



U.S. Department of Justice

Criminal Division

Office of Policy and Legislation

Washington, D.C. 20530

July 31, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

The Sentencing Reform Act of 1984 requires the Criminal Division of the Department of Justice to submit to the Commission, at least annually, a report commenting on the operation of the Sentencing Guidelines, suggesting changes to the Guidelines, and otherwise assessing the Commission's work.¹ We are pleased to submit this report pursuant to the Act. This report also responds to the Commission's Notice of Proposed Priorities ("Priorities") published last month in the Federal Register.²

I. Structural Review of Federal Sentencing

The Department of Justice fully supports the Commission's decision to undertake a multi-year evaluation of whether "current sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in the Sentencing Reform Act."³ Last year in our annual report to the Commission, we highlighted the President's commitment to "rethinking the existing criminal justice system – whom we send to prison and for how long; how people are treated while incarcerated; how prepared they are to reenter society once they have served their time; and the racial inequities that lead to the disproportionate number of incarcerated Black and Brown people."⁴ We agree with the Commission that now is the time to examine federal sentencing as a system; to look at the fundamental architecture of federal

¹ 28 U.S.C. § 994(o).

² U.S. SENT'G COMM'N, Notice of proposed 2023-2024 priorities and request for comment, 88 Fed. Reg. 39907 (June 20, 2023), <https://www.federalregister.gov/documents/2023/06/20/2023-12991/proposed-priorities-for-amendment-cycle>.

³ *Id.*

⁴ Proclamation No. 10171, 86 Fed. Reg. 17689 (Apr. 6, 2021), <https://www.federalregister.gov/documents/2021/04/06/2021-07179/second-chance-month-2021>.

sentencing and the federal Sentencing Guidelines; and to recommend a path forward for federal sentencing for the next twenty-five years or more.

The Commission has itself recognized the disconnect between the legal landscape created by the Supreme Court’s Sixth Amendment jurisprudence and the structure of the Guidelines, which was crafted in a different legal context based on different assumptions.⁵ The complexity of the current guidelines system – with its numerous aggravating and mitigating factors requiring multifaceted legal and factual determinations – reflects a pre-*Booker* framework that now leads to unnecessary inefficiencies and gross disparities. The rigid structure of the Guidelines is ill-suited to the holistic analysis required by 18 U.S.C. § 3553(a). It leads to extensive litigation at both the district and appellate court levels, often of marginal value in light of the § 3553 analysis to come. And the Commission’s own data has shown that the current sentencing structure has led to significant disparities, with some judges adhering closely to the Guidelines while others deviate from them considerably.

Comprehensive reform will be a lengthy process and require extensive engagement with all federal criminal justice stakeholders. Nonetheless, we believe that this work is long overdue. Piecemeal reform has not adequately addressed the challenges facing federal sentencing. Structural reform – including simplification – is essential to achieving equal justice under law, improving public safety, and restoring public trust.

We look forward to the work ahead and the extensive engagement it will entail.

a. The Categorical Approach and the Career Offender Guideline

We believe a comprehensive examination of the Guidelines will ultimately lead to better sentencing policy and also offer solutions to many of the difficult issues that the Commission has long heard about from stakeholders. One of those issues is the categorical approach to determining what constitutes a crime of violence and a controlled substance offense under the Guidelines. We join the chorus of judges, probation officers, and practitioners who urge the Commission to reform the categorical approach and career offender guideline.

This Commission began considering this issue during the last amendment cycle, but it ultimately deferred action. While the Commission has received several different reform proposals, there is general agreement on the goals underlying reform: eliminate the unwarranted sentencing disparities resulting from application of the categorical approach and better identify repeat offenders who pose a significant threat to public safety. The application of the categorical approach to the Guidelines’ “crime of violence” and “controlled substance offense” definitions has resulted in extensive litigation and produced unwarranted disparities and nonsensical sentencing results. Changing the crime of violence definition could substantially reduce these disparities, permit sentencing courts to appropriately exercise their discretion in assessing the offense conduct underlying a prior conviction, provide appropriately enhanced penalties for

⁵ See U.S. SENT’G COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2012), <https://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing>.

violent and dangerous offenders, and dramatically reduce the litigation burden. We remain eager to work with the Commission on these issues.⁶

As the Department explained during the last amendment cycle, we also recognize the legitimate concerns about the severity levels associated with many recidivist provisions, including the career offender guideline.⁷ Indeed, the Attorney General has encouraged prosecutors to recommend variances in certain career offender cases, acknowledging the increasing rate of below-guideline sentences in these cases. We hope as part of its review, the Commission will update its research on the career offender guideline and ultimately consider proposing legislation that will allow the Commission greater flexibility in setting penalties for repeat offenders under the Guidelines.

b. The Validity of Guideline Commentary

Another structural issue ripe for review is the validity of guideline commentary. As the Commission is well aware, recent appellate decisions have called into question the authoritativeness of guideline commentary, provisions that serve a critical role in interpreting and explaining individual guidelines. Under this evolving line of case law, guideline commentary is left in a precarious position.⁸ For example, courts have recently split as to whether the loss calculation under §2B1.1 includes intended loss.⁹ Because commentary pervades the Guidelines, some have noted that “the current structure of the entire Manual itself is called into question” by these decisions.¹⁰ The Supreme Court has repeatedly denied *certiorari* in cases presenting this issue, making Commission action imperative. We support a legislative proposal to protect and preserve the validity of the commentary as well as other steps the Commission could take to address this problem, such as moving commentary into the guideline text.

c. Acquitted conduct

During the previous amendment year, the Commission proposed amendments addressing the treatment of acquitted conduct, but ultimately deferred action on the issue.¹¹ The Supreme Court recently denied several petitions for writs of *certiorari* challenging the constitutionality of using acquitted conduct at sentencing under the Fifth and Sixth Amendments. Several justices

⁶ Letter from Kenneth Polite, Jr., Assistant Attorney General, Criminal Division, U.S. Dep’t of Justice, and Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Dep’t of Justice, to the U.S. Sent’g Comm’n on the Dep’t of Justice’s Priorities for the 2022 Amendment Cycle (Sep. 12, 2022), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/doj.pdf>.

⁷ Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Dep’t of Justice, to the Honorable Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (Feb. 27, 2023).

⁸ *United States v. Riccardi*, 989 F.3d 476, 484-85 (6th Cir. 2021) (describing the complexities involved in citing guideline commentary).

⁹ Compare, e.g., *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022) (holding that the loss enhancement in the guideline’s commentary impermissibly expands the word “loss” to include both intended and actual loss), with *United States v. You*, No. 22-5442, 2023 WL 4446497 (6th Cir. July 11, 2023) (holding that “loss” in §2B1.1 includes “intended loss” as defined by the guidelines commentary).

