U.S. Department of Justice

Criminal Division

Appellate Section

Washington, D.C. 20530

July 15, 2024

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 Criminal Division of the U.S. Department of Justice is pleased to submit its annual report to the Sentencing Commission pursuant to 28 U.S.C. § 994(o). Please also consider this report to be the Department's response to the Federal Register notice requesting public comment on the Commission's proposed priorities for 2024-2025.[1]

The Department appreciates the Commission's commitment, following the 40th anniversary of the Sentencing Reform Act, to consider measures that would allow the Commission to fulfill the statutory purposes and mission assigned to it under the Act. As explained below, the Department believes that fulfilling those purposes will require the Commission to redouble its commitment to core public safety issues—including violent crime and drug overdoses—that the Commission has prioritized since its founding four decades ago. The Department also believes that the Commission should consider how technological innovations—including the quickly evolving use of artificial intelligence—affect the ways that crimes are committed, solved, and studied.

In addition, the Department submits that the Commission should work to ensure that the guidelines promote just punishment and adequate deterrence for those offenses and offenders that, based on current data and trends, are causing the most serious individual and societal harms. To that end, the Department proposes below amendments to the guidelines—some of which we have previously offered—applicable to firearms offenses, fentanyl distribution, human smuggling, domestic terrorism, and crimes that imperil the integrity of our financial system. We also believe that the time has come to address the categorical approach, one of the issues that has most complicated the application of the Sentencing Guidelines in recent years; and that the Commission can tackle that issue as it continues to consider simplification of the guidelines more broadly.

[1] Notice of Proposed Priorities for Amendment Cycle, 89 Fed. Reg. 48,029 (June 4, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20240531_fr_proposed-priorities.pdf.

I. Top Department Priorities

Machineguns

In June 2021, President Biden and Attorney General Garland announced a comprehensive gun crime reduction strategy to "go after the people who flood our streets with guns and the bad actors who decide to use them to further terrorize the communities."[2] The Department continues to update this strategy to reflect new approaches, new threats, and new evidence-based interventions.[3] Two years ago, Congress passed the Bipartisan Safer Communities Act ("BSCA"), which strengthened federal firearms laws in several critical aspects.[4] As you know, the Commission followed up with amendments addressing unlicensed and untraceable ghost guns and implementing the new straw-purchasing and firearms-trafficking offenses created by BSCA into the guidelines.[5] We thank the Commission for its efforts to address gun violence, but additional updates are needed to meet the moment.

In contrast to a standard firearm, and even in contrast to a semi-automatic firearm, a machinegun is a very different type of weapon. As the Supreme Court recently explained:

> With a machinegun, a shooter can fire multiple times, or even continuously, by engaging the trigger only once. This capability distinguishes a machinegun from a semiautomatic firearm. With a semiautomatic firearm, the shooter can fire only one time by engaging the trigger. The shooter must release and reengage the trigger to fire another shot. Machineguns can ordinarily achieve higher rates of fire than semiautomatic firearms because the shooter does not need to release and reengage the trigger between shots.[6]

Unfortunately, as the Deputy Attorney General highlighted in her February 2024 letter to the Commission, machinegun conversion devices, such as "Glock switches,"[7] convert semiautomatic handguns into machineguns and present a fast-growing and serious danger to

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[2] The White House, *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/.

[3] U.S. Dep't of Justice, Press Release, *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.

[4] Pub. L. No. 117-159, 136 Stat. 1313 (2022).

[5] U.S. Sent'g Guidelines Manual, Appendix C, Amendment 819 (November 1, 2023) ("This multi-part amendment responds to …the Bipartisan Safer Communities Act, Pub. L. No. 117-159 … [and] addresses new offenses and other changes in law made by the Act, and revises … §2K2.1 … to account for firearms that are not marked with a serial number.")

[6] *Garland v. Cargill*, 602 U.S, ___, 144 S. Ct. 1613, 1617 (2024).

[7] The term "Glock Switch" is commonly used to identify illegal machine gun conversion devices that are specifically designed to convert Glock-type handguns to fully automatic fire. The devices, however, are not manufactured by Glock Inc., and use of that company's symbols and trademarks by illicit manufacturers is fraudulent.

communities and to law enforcement across the nation.[8] Such devices are proliferating: the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) reports that it collected 570% more machinegun conversion devices in 2021 than it did in 2017.[9] And machineguns have been involved in a growing number of shootings: in 2022, a public safety technology company recorded 75,444 rounds of automatic gunfire in the 127 cities covered by its microphones, a nearly 50% increase from just one year before.[10]

To address this problem, the Department asks the Commission to make the following vital changes. First, the Commission should amend the definition of a firearm in §2K2.1 to ensure that all National Firearms Act (NFA) weapons,[11] including machinegun conversion devices, are considered firearms for purposes of sentencing when the defendant is convicted of trafficking in firearms. The current definition of "firearm" is limited to the meaning given in 18 U.S.C. § 921(a)(3) and therefore does not encompass machinegun conversion devices that fall under the NFA.[12] To correct this significant gap, we ask the Commission to add "or as defined under the National Firearms Act, 26 U.S.C. § 5845(a)," to the definition of firearm in §2K2.1.

Second, the Commission should amend §2K2.1 to provide an increased guideline range for when a convicted felon not only breaks the law by obtaining a firearm, but equips that firearm with a deadly machinegun conversion device, such as a so-called Glock switch for a handgun, or a drop-in auto sear for a rifle. As the Commission is aware, when a felon recidivates

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[8] Lisa Monaco, Deputy Attorney General, Letter to Carlton Reeves, Chair (Feb. 22, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=83 (quoting *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.")).

