance. *Id.*

The Commission has received some comment urging the Commission to revise § 2D1.1(b)(13) because courts rarely apply this enhancement. According to those commenters, the enhancement is vague and has led to disagreement on when it should be applied. Some commenters suggested that the Commission lower the *mens rea* requirement in § 2D1.1(b)(13) to solve the application issues with the enhancement and to address the dangerous nature of substances containing fentanyl or a fentanyl analogue.

Part C of the proposed amendment would revise the enhancement at § 2D1.1(b)(13) to address these concerns. Three options are provided.

Option 1 would set forth an offense-based enhancement with no *mens rea* requirement at § 2D1.1(b)(13). The revised enhancement would provide a [2][4]-level enhancement if the offense involved representing or marketing a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance.

Option 2 would set forth a defendant-based enhancement with a *mens rea* requirement at § 2D1.1(b)(13). The revised enhancement would provide for a [2][4]-level enhancement if the defendant represented or marketed a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, with two bracketed alternatives for the *mens rea* requirement. The first bracketed alternative would require that the defendant had knowledge or reason to believe that the mixture or substance contained fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue. The second bracketed alternative would require that the defendant acted with knowledge of or reckless disregard as to the actual content of the mixture or substance.

Option 3 would set forth a tiered alternative enhancement at § 2D1.1(b)(13). Subparagraph (A) would provide for a [4]-level increase if the defendant represented or marketed a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, with two bracketed alternatives for the *mens rea* requirement. The first bracketed alternative would require that the defendant had knowledge or reason to believe that the mixture or substance contained fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue. The second bracketed alternative would require that the defendant acted with knowledge of or reckless disregard as to the actual content of the mixture or substance. Subparagraph (B) would provide for a [2]-level increase if the offense otherwise involved representing or marketing a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance. Subparagraph (B) would not contain a *mens rea* requirement.

Issues for comment are also provided.

Proposed Amendment

Section 2D1.1(b)(13) is amended by striking the following:

''If the defendant (A) knowingly misrepresented or knowingly marketed as another substance a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, increase by 4 levels; or (B) represented or marketed as a legitimately manufactured drug another mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue, and acted with willful blindness or conscious avoidance of knowledge that such mixture or substance was not the legitimately manufactured drug, increase by 2 levels. The term 'drug,' as used in subsection (b)(13)(B), has the meaning given that term in 21 U.S.C. 321(g)(1).'';

and inserting the following:

[Option 1 (Offense-based enhancement with no mens rea requirement):

''If the offense involved representing or marketing a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, increase by [2][4] levels.''.]

[Option 2 (Defendant-based enhancement with mens rea requirement):

''If the defendant represented or marketed a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, [with knowledge or reason to believe that it contained fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue][with knowledge of or reckless disregard as to the actual content of the mixture or substance], increase by [2][4] levels.''.]

[Option 3 (Tiered alternative provision with a defendant-based enhancement with mens rea requirement and an offense-based enhancement with no mens rea requirement):

''If (A) the defendant represented or marketed a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, [with knowledge or reason to believe that it contained fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue][with knowledge of or reckless disregard as to the actual content of the mixture or substance], increase by [4] levels; or (B) the offense otherwise involved representing or marketing a mixture or substance containing fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide) or a fentanyl analogue as any other substance, increase by [2] levels.''.]

Issues for Comment:

1. Part C of the proposed amendment would amend subsection (b)(13) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to address some concerns relating to application issues with the enhancement. The Commission seeks comment on whether any of the three options set forth above is appropriate to address the concerns raised by commenters. If not, is there an alternative approach that the Commission should consider? Should the Commission provide a different *mens rea* requirement for § 2D1.1(b)(13)? If so, what *mens rea* requirement should the Commission provide?

2. The Commission enacted § 2D1.1(b)(13) to address cases where individuals purchasing a mixture or substance containing fentanyl or a fentanyl analogue may believe they are purchasing a different substance. The Commission invites general comment on whether the proposed revisions to § 2D1.1(b)(13) are appropriate to address this harm and the culpability of the defendants in these cases. Is the use of terms such as ''representing'' and

''marketing'' sufficient to achieve this purpose? If not, should the Commission use different terminology to appropriately reflect the criminal conduct in these cases? What terms should the Commission use? Should the Commission consider any other changes to § 2D1.1(b)(13) to address the harm in these cases?

(D) Machineguns

Synopsis of Proposed Amendment: Subsection (b)(1) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) provides a 2-level enhancement for cases in which a ''dangerous weapon (including a firearm)'' is possessed. Section 2D1.1(b)(1) does not distinguish between different types of dangerous weapons involved in the offense, which is different from some statutory enhancements. For example, greater statutory penalties are imposed for possession of a machinegun in furtherance of a drug trafficking crime than possession of other firearms. *See* 18 U.S.C. 924(c).