¹⁰ Memorandum from the Honorable Charles R. Breyer, Acting Chair, U.S. Sent’g Comm’n (Mar. 12, 2021).

¹¹ See *U.S. Sent’g Comm’n Public Meeting on April 5, 2023*, at 22-23; U.S. Sent’g Comm’n, Proposed Amendments to the Sentencing Guidelines (Feb. 2, 2023).

wrote or joined statements respecting the denial of *certiorari* and indicated that the Court was deferring to the Commission to consider acquitted conduct in the first instance.¹²

The Department appreciates the Commission’s continued interest and careful consideration of this issue. As explained during the last amendment cycle, the Department’s position is that acquitted conduct generally cannot practically be distinguished from the definition of relevant conduct.¹³ Likewise, any change should not unduly restrict judicial factfinding, create unnecessary confusion and litigation burdening the courts, or result in sentences that fail to account for the full range of a defendant’s conduct.¹⁴ We therefore believe the most appropriate path forward is through broader reform and simplification of the Guidelines’ architecture, which could address many of the concerns raised by the Commission and litigants regarding the treatment of acquitted conduct and relevant conduct.

d. Alternatives-to-Incarceration and Diversion Programs

We share the Commission’s goals of promoting court-sponsored diversion and alternatives-to-incarceration programs. As reflected in Department policy, as well as the extensive financial and technical resources the Department provides to state and local governments, the Department strongly supports the use of alternatives-to-incarceration programs, pretrial diversion programs, and problem-solving courts, in appropriate cases.¹⁵

As the Commission examines the structure of federal sentencing and the Guidelines, we encourage it to consider how these programs could be incorporated into the Guidelines’

¹² *McClinton v. United States*, 600 U. S. ____ (2023) (Sotomayor, J., statement respecting denial of *certiorari*) (“The Sentencing Commission, which is responsible for the Sentencing Guidelines, has announced that it will resolve questions around acquitted conduct sentencing in the coming year. If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented.”); *id.* (Kavanaugh, J., statement respecting denial of *certiorari*) (“The use of acquitted conduct to alter a defendant’s Sentencing Guidelines range raises important questions. But the Sentencing Commission is currently considering the issue. It is appropriate for this Court to wait for the Sentencing Commission’s determination before the Court decides whether to grant *certiorari* in a case involving the use of acquitted conduct.”); *id.* (Alito, J., statement respecting denial of *certiorari*) (“no one should misinterpret my colleagues’ statements as an effort to persuade the Sentencing Commission to alter its longstanding decision that acquitted conduct may be taken into account at sentencing” because even “if the Commission eventually decides on policy grounds that such conduct should not be considered in federal sentencing proceedings, that decision will not affect state courts”).

¹³ Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Dep’t of Justice, to the Honorable Carlton W. Reeves, Chair, U.S. Sent’g Comm’n (Feb. 15, 2023), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ3.pdf>.

¹⁴ *Id.*

¹⁵ In his December 16, 2022, memorandum regarding charging, pleas, and sentencing, the Attorney General stated that every U.S. Attorney’s Office “should develop an appropriate pretrial diversion policy.” Memorandum for All Federal Prosecutors from Merrick Garland, Attorney General, Regarding Additional Department Policies Regarding Charges, Pleas, and Sentencing in Drug Cases (Dec. 16, 2022), <https://www.justice.gov/media/1265321/dl?inline>. On February 10, 2023, the Department updated the Justice Manual to reflect that pretrial diversion programs “provide prosecutors with another tool – in addition to the traditional criminal justice process – to ensure accountability for criminal conduct, protect the public by reducing rates of recidivism, conserve prosecutive and judicial resources, and provide opportunities for treatment, rehabilitation, and community correction.” The Justice Manual now reflects that “[e]ach U.S. Attorney’s Office shall develop and implement a policy on the use of pretrial diversion appropriate for the Office’s district.” U.S. DEP’T OF JUST., JUST. MANUAL § 9-22.010 (2018).

structure. These programs, when crafted well, help foster trust and legitimacy with the communities we serve, reduce government costs, and produce just outcomes for victims and offenders. More research is needed, however, to identify the elements that lead to success of these programs at the federal level as well as how the programs should interact with the Guidelines. We believe the Commission has an important role to play in assessing programs, convening stakeholders to develop and discuss best practices, and providing guidance to courts on best practices and opportunities for more comprehensive deployment of these programs.

e. BOP Practices

The Commission has expressed an interest in “assessing the degree to which certain practices of the Bureau of Prisons (“BOP”) are effective in meeting the purposes of sentencing as set forth in 18 U.S.C. § 3553(a).”¹⁶ The Department is committed to supporting BOP as it pursues its dual mission to “foster a humane and secure environment” and “to ensure public safety by preparing individuals for successful reentry” into the community.¹⁷ We look forward to continuing the dialogue with the Commission about BOP’s operations and practices.

The Department and BOP take seriously their responsibility to ensure that adults in custody return to their communities fully prepared to be good neighbors. Since assuming her post last August, BOP Director Colette Peters has focused on reinvigorating the Bureau’s mission and values. This includes through full implementation of the First Step Act, which plays a key role in promoting successful reentry for adults in custody. The Department recently published its comprehensive annual report on its progress in implementing the First Step Act, including its work to maximize the availability of time credits; enhance the use of home confinement and prerelease custody; increase capacity and participation in evidence-based programming to reduce recidivism; expand mental health and substance use treatment programs; and enhance reentry programs and practices.¹⁸

The Department is also deeply concerned by instances where BOP has failed to live up its mission, including egregious instances of abuse perpetrated by BOP personnel. As the Deputy Attorney General recently explained, it is “a top priority at the highest levels of the Department” to root out and prevent abuse of those in its custody.¹⁹ Last year, the Deputy Attorney General asked officials and experts from across the Department to form an Advisory Group to address this issue. The group identified more than 50 recommendations to enhance the prevention, reporting, investigation, prosecution, and discipline of these crimes, and the Deputy Attorney General directed the immediate implementation of each recommendation. Over the summer, the Department has sent Sexual Abuse Facility Enhancement and Review (“SAFER”) teams to visit women’s facilities in each of BOP’s six regions and engage with leadership, staff, and women in

¹⁶ *Supra* note 2.

¹⁷ *Agency Pillars*, Bureau of Prisons (last visited June 7, 2023), https://www.bop.gov/about/agency/agency_pillars.jsp.

¹⁸ The full report is available here: <https://www.ojp.gov/first-step-act-annual-report-april-2023>.