[9] U.S. Dep't of Justice, Press Release, *Justice Department Announces Publication of Second Volume of National Firearms Commerce and Trafficking Assessment Report Presents Unprecedented Data on Crime Gun Intelligence and Analysis* (Feb. 1, 2023), https://www.atf.gov/news/press-releases/justice-department-announces-publication-second-volume-national-firearms-commerce-and; *see also* Ted Oberg, Jeff Piper, and Carlos Olazagasti, *Incredibly serious: deadly, unpredictable switches add to DC's gun toll; prosecutors seek change*, News 4 (Nov. 29, 2023) (reporting finding 167 switches recovered in 2023 through November, 40 more than in 2022), https://www.nbcwashington.com/investigations/incredibly-serious-deadly-unpredictable-switches-add-to-dcs-gun-toll-prosecutors-seek-change/3482548/.

[10] Ernesto Londoño and Glenn Thrush, *Inexpensive Add-on Spawns a New Era of Machine Guns Popular devices known as "switches" are turning ordinary pistols into fully automatic weapons, making them deadlier and a growing threat to bystanders*, N.Y. Times (Aug. 12, 2023) ("The growing use of switches, which are also known as auto sears, is evident in real-time audio tracking of gunshots around the country, data shows. Audio sensors monitored by a public safety technology company, Sound Thinking, recorded 75,544 rounds of suspected automatic gunfire in 2022 in portions of 127 cities covered by its microphones, according to data compiled at the request of The New York Times. That was a 49 percent increase from the year before."), https://www.nytimes.com/2023/08/12/us/guns-switch-devices.html.

[11] A "machinegun" is defined under 26 U.S.C. § 5845(a) as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, *or combination of parts designed and intended, for sue in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled*." (Emphasis added).

[12] *See, e.g., United States v. Hixson*, 624 F. Supp. 3d 930, 933 (N.D. Ill. 2022) ("The Guidelines do *not* include machine guns—including devices that convert semiautomatic weapons into fully automatic weapons—in the definition of "firearms." *Compare* 18 U.S.C. § 921(a)(23) (definition of machinegun) *with* § 2K2.1 Application Note 1 (defining firearm to mean the definition in 18 U.S.C. § 921(a)(3)).").

by unlawfully possessing a firearm, he can be prosecuted under 18 U.S.C. §922(g) and, following a conviction, courts are required to apply §2K2.1 to determine the applicable guideline range. Subsection (a)(4)(B) of §2K2.1 currently provides an alternative base offense level of 20 when a defendant is convicted of being a felon in possession of a firearm and the offense involves *either* a semiautomatic firearm that is capable of accepting a large capacity magazine *or* a machinegun.[13]

In other words, once an offender arms himself with a semiautomatic firearm capable of accepting a large-capacity magazine, the guidelines provide for no increase (either as an alternative base offense or otherwise) when the offender takes the extra step of illegally equipping that firearm with, for example, a Glock switch or an AR-type auto sear. Failing to distinguish between those scenarios makes little sense. Congress has made possession of a machinegun a separate, stand-alone crime.[14] The switch or drop-in auto sear even uninstalled is illegal to possess,[15] and when installed converts that semiautomatic handgun or rifle into a machinegun, both as a legal matter and practically, enabling that offender to discharge an entire large-capacity magazine with one pull of the trigger. In contrast, a semiautomatic firearm does not fire more than one shot "by a single function of the trigger."[16] Moreover, because Glock switches fire more quickly, they are more difficult to control and greatly increase the danger to innocent bystanders and law enforcement.[17]

We note that the solution is made more difficult by the complex structure of §2K2.1, which contains multiple alternative base offense levels.[18] If the Commission were to restructure this guideline and add an enhancement for a machinegun conversion device (as described in 26 U.S.C. § 5845(b)) as a specific offense characteristic, the result would not only provide a deterrent and advance the goal of public safety, but would also advance the goal of simplifying the guidelines by making them less complex.[19]

Similarly, when a defendant is convicted of a drug trafficking offense and the offense also involves the possession of a firearm, the drug trafficking guideline does not distinguish between offenders possessing a firearm with six bullets, a firearm with a large-capacity magazine loaded with 20 bullets, and a firearm with a large-capacity magazine loaded with 20 bullets and also equipped with a machinegun conversion device. Rather, §2D1.1 simply provides a two-

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[13] §2K2.1(a)(4) ("20, if … (B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; *or* (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense…") (emphasis added).
[14] 18 U.S.C. § 922(o).
[15] 26 U.S.C. § 5845(a).
[16] *Garland v. Cargill,* 144 S. Ct. at 1620.
[17] Daryl McCormick, *Special Agent in Charge of ATF's Columbus Field Division, Trafficker of 3D-Printed "Glock Switches" and "Auto-Sears" Sentenced to Over Seven Years in Federal Prison* (Sept. 14, 2023), https://www.atf.gov/news/press-releases/trafficker-3d-printed-%E2%80%9Cglock-switches%E2%80%9D-and-%E2%80%9Cauto-sears%E2%80%9D-sentenced-over-seven-years-federal.
[18] *See* Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 14 (July 31, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=38.
[19] *See id.* (urging the Commission "to simplify this complicated and often-misapplied guideline").

level increase for when a "dangerous weapon" (defined to include a firearm) is possessed in connection with a drug trafficking offense.[20]

To remedy this problem, and to help deter drug traffickers from carrying such weapons, the Department also requests that the Commission add two prongs to the existing enhancement under the drug trafficking guideline, §2D1.1: one should be an increase for when a drug trafficking offense involves a semi-automatic firearm with a large-capacity magazine; and a second, distinct increase for when the firearm is equipped with a machinegun conversion device.