The Department of Justice has expressed concern that § 2D1.1(b)(1) fails to differentiate between machineguns and other weapons. The Department of Justice and other commenters have also noted the increased prevalence of machinegun conversion devices (''MCDs'') (*i.e.,* devices designed to convert weapons into fully automatic firearms), pointing out that weapons equipped with MCDs pose an increased danger because they can fire more quickly and are more difficult to control.

Part D of the proposed amendment would amend the enhancement at § 2D1.1(b)(1) for cases involving the possession of a weapon. It would create a tiered enhancement based on whether the weapon possessed was a machinegun (as defined in 26 U.S.C. 5845(b)) or some other dangerous weapon. Courts would be instructed to apply the greater of either a 4-level enhancement if a machinegun was possessed or a 2-level enhancement if a dangerous weapon was possessed.

An issue for comment is also provided.

Proposed Amendment

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

''If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.'';

and inserting the following:

''(Apply the greater):

(A) If a machinegun (as defined in 26 U.S.C. 5845(b)) was possessed, increase by [4] levels;

(B) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 11(B) by striking ''dangerous weapon'' and inserting ''weapon''.

Issue for Comment:

1. Subsection (b)(1) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applies if ''a dangerous weapon . . . was possessed'' as part of the offense and does not require that the defendant possessed the weapon. In addition, the Commentary to § 2D1.1 provides that the enhancement ''should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.'' *See* USSG § 2D1.1, comment. (n.11(A)). Therefore, § 2D1.1(b)(1) may apply more broadly than other weapons-related provisions elsewhere in the guidelines. The Commission seeks comment on whether the changes set forth in Part D of the proposed amendment are appropriate in light of these factors. Should the Commission consider additional changes to § 2D1.1(b)(1) to address these considerations? What changes, if any, should the Commission consider?

(E) Safety Valve

Synopsis of Proposed Amendment: Section 3553(f) of title 18, United States Code, allows a court to impose a sentence without regard to any statutory minimum penalty if it finds that a defendant meets certain criteria. The safety valve applies only to offenses under 21 U.S.C. 841, § 844, § 846, § 960, or § 963, or 46 U.S.C. 70503 or § 70506, and to defendants who, among other things, ''truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.'' *See* 18 U.S.C. 3553(f). When it first enacted the safety valve, Congress directed the Commission to promulgate or amend guidelines and policy statements to ''carry out the purposes of [section 3553(f)].'' *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, 80001(b). The Commission implemented the directive by incorporating the statutory text of section 3553(f) into the guidelines at § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

Section 5C1.2(a)(5) does not prescribe any particular manner by which a defendant must satisfy the requirement of providing truthful information and evidence to the Government. The Commission has heard concerns, however, that this requirement has been understood to require that the defendant meet directly with the Government. Due to safety concerns, defendants otherwise eligible for the safety valve may forego that benefit due to the requirement of an in-person meeting.

Part E of the proposed amendment would address these concerns by amending the Commentary to § 5C1.2 to add a provision stating that subsection (a)(5) does not specify how the defendant should provide such information and evidence to the Government. It would also provide that the specific manner by which the defendant has disclosed the information—whether by written disclosure or in-person meeting—should not preclude a determination by the court that the defendant has complied with the requirement of disclosing information about the offense, provided that the disclosure satisfies the requirements of completeness and truthfulness. It would state that the fact that the defendant provided the information as a written disclosure shall not by itself render the disclosure—if otherwise found complete and truthful—insufficient.

An issue for comment is also provided.

Proposed Amendment

The Commentary to § 5C1.2 captioned ''Application Notes'' is amended in Note 4 by striking the following:

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

and inserting the following:

''*Application of Subsection (a)(5).*—

(A) *Disclosure of Information by the Defendant.*—Under subsection (a)(5), the defendant is required, not later than the time of the sentencing hearing, to truthfully provide to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. Subsection (a)(5) does not specify how the defendant should provide such information and evidence to the Government. The specific manner by which the defendant has disclosed the information—whether by written disclosure or in-person meeting—

should not preclude a determination by the court that the defendant has complied with this requirement, provided that the disclosure satisfies the requirements of completeness and truthfulness. The fact that the defendant provided the information as a written disclosure shall not by itself render the disclosure—if otherwise found complete and truthful—insufficient.

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

Issue for Comment:

1. The Commission seeks comment on whether the changes set forth in Part E of the proposed amendment are appropriate to address the concerns raised by commenters. If not, is there an alternative approach that the Commission should consider?

[FR Doc. 2025–02129 Filed 2–3–25; 8:45 am]

BILLING CODE 2210–40–P