¹⁹ Lisa O. Monaco, Deputy Attorney General, U.S. Dep’t of Justice, Remarks at Bureau of Prisons Warden Training (Apr. 25, 2023), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-bop-warden-training>.

custody at those facilities.²⁰ These teams are focused on ensuring safer environments for all in the BOP's custody and care. Likewise, as the Department represented before this Commission last amendment cycle, in appropriate cases, it will support a sentence reduction for an individual who suffered sexual assault, or physical abuse resulting in serious bodily injury, committed by a correctional officer or other employee of the BOP while in custody. Indeed, just last week, the BOP Director moved for compassionate release for the victim of a sexual assault that was committed by a BOP employee as established by a conviction in a criminal case.

The Department and BOP also welcome proper oversight of BOP operations. The Inspector General plays an essential role in overseeing BOP, and between January 1, 2021, and July 1, 2023, the Office of the Inspector General ("OIG") has released more than 40 unique reports that address BOP.²¹ OIG has also received funding to hire 16 new employees to support a BOP interdisciplinary team that will help identify, assess, and track significant risks in BOP programs and operations. In addition to increasing OIG's investigative capacity, these new personnel will allow OIG to increase its oversight work, including audits, evaluations, and inspections. Indeed, OIG has recently established a proactive, unannounced BOP inspection program informed by ongoing investigations, audits, risk assessments, and other related work. Likewise, the Department is working with Congress to identify problems and solutions. Since January 2021, the U.S. Government Accountability Office (GAO) has published 19 reports addressing BOP.²² In the last two years, Congress has held four hearings on conditions at BOP, and in the last year, Director Peters has testified twice before Congress and is scheduled to testify a third time this fall.

We look forward to sharing more about our ongoing efforts with the Commission in the coming months.

II. Critical Public Safety Issues

The Department strongly urges the Commission to address two critical issues of national public safety: the epidemics of fentanyl²³ poisoning²⁴ and firearms violence. While we understand the Commission's decision to limit its consideration of amendments this cycle, these pressing matters of public safety continue to demand the Commission's urgent attention. We

²⁰ Press Release, U.S. Dep't of Justice, Office of Public Affairs, Readout of the First SAFER Team Visit to FCI Tallahassee (June 12, 2023), <https://www.justice.gov/opa/pr/readout-first-safer-team-visit-fci-tallahassee>.

²¹ U.S. Dep't of Justice, Office of the Inspector General, Reports, https://oig.justice.gov/reports?keys=&field_publication_date_value=2021-01-01&field_publication_date_value_1=2023-07-01&field_doj_component_target_id=141&field_report_type_target_id=All&field_location_country_code=All&sort_by=field_publication_date_value&sort_order=DESC&items_per_page=25 (last visited July 28, 2023).

²² U.S. Government Accountability Office, Reports & Testimonies, https://www.gao.gov/reports-testimonies?f%5B0%5D=by_agency_name%3ABureau%20of%20Prisons&f%5B1%5D=date%3Astart%2B2021-01-01%2Bend%2B2023-07-01 (last visited July 28, 2023).

²³ For purposes of this letter, all references to fentanyl include fentanyl, fentanyl analogues, and fentanyl related substances.

²⁴ Centers for Disease Control and Prevention, *Provisional Data Shows U.S. Drug Overdose Deaths Top 100,000 in 2022*, NATIONAL CENTER FOR HEALTH STATISTICS BLOG (May 18, 2023), <https://blogs.cdc.gov/nchs/2023/05/18/7365/#:~:text=Findings%3A,2022%2C%20from%20107%2C573%20to%20105%2C452>.

thank the Commission for the initial steps it took last amendment cycle to address these issues, but substantial work remains. Anomalies in the guidelines governing fentanyl and firearms offenses create significant and unwarranted sentencing disparities. While we appreciate that sentencing policy alone cannot solve these issues, the Commission has a critical role to play, as each lie at the core of federal sentencing policy and practice. Because they can be addressed with discrete amendments to the Guidelines, the Commission should identify each as priorities this amendment year.

a. The Fentanyl Epidemic

Fentanyl has transformed drug use and abuse across the country, leading to death and other harm at extraordinary scale. Fentanyl is cheap to make, easy to disguise, and all too often, deadly to those who take it. According to the Centers for Disease Control and Prevention, the United States experienced more than 105,000 deaths from drug poisonings during 2022.²⁵ More than three-fourths of these deaths were from synthetic opioids – primarily fentanyl – with the number of deaths attributed to fentanyl continuing to increase from previous years.²⁶ Fueling the problem is the ease with which fentanyl can be produced, bought, and sold, as cartels use the dark web to operate with increased anonymity²⁷ and turn to social media²⁸ to market “to unsuspecting children, young adults, and members of the public who think they are getting legitimate prescription drugs” but are actually purchasing potentially fatal doses of fentanyl.²⁹ Fentanyl is the leading cause of death for Americans between the ages of 18 to 45.³⁰ Further exacerbating the fentanyl epidemic is the increasing prevalence of xylazine, which potentially renders lifesaving medications, like naloxone, less effective in treating overdoses.³¹ We urge the Commission to combat this public safety threat and consider the following proposals.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Press Release, Drug Enforcement Administration, Fentanyl distributor who used the dark web and crypto currency sentenced to 30 years in federal prison (Oct. 3, 2019), <https://www.dea.gov/press-releases/2019/10/03/fentanyl-distributor-who-used-dark-web-and-crypto-currency-sentenced-30>.

²⁸ Press Release, Drug Enforcement Administration, Drug Enforcement Administration announces seizure of over 379 million deadly doses of fentanyl in 2022 (Dec. 20, 2022), <https://www.dea.gov/press-releases/2022/12/20/drug-enforcement-administration-announces-seizure-over-379-million-deadly>; Glenn Kessler, *DEA said it seized enough fentanyl to kill us all. The claim adds up*, WASH. POST, Jan. 20, 2023,

<https://www.washingtonpost.com/politics/2023/01/20/dea-said-it-seized-enough-fentanyl-kill-us-all-claim-adds-up/>.

²⁹ Press Release, Drug Enforcement Administration, Fentanyl Deaths Climbing, DEA Washington Continues the Fight (Feb. 16, 2022), <https://www.dea.gov/stories/2022/2022-02/2022-02-16/fentanyl-deaths-climbing-dea-washington-continues-fight>.