Fentanyl and Other Deadly Opioids

As we brought to the Commission's attention in September 2022,[21] the United States experienced an estimated 107,000 deaths from drug overdoses during 2021, and more than two-thirds of these were from synthetic opioids like fentanyl.[22] Fueling the problem has been vast quantities of imitation pills containing fentanyl and other synthetic opioids, easily purchased and widely available.[23] As we also noted, many overdose victims, including teenagers, have no idea what they are ingesting, nor the potency of what they are ingesting, until it is too late.[24] In our letter, we asked the Commission to address the problem by amending the drug trafficking guideline to address imitation pills.

The Commission responded by amending the existing four-level enhancement under §2D1.1(b)(13) for knowingly misrepresenting fentanyl as another substance to add an *alternative* two-level enhancement, also under (b)(13), "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."[25] The change took effect on November 1, 2023. Between November 1, 2023, and the end of that calendar year, courts applied the four-level enhancement to only 18 defendants and the new two-level enhancement to one defendant. In comparison, during the same period in 2022, the four-level enhancement was applied to 15 defendants.

These numbers suggest that, although the Commission added the new two-level enhancement to address the harm associated with imitation pills, the new two-level enhancement has proven not to be very useful. That is likely because it requires that the defendant "represented" or "marketed" the fake pills as legitimately manufactured, and drug traffickers are

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[20] §2D1.1(b)(1). "The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet." §2D1.1 comment. (n.1).
[21] Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 24 (Sept. 12, 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/doj.pdf.
[22] *See* Ctr. for Disease Control, Press Release, *U.S. Overdose Deaths In 2021 Increased Half as Much as in 2020 – But Are Still Up 15%* (May 11, 2022), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/202205.htm.
[23] *Id*.
[24] *Id*.
[25] U.S. Sent'g Comm'n, Amend. 818 (eff. November 1, 2023), https://www.ussc.gov/guidelines/amendment/818.

savvy enough to speak in code—or not to make any representations at all, since the shape, color, and appearance of the pills frequently do the talking for them.

Meanwhile, the grave problems described in our September 2022 annual report have continued. According to the CDC, more than 111,000 people died of overdoses in the United States in 2022, and an additional 107,543 died of overdoses last year.[26] The Drug Enforcement Administration (DEA) reports that it seized more than 80 million fentanyl-laced fake pills in 2023 and nearly 12,000 pounds of fentanyl powder, equivalent to more than 381 million lethal doses of fentanyl.[27]

We are now asking the Commission to take additional steps to address this national Public Health Emergency,[28] and to do so in a manner likely to bring about significant, large-scale change. The Department has several suggestions, and we implore you to act in two ways: first, make changes to the guidelines to raise the risk of severe punishment for engaging in certain conduct, described below; and second, issue a public service announcement that you have made such changes to the guidelines, so as to amplify the deterrent effect of your actions.

First, as the Department proposed in last year's annual report,[29] the Commission should create a new enhancement under §2D1.1 for distributing controlled substances to minors. In particular, we recommend a specific offense characteristic applicable to the distribution of fentanyl, fentanyl analogues, and other opioids to children and young adults under 21. Members of that age group have increasingly become victims of drug overdoses. A recent study in the New England Journal of Medicine, for instance, estimates that approximately 22 adolescents (ages 14 to 18 years) died from drug overdoses in the U.S. each week during 2022, and that most of the deaths were due to fentanyl in counterfeit pills.[30]

Second, we renew our request that the Commission create an enhancement for drug trafficking using the dark web or other anonymizing technologies to avoid detection.[31] Drug traffickers are increasingly relying on anonymizing technologies to further their illicit activity, posting advertisements for fentanyl pills on dark web marketplaces where the seller is unknown to the buyer, the transaction involves an exchange of cryptocurrency, and the product is shipped with misleading tracking information.

Third, the Commission should consider an enhancement for drug trafficking where the offense involves fentanyl or another synthetic opioid adulterated with xylazine or medetomidine. As we noted in last year's annual report,[32] drug traffickers are increasingly adulterating fentanyl

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[26] Ctr. for Disease Control, Nat'l Ctr. for Health Statistics, *U.S. Overdose Deaths Decrease in 2023, First Time Since 2018* (May 15, 2024), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2024/20240515.htm.
[27] Drug Enforcement Admin., *DEA Fentanyl Seizures in 2024*, https://www.dea.gov/onepill.
[28] Dep't of Health and Human Serv., *Determination That A Public Health Emergency Exists* (October 26, 2017), https://www.hhs.gov/sites/default/files/opioid%20PHE%20Declaration-no-sig.pdf.
[29] *See* Letter to Hon. Carlton Reeves, Chair, *supra* n.18, at 8.
[30] Friedman and Hadland, *The Overdose Crisis among U.S. Adolescents*, 390 N. Engl. J. Med 97, 97-100 (2024), https://www.nejm.org/doi/full/10.1056/NEJMp2312084.
[31] *See* Letter to Hon. Carlton Reeves, Chair, *supra* n.18, at 8.
[32] *Id*. at 8-9.

with these alpha-2-adrenergic agonists,[33] which can extend a user's high and also serve as a filler and binding agent. The DEA reports that approximately 23% of fentanyl powder and 7% of fentanyl pills seized by the DEA in 2022 contained xylazine.[34] Because these substances are not approved for use in humans, their effects have not yet been fully studied; nevertheless, the effects of xylazine and medetomidine on humans can include heightened sedation and bradycardia.[35] At the same time, these substances are profoundly dangerous because their effects cannot be reversed by life-saving medicines like naloxone (Narcan).[36] Trafficking of substances adulterated with drugs not approved for human consumption is dangerous in and of itself—and especially so when that substance is combined with a drug as deadly as fentanyl or an analogue of fentanyl. We ask the Commission to do what it can to deter such conduct.