³⁰ Centers for Disease Control and Prevention, National Center for Health Statistics, *U.S. Overdose Deaths In 2021 Increased Half as Much as in 2020 – But Are Still Up 15%*, https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm (Synthetic opioids caused 71,238 deaths in 2021, up from 57,834 the year before.); Center for Disease Control and Prevention, “Data Analysis & Resources” (last reviewed June 1, 2022), <https://www.cdc.gov/opioids/data/analysis-resources.html>. Fentanyl appears to be the leading cause of death amongst 18- to 45-year-olds in 2019 and 2020, but not among all America adults. See Nusaiba Mizan, *Fact-check: Is fentanyl the leading cause of death among American adults?*, EL PASO TIMES (Feb. 2, 2023), <https://www.elpasotimes.com/story/news/2023/02/02/fentanyl-overdose-cause-of-death-among-adults-greg-abbott/69867350007/>.

³¹ DRUG ENFORCEMENT ADMINISTRATION JOINT INTELLIGENCE REPORT, THE GROWING THREAT OF XYLAZINE AND ITS MIXTURE WITH ILLICIT DRUGS (Oct. 2022) at 2-4, <https://www.dea.gov/sites/default/files/2022-12/The%20Growing%20Threat%20of%20Xylazine%20and%20its%20Mixture%20with%20Illicit%20Drugs.pdf>.

i. Distributing Drugs to Minors and Using Direct Communication via Online Platforms or the Dark Web

The Centers for Disease Control reported a surge in overdose deaths in individuals under the age of 21: between 2019 and 2020, overdose deaths among those 14 to 18 years old increased 94%; between the second half of 2019 and the same period in 2021, the median monthly overdose deaths among those 10 to 19 years old increased 109%, with approximately 90% of those deaths involving opioids.³² The widespread availability of illicit fentanyl, the proliferation of fake pills resembling prescription drugs but containing fentanyl or other unlawful controlled substances, and the ease of purchasing pills through social media have increased the fatal overdose risk among adolescents.³³ Compounding the problem is traffickers' use of social media and anonymizing technologies to directly connect with and sell dangerous fentanyl to children and young adults.

We recommend two amendments to combat this problem. First, we recommend that the Commission provide an enhancement applicable to all distributions of controlled substances to children and young adults under 21. Second, we also recommend that the Commission expand application of the existing enhancements in §2D1.1(b)(7) to apply to drug traffickers who use direct private communications associated with interactive computer services and to provide further enhancements for those who use anonymizing technologies to avoid detection. The existing mass-marketing enhancement does not cover distribution through direct electronic communication or the use of anonymizing technologies that evade detection,³⁴ and we urge the Commission to close these gaps.

ii. Distributing Fentanyl Mixed with Xylazine

Fentanyl alone can be lethal, but fentanyl mixed with xylazine is appreciably deadlier. Xylazine is a non-opiate sedative, analgesic, and muscle relaxant that is not currently controlled under federal law and is only authorized for veterinary use in the United States. The Drug Enforcement Administration ("DEA") reports that the "detection of xylazine in drug mixtures – particularly in combination with fentanyl – is increasing across the country."³⁵ Compounding the problem, xylazine can render lifesaving medications, like naloxone, less effective in treating

³² Centers for Disease Control and Prevention, *Drug Overdose Deaths Among Persons Aged 10–19 Years — United States, July 2019–December 2021*, 71(50);1576–1582 (Dec. 16, 2022), <https://www.cdc.gov/mmwr/volumes/71/wr/mm7150a2.htm>

³³ Friedman J, Godvin M, et.al., *Trends in drug overdose deaths among US adolescents*, January 2010 to June 2021. JAMA 2022;327:1398–400; O'Donnell J, Tanz LJ, Gladden RM, Davis NL, Bitting J. *Trends in and characteristics of drug overdose deaths involving illicitly manufactured fentanyls—United States, 2019–2020*. MMWR Morb Mortal Wkly Rep 2021;70:1740–6.

³⁴ USSG §2D1.1, comment. (n.13). *See, e.g., United States v. Victoria Martinez*, 2020 WL 5823325 (5th Cir. Sept. 30, 2020) (affirming application of §2D1.1 (b)(7) enhancement when defendant posted to 3,100 Facebook friends that she had bags available and a co-conspirator sold through Facebook groups); *United States v. Perz*, 2021 WL 1111404 (5th Cir. March 23, 2021) (affirming application of §2D1.1(b)(7) when Facebook messenger and Facebook used to solicit large numbers of persons to buy drugs); *United States v. Margenat-Castro*, 2018 WL 5805923 (11th Cir. Nov. 6, 2018) (noting that district court applied §2D1.1(b)(7) enhancement when website and social media board used to further drug distribution).

³⁵ U.S. DRUG ENFORCEMENT AGENCY, *The Growing Threat of Xylazine and its Mixture with Illicit Drugs*, *supra* note 33 at 2–4.

overdoses.³⁶ The Director of the Office of National Drug Control Policy has designated fentanyl adulterated or associated with xylazine as an emerging threat.³⁷ To address this threat and assist with “the whole-of-government response,”³⁸ the Commission should consider amending the Guidelines to account for convictions involving fentanyl that is adulterated with xylazine. The Department would be pleased to work with the Commission on appropriate language for such an amendment.

iii. Death Resulting and Serious Bodily Injury

Fentanyl and other drugs have generated unprecedented numbers of overdose deaths. Federal statutes impose lengthy mandatory-minimum sentences – and the Guidelines provide high base offense levels – when the offense of conviction establishes that death or serious bodily injury resulted from distribution.³⁹ But, consistent with the Department’s charging policy,⁴⁰ there may be particular cases where the circumstances suggest that it is inappropriate to pursue charges carrying a 20-year mandatory term of imprisonment.⁴¹ Even where a mandatory minimum sentence is inappropriate, however, the Guidelines should still provide for a just punishment that appropriately reflects the defendant’s culpability.⁴²

The current Guidelines provide for a sentencing enhancement for resulting death or serious bodily injury only when the defendant is charged and convicted under a provision carrying a mandatory term of imprisonment. This may lead to an unwarranted disparity between defendants convicted of charges carrying mandatory terms of imprisonment and defendants who engaged in the same or similar conduct, but who were not charged with an offense carrying a mandatory minimum sentence. Although the Guidelines provide for an upward departure when

³⁶ *Id.*

³⁷ Press Release, The White House, Biden-Harris Administration Designates Fentanyl Combined with Xylazine as an Emerging Threat to the United States (April 12, 2023), <https://www.whitehouse.gov/ondcp/briefing-room/2023/04/12/biden-harris-administration-designates-fentanyl-combined-with-xylazine-as-an-emerging-threat-to-the-united-states/>.

³⁸ *Id.*

³⁹ Multiple circuits have held that these enhancements do not apply unless death or serious bodily injury was an element of the crime of conviction. *See, e.g., United States v. Lawler*, 818 F.3d 281, 285 (7th Cir. 2016). However, some courts have suggested that the guideline enhancement can be available without a statutory conviction. *See, e.g., Young v. Antonelli*, 982 F.3d 914, 919 (4th Cir. 2020) (finding Supreme Court’s but-for causation requirement for death resulting applies in application of death resulting guideline under §2D1.1).

⁴⁰ The Attorney General has instructed prosecutors that “charges that subject a defendant to a mandatory minimum sentence should ordinarily be reserved for instances in which the remaining charges would not sufficiently reflect the seriousness of the defendant’s criminal conduct, danger to the community, harm to victims and such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.” Memorandum for All Federal Prosecutors from Merrick Garland, Attorney General, Regarding Additional Department Policies Regarding Charges, Pleas, and Sentencing in Drug Cases (Dec. 16, 2022), <https://www.justice.gov/media/1265321/dl?inline> (alterations and internal quotation marks omitted).

⁴¹ In instances where death or serious bodily injury results, the “safety valve” would not provide a remedy to avoid application of the mandatory minimum sentences. 18 U.S.C. § 3553(f); USSG §5C1.2.

⁴² The Attorney General’s guidance to federal prosecutors also addressed the use of mandatory minimums, including guidance specific to drug cases brought under Title 21 of the United States Code. Memorandum for All Federal Prosecutors from Merrick Garland, Attorney General, Regarding Additional Department Policies Regarding Charges, Pleas, and Sentencing in Drug Cases (Dec. 16, 2022).

death or serious bodily injury results,⁴³ these departures and variances can also result in inconsistencies and disparities. Courts and litigants would benefit from guidance in the form of a reformed guideline enhancement that meaningfully accounts for death or serious bodily injury resulting from drug distribution, regardless of whether charges carrying mandatory terms of imprisonment were brought. We recommend that the Commission adopt a new base offense level and enhancements – lower than those applicable when a mandatory minimum is charged but higher than that applicable to drug distribution that does not result in death.

iv. Drugs and Multiple or Especially Dangerous Firearms

The current Guidelines provide for an enhancement if the defendant possessed a dangerous weapon or firearm to “reflect the increased danger of violence when drug traffickers possess weapons.”⁴⁴ But this enhancement fails to account for the increased public safety risk posed by traffickers who possess multiple weapons or especially dangerous weapons while trafficking drugs.⁴⁵ We recommend that the Commission consider an enhancement for possession of especially dangerous firearms or quantities of firearms, including three or more firearms, a semiautomatic firearm capable of accepting a large capacity magazine, or a firearm as described in 26 U.S.C. § 5845. Consistent with the current Guidelines, we do not propose that this enhancement be used in conjunction with violations of 18 U.S.C. § 924(c).⁴⁶

b. Firearms Violence

Too many Americans are dying from firearms violence. Recognizing this “public health crisis,”⁴⁷ the President and the Attorney General announced a strategy to “combat the epidemic of gun violence and other violent crime,”⁴⁸ which we continue to update to reflect new approaches, new threats, and new evidence-based interventions.⁴⁹ Last year, Congress passed the Bipartisan Safer Communities Act (“BSCA”), which strengthened federal firearms laws in several critical aspects.⁵⁰ And the Commission promulgated amendments during the last amendment year to, *inter alia*, address the threat of unlicensed and untraceable ghost guns,

⁴³ USSG §§5K2.1-5K2.2. *See, e.g., United States v. Watley*, 46 F.4th 707, 717-18 (8th Cir. 2022) (affirming upward departures under §§5K2.1 and 5K2.2 where defendant sold drugs that caused one individual to overdose and another to die).

⁴⁴ USSG §2D1.1(b)(1), app. n.11(A).

⁴⁵ *See, e.g., United States v. Fairchild*, 189 F.3d 769, 779 (8th Cir. 1999) (affirming two-level firearms enhancement for defendant who possessed 32 firearms). The First Circuit has rejected an upward variance premised upon a defendant’s possession of multiple firearms when the defendant had received a two-level enhancement under USSG §2D1.1(b)(1). *United States v. Ortiz-Rodriguez*, 789 F.3d 15, 19-20 (1st Cir. 2015) (vacating and remanding for resentencing due to inadequate explanation of the basis of a large variance from the guidelines range).

⁴⁶ USSG §2K2.4, comment. n.4.

⁴⁷ President Biden and Attorney General Garland, Remarks on Gun Crime Prevention Strategy (June 23, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/23/remarks-by-president-biden-and-attorney-general-garland-on-gun-crime-prevention-strategy/>.

⁴⁸ *Id.*

⁴⁹ Press Release, U.S. Department of Justice Office of Public Affairs, FACT SHEET: Update on Justice Department’s Ongoing Efforts to Tackle Gun Violence (June 14, 2023), <https://www.justice.gov/opa/pr/fact-sheet-update-justice-department-s-ongoing-efforts-tackle-gun-violence>.

⁵⁰ Pub. L. No. 117-159, 136 Stat. 1313 (2022).

incorporate the new straw-purchasing and firearms-trafficking offenses created by BSCA, and provide mitigating adjustments for duress and domestic violence.

While we applaud the Commission's efforts thus far, more change is needed. Current anomalies in §2K1.1 result in sentences that do not reflect the severity and dangerousness of conduct occurring in many cases. Simplification of the Guidelines' architecture – especially for the firearms guideline – would help address the inequities created by this confusing and often misapplied provision.⁵¹ We also recommend tailored guideline changes such as revising the definition of “firearm” in the application notes and ensuring that defendants with prior domestic-violence and firearm-related convictions are treated like other recidivists.⁵²

i. Definition of Firearm in Application Note 1

Machinegun conversion devices have emerged as an extraordinary threat to public safety. Also called “auto sears,” “switches,” or “Glock switches,”⁵³ these devices, which the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) reports “are flooding our communities,”⁵⁴ convert “an already dangerous firearm into an extremely dangerous machinegun.”⁵⁵ They are cheaply produced – sometimes at home, using a 3D printer – and designed to turn a semiautomatic firearm into an automatic machinegun.

Many courts, however, have construed the definition of “firearm” in Application Note 1 to §2K2.1 to exclude machinegun conversion devices. The application note refers only to “firearms” as defined by 18 U.S.C. § 921(a)(3), which courts have held does not include machinegun conversion devices. It does not reference “firearms” as defined by 26 U.S.C. § 5845(a), which expressly includes such devices. As a result, the application note may be understood to exclude some of the most dangerous weapons in circulation.⁵⁶ Indeed, most courts to consider the question have held that machinegun conversion devices are not firearms under

⁵¹ Letter from Lisa Monaco, Department of Justice Deputy Attorney General, to U.S. Sent'g Comm'n Celebrating the Commissioners Confirmations and Reiterating Policy Priorities (Oct. 17, 2022), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/doj-dag.pdf>.