Fourth, the Commission should expand the current enhancement at §2D1.1(b)(5) (importation of methamphetamine) to include importation of fentanyl and any analogues of fentanyl. Much of the fentanyl being distributed in the United States (and the chemicals used to make it) originates in other countries. Indeed, more than 90% of illicit fentanyl is seized at official border crossings.[37] In October 2023, the President asked Congress for $1.2 billion in funding for the Department of Homeland Security to assist in interdicting fentanyl pills and powder coming across the nation's borders.[38] While the guidelines provide for a two-level enhancement under §2D1.1(b)(5) for defendants who import methamphetamine or manufacture methamphetamine using unlawfully imported chemicals, they contain no similar enhancement available for fentanyl. The Department recommends adding one.

Fifth, the Commission should add the most prevalent and important fentanyl precursor chemicals to the Chemical Quantity Tables at §2D1.11 for offenses relating to precursors and other chemicals and equipment required to manufacture fentanyl. Doing so would help further the recent action taken by the United Nations Commission on Narcotic Drugs (at the request of

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[33] *See, e.g.*, N.Y. Dep't of Health, Press Release, *New York State Department of Health Issues Public Health Alert for Medetomidine Detected In Drug Samples In Schenectady and Syracuse* (June 21, 2024), https://www.health.ny.gov/press/releases/2024/2024-06-21_medetomidine.htm#:~:text=The%20Public%20Health%20Alert%20was,%2C%22%20State%20Health%20Commissioner%20Dr.

[34] Drug Enforcement Admin., *DEA Reports Widespread Threat of Fentanyl Mixed with Xylazine*, https://www.dea.gov/alert/dea-reports-widespread-threat-fentanyl-mixed-xylazine.

[35] *See, e.g.*, Ctr. for Forensic Science, Research, and Education, *Medetomidine Rapidly Proliferating Across USA — Implicated In Recreational Opioid Drug Supply & Causing Overdose Outbreaks* (May 20, 2024), https://www.cfsre.org/nps-discovery/public-alerts/medetomidine-rapidly-proliferating-across-usa-implicated-in-recreational-opioid-drug-supply-causing-overdose-outbreaks.

[36] *DEA Reports Widespread Threat of Fentanyl Mixed with Xylazine*, *supra* n.34; N.Y. State Office of Addiction Services and Supports, *Advisory: Another Potent Sedative, Medetomidine, Now Appearing in Illicit Drug Supply* (May 31, 2024), https://oasas.ny.gov/advisory-may-31-2024.

[37] Dep't of Homeland Sec., *Fact Sheet: President's State of the Union Highlights DHS Efforts on the Front Lines Combating Illicit Opioids, Including Fentanyl* (March 8, 2024), https://www.dhs.gov/news/2024/03/08/fact-sheet-presidents-state-union-highlights-dhs-efforts-front-lines-combating#:~:text=This%20Administration%20is%20working%20intensively,vehicles%20driven%20by%20U.S.%20citizens.

[38] The White House, *White House Calls on Congress for Immediate Action to Continue the Administration's Work to Disrupt Fentanyl Trafficking* (Oct. 20, 2023), https://www.whitehouse.gov/ondcp/briefing-room/2023/10/20/white-house-calls-on-congress-for-immediate-action-to-continue-the-administrations-work-to-disrupt-fentanyl-trafficking/.

the United States) to control three chemicals used by drug traffickers to produce illicit fentanyl.[39] This could be done through a separate table targeting precursors for fentanyl, fentanyl analogues, and fentanyl-related substances, similar to the current table for three methamphetamine and amphetamine precursor chemicals.[40] The fentanyl chemicals could include, for example, 4-piperidone; N-phenethyl-4-piperidone (NPP); 4-AP; 1-boc-4-AP; and benzylfentanyl.

Sixth, the Commission should create a new enhancement for chemicals and equipment used in fentanyl production. This could be done by adding fentanyl to §2D1.12(b)(1), which currently provides for a two-level increase when the covered chemicals and equipment are used to produce methamphetamine.

Finally, the Commission should create a new enhancement under §2D1.1 for a drug trafficking offense also involving a tableting machine or an encapsulating machine (commonly referred to as a pill press). Significant quantities of fentanyl pills are being pressed in the United States, as evidenced by alarming recent seizures. For example, as part of drug investigations in just the last six months, agents in New Orleans seized 80,000 fentanyl pills made to look like Xanax, oxycodone, and MDMA, along with 2 pill presses (and fentanyl powder and 13 firearms); agents in Louisville seized an electronic "TDP 5" pill press with M-30 punch die molds, a large quantity of counterfeit M-30 pills containing fentanyl, and approximately one kilogram of powder containing a mixture of fentanyl; and agents in the Bronx, New York seized two industrial-scale pill presses, approximately 130,000 pills, approximately three kilograms of a powder containing fentanyl, approximately 20 pounds of powder containing methamphetamine, and approximately 3.5 pounds of suspected crystal meth.[41]

In each of these takedowns, agents seized enough drugs (and firearms) to ensure that the defendants, if convicted, would face substantial sentences and would not quickly return to their production of deadly substances. But the fact that the guidelines do not account for the presence of a pill press in a drug trafficking operation raises the possibility that, in cases involving less timely takedowns that result in the seizure of one or more pill presses accompanied by smaller quantities of drugs, the guideline range will substantially understate the seriousness of the offense conduct.