⁵² Although we are focusing on these priorities, we also renew our requests from last cycle that the Commission: (1) apply BSCA's sentencing adjustments to prohibited persons, as well as straw purchasers; (2) adopt an offense-level increase greater than two levels in the new provision, §2K2.1(b)(5)(B), directed at a defendant engaged in straw purchasing or trafficking, to implement BSCA; (3) create a new enhancement for burglaries or robberies of Federal Firearm Licensees (FFLs); (4) create a new enhancement for transfers to minors; (5) create a new enhancement when a defendant has three or more predicate convictions for crimes of violence or drug-trafficking offenses; and (6) eliminate the use of any categorical approach in the Guidelines, including in Section 2K2.1.

⁵³ These devices have the same purpose, but auto sears convert AR-15 variant rifles to automatic firearms and switches or “Glock switches” convert Glock-variant semi-automatic pistols into automatic handguns.

⁵⁴ Chip Brownlee, *ATF Director Urges Action on Auto Sears 'Flooding Our Communities'*, THE TRACE, Mar. 1, 2023, <https://www.thetrace.org/2023/03/atf-auto-sears-dettelbach-machine-gun/>.

⁵⁵ *United States v. Hixson*, 624 F. Supp. 3d 930, 940 (N.D. Ill. 2022) (“The dangerousness manifests itself not only in the sheer number of bullets that can be emptied from the magazine in the blink of an eye but also in the resulting lack of control of the firearm when discharging it.”)

⁵⁶ Section 921(a)(3) broadly defines “firearm,” whereas § 5845(a) limits the definition of “firearm” to a narrower class of weapons. 28 U.S.C. § 5845(a), (b); 18 U.S.C. § 921(a)(3).

Section 921(a)(3)⁵⁷ and, as a result, generally do not trigger §2K2.1’s enhancements for multiple firearms, firearms-trafficking, and use of a firearm in connection with another crime.⁵⁸ This is a perverse result, as the statutory scheme and the Guidelines were drafted on the presumption that Section 5845(a) weapons are a *more* dangerous subset of Section 921(a)(3) weapons.⁵⁹ We recommend that the Commission amend the definition in Application Note 1 to make clear that it includes firearms under *both* Section 5845(a) and Section 921(a)(3).

ii. Recidivism Enhancement for Prior Domestic-Violence and Firearm-Related Convictions

Two categories of prior convictions qualify for the recidivism enhancement in §2K2.1 – violent felonies and drug-trafficking crimes. Defendants with prior misdemeanor domestic-violence convictions or prior firearm-related convictions who then commit additional firearms offenses do not currently qualify. We recommend that the Commission incorporate these two especially dangerous categories of prior convictions as qualifying predicates for §2K2.1’s recidivism enhancement, as each represents exactly the type of aggravated conduct that the enhancements should target.

Domestic-violence offenders who unlawfully possess firearms pose a significant public-safety risk. Congress enacted 18 U.S.C. § 922(g)(9) – which prohibits gun possession by anyone convicted of a misdemeanor crime of domestic violence – precisely because “existing felon-in-possession laws were not keeping firearms out of the hands of domestic abusers, because ‘many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.’”⁶⁰ Regrettably, “most of those who commit family violence are never even prosecuted” and when they are, roughly “one-third of the cases that would be considered felonies if committed by strangers are instead filed as misdemeanors.”⁶¹ The presence of a firearm substantially increases the lethality of these offenses.⁶² Homicide is a leading cause of death of young women, with intimate-partner violence accounting for half of those murders.⁶³ More than

⁵⁷ See, e.g., *Hixson*, 624 F. Supp. 3d 930, 936, 941-42; but see *United States v. Hunter*, 843 F. Supp. 235, 256 (E.D. Mich. 1994) (expressing the minority view that “conversion kits are . . . themselves ‘weapons’ under § 921(a)(3)” because “that section clearly envisions machineguns as weapons”).

⁵⁸ *Hixson*, 624 F. Supp. 3d at 941-42 (“[T]he advisory Sentencing Guidelines range . . . of 30 – 37 months woefully underrepresents the seriousness of the offenses. In particular, the range completely ignores the Glock switches, which Congress has defined as machineguns. Sentencing Mr. Hixson within the sentencing range does not account for the possession, sale, and distribution of the Glock switches.”).

⁵⁹ Sawed-off shotguns, short-barreled rifles, and machineguns qualify as firearms under § 921(a) and, because of their dangerousness, are subject to additional restrictions under 28 U.S.C. § 5861. Thus, when condensing the three prior firearms guidelines into what is now §2K2.1 in 1991, the Commission structured application note 1 to broadly define “firearms” for the purposes of the Guideline as a whole under § 921(a)(3) but reserved the narrower definition of “firearm” in § 5845(a) for the enhancements involving the most dangerous firearms in §2K2.1(a)(1), (3), and (5) to Section 5845(a).

⁶⁰ *United States v. Hayes*, 555 U.S. 415, 426 (2009) (quoting 142 Cong. Rec. S10377-01 (1996) (statement of Sen. Lautenberg)).

⁶¹ 142 Cong. Rec. S10377-78.

⁶² DEP’T OF JUSTICE, *Firearms and Domestic Violence: The Intersections* (Dec. 13, 2016), <https://www.justice.gov/archives/ovw/blog/firearms-and-domestic-violence-intersections>.

⁶³ Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence — United States, 2003–2014*, 66 MMWR MORBIDITY AND MORTALITY WEEKLY REPORT 741 (2017), https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm?s_cid=mm6628a1_w.

half of male-perpetrated intimate partner homicides are by a firearm and studies have shown a correlation between limiting access to firearms for intimate-partner violence offenders and lower rates of intimate partner homicide.⁶⁴ And incidents of domestic violence are one of the more frequent circumstances of firearm homicide of children younger than 13 years old.⁶⁵ As Senator Lautenberg – the sponsor of what would become Section 922(g)(9) – put it, “all too often, the only difference between a battered woman and a dead woman is the presence of a gun.”⁶⁶ We appreciate that when it adopted the new trafficking enhancement during the last amendment cycle, the Commission equated misdemeanor crimes of domestic violence with felony crimes of violence, and we urge the Commission to treat these offenses equivalently for the purposes of the recidivism enhancement as well.