Human Smuggling

On June 14, 2024, Attorney General Garland announced that the work of Joint Task

[39] The White House, *At Urging of U.S., UN Commission Acts Against "Precursor" Chemicals Used to Produce Illicit Fentanyl* (March 16, 2022) ("Today's action by CND adds three fentanyl precursor chemicals – 4-anilinopiperidine (4-AP), 1-(tert-butoxycarbonyl)-4-phenylaminopiperidine (boc-4-AP), and N-phenyl-N-(piperidin-4-yl) propionamide (norfentanyl) – to the list of chemicals under Table I of the 1988 Convention Against Illicit Traffic of Narcotic Drugs and Psychotropic Substances, one of the three international drug control conventions that guide global efforts to reduce drug use and trafficking. The CND also voted today to schedule brorphine and metonitazene, two synthetic opioids, under Schedule I of the 1961 Convention on Narcotic Drugs and eutylone, a synthetic stimulant, under Schedule II of the 1971 Convention on Psychotropic Substances."), https://www.whitehouse.gov/ondcp/briefing-room/2022/03/16/at-urging-of-u-s-un-commission-acts-against-precursor-chemicals-used-to-produce-illicit-fentanyl/)

[40] §2D1.11(d) (Methamphetamine and Amphetamine Precursor Chemicals).

[41] Drug Enforcement Admin., *Recent DEA Seizures of Pill Presses*, April 9, 2024, https://www.dea.gov/stories/2024/2024-04/2024-04-09/recent-dea-seizures-pill-presses.

Force Alpha—a U.S. Department of Justice and U.S. Department of Homeland Security joint task force focused on the most prolific and dangerous human smuggling groups—has resulted in more than 300 domestic and international arrests and more than 240 convictions on human smuggling offenses.[42] During the announcement, the Attorney General remarked that smugglers' singular focus is profit and that they "do not care whether the migrants they take advantage of live or die."[43] Because of the depravity of smuggling crimes, the Department has continued to prioritize holding these offenders accountable. During the 2023 Fiscal Year, federal courts sentenced 4,731 defendants for human smuggling under §2L1.1, up from 4,056 during the 2022 Fiscal Year.[44]

One of the critical, enduring values of the Sentencing Guidelines is to help courts identify offenses involving the most serious offense conduct, and to distinguish these offenses from offenses that are less serious, so that courts are better able to comply with Congress's requirement that courts "impose a sentence sufficient, but not greater than necessary … to reflect the seriousness of the offense, to provide respect for the law, and to provide just punishment for the offense; to provide adequate deterrence."[45] Yet the provisions of §2L1.1 do not adequately distinguish the most serious of human smuggling offenses from the less serious.

To start, §2L1.1 fails to adequately account for the number of migrants that any one defendant smuggles. The base offense level of §2L1.1 remains unchanged whether a defendant smuggles one, three, or five migrants because the enhancement at subsection (b)(2) is triggered only when the defendant smuggles six or more persons.[46] At that point, the guidelines apply the same three-level enhancement when the defendant smuggles six persons, all the way up to 24 persons.[47] Likewise, it applies the same six-level enhancement whether the defendant smuggles 25 persons, 50 persons, or 75 persons, all the way up to 99 persons,[48] essentially treating human beings the same way the guidelines count money or weigh drugs. This contradicts the intent of 8 U.S.C. § 1324, which provides for terms of incarceration "for each alien in respect to whom such a violation occurs."[49] Congress's intent is clear: to provide increased punishment for each additional alien smuggled. The guidelines do not reflect that intent.

To address that deficiency, and as the Department further explained in a recent legislative proposal transmitted to Congress,[50] the Commission should amend subsection (b)(2) by

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[42] U.S. Dep't of Justice, *Attorney General Merrick B. Garland Delivers Remarks on Human Smuggling* (June 14, 2024), https://www.justice.gov/opa/video/attorney-general-merrick-b-garland-delivers-remarks-human-smuggling.
[43] *Id*.
[44] U.S. Sent. Comm'n, *Interactive Data Analyzer*; U.S. Sent. Comm'n, *Quick Facts, Alien Smuggling Offenses* (FY 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Alien_Smuggling_FY22.pdf.
[45] 18 U.S.C. § 3553(a).
[46] §2L1.1(b)(2) ("If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows …").
[47] §2L1.1(b)(2)(A).
[48] §2L1.1(b)(2)(B).
[49] 8 U.S.C. § 1324(a)(1)(B) ("A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs— … not more than 10 years … not more than 5 years …").
[50] U.S. Dep't of Justice, Press Release, *Readout of Joint Task Force Alpha's Third Anniversary Meeting* (June 11, 2024) (explaining that the proposal would amend §2L1.1 "by creating steeper penalty tiers based on the number of

narrowing the ranges and imposing appropriate enhancements for the number of people smuggled, ranging from a two-level enhancement for smuggling up to four people to a ten-level enhancement for smuggling 49 or more people. The proposed changes are more closely aligned with the actual language of § 1324, more accurately reflect the culpability of the defendant's conduct, and are more likely to deter large scale human smuggling.

Similarly, subsection (b)(7) does not draw a distinction between one migrant suffering bodily injury after being locked in a compartment, or five migrants suffering that harm. The two-level enhancement prescribed in that provision applies whether the smuggler injures one victim, five victims, 10 victims, or more.[51] That scheme is inconsistent with the statutory requirement that the Commission promulgate guidelines that account for "the nature and degree of the harm caused by the offense, including whether it involved … a number of persons."[52] The Commission can address this issue by amending §2L1.1(b)(7) so that the offense level increases for each person who is injured or dies.