Similarly, firearm offenders with prior firearm-related convictions pose an acute risk to public safety. As the Commission has observed, firearms offenders recidivate at a higher rate than non-firearms offenders. In its recidivism report focusing on firearms offenders, the Commission reported that “[o]ver two-thirds (68.1%) of firearms offenders were rearrested for a new crime during the eight-year follow-up period compared to less than half of non-firearms offenders (46.3%).”⁶⁷ And “nearly half of the §2K2.1 offenders had previously been convicted of a weapons offense (44.2%).”⁶⁸ Firearm offenders are not only more likely to reoffend but are also more likely to commit a future violent crime.⁶⁹ Section 2K2.1 should reflect the Commission’s findings regarding the danger posed by repeat firearms offenders. Accordingly, we agree with the recommendation put forward last amendment year by the Probation Officers Advisory Group to adopt a recidivism enhancement for prior firearm-related convictions.

⁶⁴ Websdale N, Ferraro K, Barger SD. *The domestic violence fatality review clearinghouse: introduction to a new National Data System with a focus on firearms*, INJ EPIDEMIOL. 2019 6:6. doi: 10.1186/s40621-019-0182-2. PMID: 31245255; PMCID: PMC6582678, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6582678/>.

⁶⁵ Zeoli, A. M., Goldstick, J., Mauri, A., Wallin, M., Goyal, M., Cunningham, R., & FACTS Consortium (2019). The association of firearm laws with firearm outcomes among children and adolescents: a scoping review. *Journal of Behavioral Medicine*, 42(4), 741–762. <https://doi.org/10.1007/s10865-019-00063-y>; Fowler, K.A., Dahlberg, L.L., Haileyesus, T., Gutierrez, C., & Bacon, S. (2017). Children firearm injuries in the United States. *Pediatrics*, 140, e20162486.

⁶⁶ 142 Cong. Rec. S10377. There is also a strong correlation between domestic violence and mass shootings. According to one peer-reviewed study, 59.1% of mass shootings between 2014-19 were domestic violence-related and, in 68.2% of mass shootings, the perpetrator either killed at least one partner or family member or had a history of domestic violence. See Lisa B. Geller, et. al., *The role of domestic violence in fatal mass shootings in the United States, 2014–2019* (2021), <https://injejournal.biomedcentral.com/articles/10.1186/s40621-021-00330-0>.

⁶⁷ U.S. SENT’G COMM’N, *Recidivism Among Federal Firearm Offenders* (2019), at 4, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190627_Recidivism_Firearms.pdf.

⁶⁸ U.S. SENT’G COMM’N, *What Do Federal Firearms Offenses Really Look Like?* at 20, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf.

⁶⁹ Compared to non-firearms offenders, “a greater percentage of firearms offenders were rearrested for a violent crime as the most serious new offense.” U.S. SENT’G COMM’N, *Recidivism Among Federal Firearm Offenders* at 19.

iii. Simplification of Section 2K2.1

Last year, the Department urged the Commission to undertake a broad review of §2K2.1.⁷⁰ We continue to support efforts to simplify this complicated and often-misapplied guideline. As currently drafted, §2K2.1 provides eight different base offense levels that depend on various factors, including the type of offense, the defendant's prior criminal history, and the type of firearm(s) involved. Converting the base offense level enhancements for dangerous firearms and prior serious crimes into specific offense characteristics would significantly reduce the complexity of the calculation and allow the type of offense to dictate the base offense level. The current complex structure undermines pretrial resolution of these cases, as parties are often unable to agree on the appropriate base offense level – which may change when the Probation Office uncovers additional predicate offenses or applies the categorical approach in a manner contrary to the parties' expectations. Simplifying the base offense level structure will also make it easier for the Commission to research and analyze §2K2.1 sentencing data to better inform future amendments.

III. Other Critical and Discrete Sentencing Issues

While we recognize that the Commission's proposed priorities and addressing the two most pressing national public safety priorities discussed above will leave little room for other issues, we identify here several that we think are important and deserve the Commission's attention in the coming amendment years.

a. **Cocaine Sentencing Policy**

For almost thirty years, there has been no greater symbol of racial inequity in sentencing policy than the disparity between offenses involving crack cocaine and those involving powder cocaine. In December 2022, the Attorney General instructed federal prosecutors to “promote the equivalent treatment of crack and powder cocaine offenses” through their charging decisions and sentencing recommendations.⁷¹ The Commission has likewise recognized the unwarranted disparity between crack and powder cocaine and played a leading role in reform efforts.⁷²

⁷⁰ Letter from Lisa Monaco, Department of Justice Deputy Attorney General, to U.S. Sent'g Comm'n Celebrating the Commissioners Confirmations and Reiterating Policy Priorities (Oct. 17, 2022).

⁷¹ The Attorney General observed that “mandatory minimum sentences based on drug type and quantity have resulted in disproportionately severe sentences for certain defendants and perceived and actual racial disparities in the criminal justice system.” He thus instructed prosecutors to decline to charge the quantity necessary to trigger a mandatory minimum for certain low-level, non-violent drug offenses where the defendant does not have ties to large-scale criminal organizations or a significant criminal history. Memorandum for All Federal Prosecutors from Merrick Garland, Attorney General, Regarding Additional Department Policies Regarding Charges, Pleas, and Sentencing in Drug Cases (Dec. 16, 2022).

⁷² See U.S. SENT'G COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf; U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 131–33 (2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

While this issue is now primarily one for Congress, the Commission can and should take action, too. First, the Commission should advocate for the enactment of the EQUAL Act to remedy the current disparity.⁷³ Second, the Commission should remind sentencing courts of their obligation, when considering Section 3553(a) factors, to consider the pharmacological similarities between powder and crack cocaine and whether it is appropriate to impose a variance consistent with the relevant base offense level for powder cocaine. Analysis and advocacy by the Commission, the Judiciary, the Administration, and many non-governmental organizations led to the enactment of the Fair Sentencing Act of 2010. The Commission's subsequent conforming amendments to the Guidelines, and application of those amendments to thousands of incarcerated individuals, were supported by the Judiciary and by the Department and have made an important contribution to equity in sentencing. The same model can help achieve enactment of the EQUAL Act and other necessary legislative reforms.

b. Human Smuggling Organizations

On June 27, 2022, forty-six migrants were found dead inside a sweltering tractor-trailer vehicle abandoned on the side of a road near San Antonio, Texas.⁷⁴ Although this incident was one of the deadliest in recent history, similar tragedies have occurred for years.⁷⁵ To address the threats posed by transnational human smuggling networks, the Attorney General established Joint Task Force Alpha comprising agents and personnel from the Departments of Justice and Homeland Security.⁷⁶ The President and the Secretary of Homeland Security also announced an Executive Branch-wide effort to disrupt and dismantle human smuggling efforts in Latin America and along the Southwest border.⁷⁷ Congress's objective in Section 1324 of Title 8 was clear: to provide increased punishment for each additional noncitizen smuggled.⁷⁸ The Guidelines, however, do not presently effectuate this intent. We continue to urge the Commission to review the guideline for smuggling offenses, §2L1.1, and to amend it to account for the grave victimization – including of children (regardless of whether they are “unaccompanied”) – caused by human smuggling, such as sexual assault, serious bodily injury, and death.”⁷⁹

⁷³ Eliminating a Quantifiably Unjust Application of the Law Act or the EQUAL Act, S.79, 117th Cong. (2021).