Relatedly, and of no less importance, the Commission should amend §2L1.1 to ensure that it provides an adequate punishment range in cases where the defendant sexually assaults migrants in the course of the smuggling offense. In her 2016 letter to the Commission concerning human smuggling, then-Director of ICE Sarah Saldaña wrote that "the safety of migrants is rarely a consideration, and the results are apparent in the countless incidents of sexual assault."[53] Yet as currently drafted, the four-level enhancement under subsection (b)(7) is limited to instances of death or bodily injury. That definition may not reach sexual assaults perpetrated against migrants because, as the Department has previously explained, such assaults do not necessarily entail physical violence of the sort that results in bodily injury.[54] Smugglers, after all, need not employ physical violence (and consequently cause physical injury) when they can sexually exploit the emotional, mental, and physical control they have over a vulnerable victim in an inherently coercive setting.

Even when the four-level enhancement applies, moreover, it may not be sufficient to capture the gravity of sexual assault that smuggling victims endure. Because the base offense level for this guideline is only 12 for a smuggler who commits the standard § 1324 violation, a

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people smuggled by the defendant; increasing penalties when the defendant's conduct results in injury or death to more than one person; and ensuring defendants are subject to sentencing enhancements for sexual assault and other types of prohibited sexual conduct committed during the smuggling offense, even if that conduct occurred outside U.S. jurisdiction"), https://www.justice.gov/opa/pr/readout-joint-task-force-alphas-third-anniversary-meeting.

[51] §2L1.1(b)(7)(B) ("If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury").

[52] 28 U.S.C. § 994(c)(3).

[53] Sarah R. Saldaña, Dir., U.S. Immigr. and Customs Enf't, Comment Letter on Proposed Amendments to the Federal Sentencing Guidelines (Jan. 15, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20160321/DHS.pdf.

[54] Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 33 (Feb. 22, 2024) ("[J]ust like the falsity that most sexual assaults are committed by strangers, so too is the falsity that most sexual assaults involve violence or threats of violence or that defendants are first-time offenders. The starkest examples include law enforcement officers, human traffickers, and defendants who target vulnerable victims unable to fight back. Officers who target those in their custody do so by weaponizing their authority to obtain their victims' submission.") (internal citations omitted), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202402/88FR89142_public-comment.pdf#page=78.

four-level increase brings the offense level up to 16, resulting in a guideline range of 21-27 months for a smuggler with no criminal history, or 12-18 months after a reduction for a timely guilty plea.[55] A guideline range of 21-27 months as applied to a smuggler who has sexually assaulted a migrant is wholly inadequate. In fact, even this example understates the inadequacy. As noted above, the four-level enhancement under (b)(7) applies regardless of the number of victims or number of sexual assaults that a defendant committed.[56]

The migrant victims in such cases, as one judge explained to the Commission, "are for all practical purposes in the same position as a kidnapping victim" in that they may be compelled "by threats of harm either to their children or family members."[57]

To ensure adequate punishment, the Commission should consider adding a cross-reference to subsection (c) of §2L1.1 instructing courts to apply the appropriate guidelines from Chapter II, Part A, Subpart 3. The change would align with the treatment of offenses resulting in death, as the cross-reference in §2L1.1(c)(1) provides for application of "the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline."[58]

This is not the first time that the Executive Branch has brought the foregoing concerns with §2L1.1 to the Commission's attention. In September 2022, the Department asked the Commission to amend §2L1.1 to "account for the serious victimization caused by human smuggling, including sexual assault, serious bodily injury, and death," and also to "address offenses where the defendant personally was involved in sexual abuse or sexual assault of a migrant, was involved in the death or serious bodily injury of more than one person, was involved in smuggling a known or suspected terrorist, or was involved in subjecting a child to serious risks of injury or death, regardless of whether the child was "unaccompanied."[59] On October 16, 2022, Department of Homeland Security Secretary Alejandro Mayorkas also wrote to the Commission, and, after noting that he agreed with the Department's letter, specifically mentioned that "the Commission should, among other things, consider enhancements to the guidelines to account for the offenses in which migrants were sexually abused or sexually assaulted."[60] The Commission did not act then. It should act now.

Accordingly, the Department renews our prior request for amendments to §2L1.1 and urges the Commission to make the changes described above and in the Department's June 2024 legislative proposal, including: 1) provide more gradations in the advisory guideline ranges for the number of migrants smuggled, as well as a higher maximum increase for the most prolific smugglers; 2) provide offense-level increases under §2L1.1(b)(7) for each migrant who suffers bodily injury (2 levels per person), serious bodily injury (4 levels per person), permanent or life-threatening injury (6 levels per person), or death (10 levels per person) as a result of the offense,

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[55] U.S.S.G. Ch. 5 Pt. A (Sentencing Table).
[56] §2L1.1(b)(7)(B) (add 4 levels "if any person" sustained serious bodily injury).
[57] Hon. Andrew S. Hanen, Letter to U.S. Sent'g Comm'n (March 9, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160316/20160316_Hanen.pdf.
[58] §2L1.1(c)(1).
[59] Letter to Hon. Carlton Reeves, Chair, *supra* n.21, at 24-25.
[60] Alejandro Mayorkas, Secretary, Department of Homeland Security, Letter to Hon. Carlton Reeves, Chair (Oct. 16, 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20221017/dhs.pdf.

subject to an appropriate offense-level cap; and 3) provide a cross reference to specifically address human smuggling offenses involving sexual assault.

Use of Artificial Intelligence to Commit or Avoid Apprehension for Crimes

The Commission has announced that, "[i]n light of the 40th anniversary of the Sentencing Reform Act of 1984, Public Law 98-473, 98 Stat. 1987 (1984), the Commission intends to focus on furthering [its] statutory purposes and missions as set forth" in the Act.[61] The Department supports that focus, which necessarily involves looking both back and ahead: back toward the "fundamental changes to federal sentencing" effectuated through the Act,[62] and ahead to how the Commission can best fulfill its mission against the backdrop of a sentencing framework and criminal-justice landscape that differ markedly from the ones that Congress addressed in 1984.