⁷⁴ See Arelis R. Hernández, et. al., *46 Migrants Found Dead in Texas Inside Sweltering Tractor-Trailer*, WASH. POST (June 28, 2022), <https://www.washingtonpost.com/nation/2022/06/27/migrants-dead-texas/>.

⁷⁵ See, e.g., Eva Ruth Moravec, et. al., *9 People Dead After at Least 39 Were Found Packed in a Sweltering Tractor-Trailer in San Antonio*, WASH. POST (July 23, 2017), https://www.washingtonpost.com/national/at-least-39-people-found-packed-into-sweltering-tractor-trailer-in-san-antonio/2017/07/23/c160b680-3b41-43ab-9e9c-cf133a3ca683_story.html.

⁷⁶ See, e.g., U.S. DEP'T OF JUSTICE, *Attorney General Announces Initiatives to Combat Human Smuggling and Trafficking and to Fight Corruption in Central America* (June 7, 2021), <https://www.justice.gov/opa/pr/attorney-general-announces-initiatives-combat-human-smuggling-and-trafficking-and-fight>.

⁷⁷ The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S. Government and Foreign Partner Deliverables*, (June 10, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/>.

⁷⁸ 8 U.S.C. § 1324(a)(1)(B).

⁷⁹ Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Dep't of Justice, to the Honorable Carlton W. Reeves, Chair, U.S. Sent'g Comm'n (Sept. 12, 2022), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/doj.pdf>; Letter from Alejandro Mayorkas, Secretary, Dep't of Homeland Security, to the Honorable Carlton W. Reeves, Chair, U.S.

c. Evasion of Export Controls and Sanctions

Finally, the Commission should act to address an important matter of national security – evasion of export controls and sanctions. Earlier this year, the Department of Justice and the Department of Commerce’s Bureau of Industry and Security launched the Disruptive Technology Strike Force to strengthen supply chains and protect critical technological assets.⁸⁰ As the Deputy Attorney General explained when announcing the Task Force, “[t]oday, autocrats seek tactical advantage through the acquisition, use, and abuse of America’s most innovative technology. They use it to enhance their military capabilities, support mass surveillance programs that enable human rights abuses and all together undermine our values.”⁸¹ The Strike Force “will bring together the Justice and Commerce Departments’ expertise to strike back against adversaries trying to siphon off our most advanced technology.”⁸²

We anticipate that the Strike Force will send a letter to the Commission further explaining its proposal for amending the Guidelines to better address this threat. In short, under the Export Administration Regulations (EAR) and the Commerce Control List (CCL), export controls related to national security can carry various designations, including “NS” (National Security), “MT” (Missile Technology), “RS” (Regional Stability), “CB” (Proliferation of Chemical and Biological Weapons), “AT” (Anti-Terrorism), or “NP” (Nuclear Nonproliferation).⁸³ The EAR also separately controls exports to military end-users and certain foreign entities whose activities are contrary to national security policy interests.⁸⁴ In addition, sanctions and embargoes ordered pursuant to the International Emergency Economic Powers Act control the export of goods and services to certain countries and foreign entities to protect national security.⁸⁵ However, §2M5.1 refers specifically to “national security controls,” which may cause sentencing courts to erroneously conclude that only goods controlled for “NS” reasons under the EAR and the CCL qualify in assessing both the base offense level and the applicability of a departure. The Strike Force recommends amending §2M5.1 to clarify that the

Sent’g Comm’n (Oct. 16, 2022), <https://www.usssc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/dhs.pdf>; Letter from Kenneth Blanco, Assistant Attorney General, and Zachary Bolitho, Counsel to the Deputy Attorney General, to the Honorable William H. Pryor Jr., Chair, U.S. Sent’g Comm’n (July 31, 2017), <https://www.usssc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/DOJ.pdf>; See Letter from Sarah R. Saldaña, Dir., U.S. Immigr. and Customs Enf’t, to Chief Judge Patti B. Saris, Chair, U.S. Sent’g Comm’n (Jan. 15, 2016), <https://www.usssc.gov/sites/default/files/pdf/amendment-process/public-comment/20160321/DHS.pdf>.

⁸⁰ U.S. DEP’T. OF JUSTICE, *Justice and Commerce Departments Announce Creation of Disruptive Technology Strike Force*, (Feb. 16, 2023), <https://www.justice.gov/opa/pr/justice-and-commerce-departments-announce-creation-disruptive-technology-strike-force>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ BUREAU OF INDUSTRY AND SECURITY, DEP’T OF COMMERCE, UNOFFICIAL ELECTRONIC EXPORT ADMINISTRATION REGULATION FILES, <https://www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear> (last visited July 7, 2023); BUREAU OF INDUSTRY AND SECURITY, DEP’T OF COMMERCE, SUPPLEMENT NO. 4 TO PART 774 – COMMERCE CONTROL LIST ORDER OF REVIEW, <https://www.bis.doc.gov/index.php/documents/regulations-docs/13-commerce-control-list-index/file> (last visited July 7, 2023).

⁸⁴ *Id.*; BUREAU OF INDUSTRY AND SECURITY, DEP’T OF COMMERCE, SUPPLEMENT NO. 7 TO PART 774 – ‘MILITARY END-USER’ (MEU) LIST, <https://www.bis.doc.gov/index.php/documents/regulations-docs/13-commerce-control-list-index/file> (last visited July 12, 2023).

⁸⁵ *United States v. McKeeve*, 131 F.3d 1, 14 (1st Cir.1997) (holding that export of computer equipment to Libya, which was subject to an embargo, was evasion of national security controls).

provision applies to *all* “controls related to national security,” and revising the accompanying application note to ensure that sanctions, embargoes, anti-terrorism, missile technology, regional stability, proliferation of chemical and biological weapons, nuclear nonproliferation, and military and WMD end-user and entity-specific controls are included.

* * *

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions, and we look forward to working with the Commission on all of the issues in the coming amendment year.

Sincerely,



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Director, Office of Policy and Legislation
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