Looking toward the future, all participants in the federal criminal justice system need to take account of technological changes that affect the ways individuals commit crimes, solve crimes, and analyze relevant data. One such change is the existence, and increasingly widespread availability, of powerful artificial intelligence (AI) tools. As Deputy Attorney General Lisa Monaco recently explained, when used responsibly, AI can be of valuable assistance to law enforcement agents as they strive to solve crimes and to prosecutors as they marshal evidence needed to prosecute offenders.[63] AI may similarly aid those gathering and analyzing data concerning the criminal-justice system—as the Commission does through its statutorily prescribed data-collection and -analysis functions.[64]

At the same time, AI poses significant risks of dangerous misuse. It can make crimes easier to commit; amplify the harms that flow from crimes once committed; and enable offenders to delay or avoid detection. AI also raises particular concern in certain areas—such as cybercrime and election security—where its misuse can have societal ramifications beyond the impact on individual victims.[65]

In light of those concerns, the Deputy Attorney General announced in February 2024 (1) that Department of Justice prosecutors would, where permitted by law, seek stiffer sentences for offenses made significantly more dangerous by the misuse of AI; and (2) that if the Department determined that existing sentencing enhancements do not adequately address the harms caused by misuse of AI, we would seek reforms to those enhancements to close that gap.[66]

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[61] Notice of Proposed Priorities for Amendment Cycle, 89 Fed. Reg. 48,029 (June 4, 2024).
[62] *Pepper v. United States*, 562 U.S. 476, 488-89 (2011).
[63] U.S. Dept. of Just., *Deputy Attorney General Lisa O. Monaco Delivers Prepared Remarks at the University of Oxford on the Promise and Peril of AI* (Feb. 14, 2024), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-university-oxford-promise-and.
[64] *See* 28 U.S.C. § 991(b)(2) (requiring the Commission to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing"); 28 U.S.C. § 995(a)(12)(A) (authorizing the Commission to establish a research and development program in order to "serv[e] as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices").
[65] *Remarks at the University of Oxford on the Promise and Peril of AI*, *supra* n.63.
[66] *Id*.

In line with those remarks, and as the Commission works to ensure that sentencing policies and practices promote deterrence, just punishment, and incapacitation, the Department recommends that the Commission consider how the guidelines should account for the risks posed by the misuse of AI. In the short term, the Department recommends that the Commission consider a Chapter 3 enhancement applicable to cases in which the defendant used artificial intelligence during the commission of an offense, in preparation for the offense, or in an attempt to avoid apprehension for the offense. Such an enhancement would differ from the sophisticated-means enhancement that applies to defendants whose guideline range is set by §2B1.1, because it would apply to all offenses of conviction—not just those keyed to §2B1.1, and not just those where the use of artificial intelligence was sophisticated. It would also be distinct from the special-skill enhancement in §3B1.3 because it would apply regardless of whether special skill was required to use the AI. Although the impact of AI will surely warrant further study going forward, an enhancement of this nature would recognize the danger posed by AI-fueled crime and send a valuable early signal that those exploiting this new form of promising technology will face increased penalties.

Domestic Terrorism

In our September 2022 letter, we asked the Commission to address the increasing number of domestic terrorism offenses where the perpetrator's purpose is to intimidate a civilian population through violent acts but where the defendant is not convicted under one of the "federal crimes of terrorism" included in §3A1.4. For example, a mass shooting intended to intimidate persons based on their political viewpoint may not trigger the offense-level enhancement in §3A1.4(a) and may likewise fall outside the circumstances in which Application Note 4 provides for an upward departure.

The Commission did not act on our 2022 request. But we continue to believe that this area of sentencing law is important and urge the Commission to give it further consideration.

Bank Secrecy Act

Under the Bank Secrecy Act (BSA), 31 U.S.C. § 5311 *et seq.*, financial institutions are required to have appropriate anti-money laundering programs to protect customers, the financial institution, and the U.S. financial system from the risk of money laundering, terrorist financing, and illicit finance. Criminal failures to implement anti-money-laundering programs can allow hundreds of millions or billions of dollars to flow through the U.S. financial system without any safeguards or controls. In recent years, the risks posed by those failures have become especially acute in the field of cryptocurrency and digital assets, where criminals use exchanges and other money transmitting businesses that provide digital-asset-transfer services to transmit funds to finance criminal activity and the resulting ill-gotten gains across the globe in the blink of an eye.

Currently, however, the advisory guideline ranges for violations of the BSA's anti-money laundering program provision do not reflect the severity of the criminal act. In particular, in our experience, the offense level for a BSA program violation under §2S1.3 is never higher than a 12 (yielding a range of 10-16 months at criminal history category I) before application of any leadership enhancements. Such low offense levels have contributed to sentences of little or no

incarceration for offenders who admitted to serious BSA program violations involving millions or billions of dollars, thereby undermining the deterrent value of the statute's criminal penalties. This was precisely the case for Chengpeng Zhao, founder and CEO of Binance, the world's largest cryptocurrency exchange. Zhao was sentenced to four months of imprisonment for his role in allowing trillions of dollars in transactions that were not subject to an effective anti-money laundering program and enabling more than $898 million in transfers that violated U.S. sanctions.

To address that deficiency, the Department recommends that the Commission amend §2S1.3 to provide enhancements that take into account the scope and severity of the BSA violations. Concretely, the Department recommends that the Commission add a new specific offense characteristic referencing violations under 31 U.S.C. §§ 5318, 5318A, and 5322, and then add a table raising the offense level based on the value of the criminal proceeds transacted in the offense.

The Categorical Approach and Simplification

The Commission has published as a proposed priority the continued examination of the career offender guideline (and alternative approaches to the "categorical approach" in determining whether an offense is a "crime of violence" or a "controlled substance offense"), as well as the exploration of ways to simplify the guidelines.[67] In our view, the goal of simplification is not necessarily to shorten the Guidelines Manual, but to make the application of the guidelines less complex, so that the results are more consistent and can be anticipated by the defendant, the prosecutor, crime victims, and the public. We think the most suitable starting place is with the career offender guideline, as this provision has become among the most complex in the entire Guidelines Manual.

In 2018, the Commission published proposed changes to the guidelines to address the categorical approach. The Commission's rationale was based largely on the complexity of the process involved in applying the categorical approach to the definition of a crime of violence or of a controlled substance offense, and the resulting inconsistency of results:

> The Commission has received significant comment over the years regarding the categorical approach, most of which has been negative. Courts and stakeholders have criticized the categorical approach as being an overly complex, time consuming, resource-intensive analysis that often leads to litigation and uncertainty. Commenters have also indicated that the categorical approach creates serious and unjust inconsistencies that make the guidelines more cumbersome, complex, and less effective at addressing dangerous repeat offenders.[68]

For a number of years, and most recently in our March 27, 2023 comment letter to the Commission, the Department has suggested that the best way to address the categorical approach

[67] Proposed Priorities for Amendment Cycle, 89 Fed. Reg. at 48029.
[68] U.S. Sent'g Comm'n., Proposed Amendments to the Sentencing Guidelines, p. 23 (December 20, 2018), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20181219_rf-proposed.pdf.

is to permit courts to consider actual conduct.[69] In our view, that approach would result in less complex, less opaque, and more predictable and consistent outcomes: in other words, such a change would simplify the guidelines.

Ongoing circuit conflicts concerning application of the controlled substances offense definition make prompt resolution of this issue especially important. As the Commission is aware, courts remain divided over (1) whether the term "controlled substance" is limited to drugs regulated by the federal Controlled Substances Act,[70] and (2) whether courts conducting a categorical analysis consider the version of the Controlled Substances Act in effect at the time the defendant committed the prior offense or instead the version in effect at the time of the current federal sentencing.[71] The Supreme Court's recent decision in *Brown v. United States*, 144 S. Ct. 1195 (2024), addressed the latter question in the context of the Armed Career Criminal Act but did not directly resolve the question under the guidelines.

Finally, any effort at simplification—of the categorical approach or otherwise—will have to account for principles of administrative law that have undergone significant changes in recent years (and months). As the Commission is aware, courts have disagreed about the effect of, and judicial deference owed to, the guideline commentary. The Commission has responded by amending the guidelines to move certain provisions from the commentary to the text. Future efforts at simplification, whether directed at the categorical approach or other areas, will have to be responsive to the evolving legal framework.

II. Other Programmatic Issues

False Statements to Financial Institutions

In addition to the harms described above flowing from criminally deficient anti-money-laundering programs, the integrity of the financial system can be compromised when individuals obtain access to banking services under false or fraudulent pretenses and use those services to hide their profits from past crimes or facilitate future ones. Offenders may, for example, conceal that funds deposited into or transacted through an account constitute proceeds of business done in sanctioned jurisdictions—placing the financial institution at risk of violating sanctions law itself.

When, however, the individual's use of the fraudulently obtained account access does not result in a monetary loss to a financial institution or a victim, offense-level enhancements under §2B1.1's loss table will not be available. The resulting guideline range will therefore often be

[69] Jonathan J. Wroblewski, U.S. Dep't of Justice, Letter to Hon. Carlton Reeves, Chair, at 27 (February 27, 2023) ("The Department has long maintained that the best way to address the categorical approach is to retain the current definitions (as amended in Parts B-D and in Part B regarding Circuit Conflicts) but permit courts to consider actual conduct."), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf#page=457.

[70] *See United States v. Lewis*, 58 F.4th 764, 768-69 (3d Cir.) (collecting cases), *cert denied*, 144 S. Ct. 489 (2023).

[71] *Id.* at 771 (joining the Sixth and Eighth Circuits in adopting a time-of-prior-offense rule but explaining that the First, Second, and Ninth Circuits have adopted a time-of-federal-sentencing rule).

low, despite the risks that this category of fraudulent conduct presents to the affected financial institution and the system as a whole.

To ensure just punishment and adequate deterrence, the Department recommends that the Commission consider two changes to §2B1.1 for violations of 18 U.S.C. §§ 1014, 1344, and 1349 that involve fraudulently obtaining banking services, rather than loans. First, the Commission could amend the guidelines to ensure that where the crime involves obtaining services from a financial institution through fraud and no monetary loss can be shown, the offense level be based on the volume of transactions conducted as a result of the offense. Second, the Commission could consider an additional offense-level enhancement where the defendant was convicted under the same statutes for defrauding a bank into providing services and the defendant knew or believed that the transactions processed through those services involved proceeds of unlawful activity or were intended to promote unlawful activity.

Trade Secrets

Trade secret theft and economic espionage pose an increasing threat, not only to American businesses and our competitive advantage, but in some cases to critical infrastructure, national security, and public safety. The applicable guideline ranges for convictions for trade secret and economic espionage offenses under 18 U.S.C. §§ 1831 and 1832 are insufficient to reflect the seriousness of the offenses, and to provide adequate deterrence, and we ask that the Commission raise the advisory guideline ranges for these offenses.

Trade secrets—for example, scientific and technical research, chemical formulas, manufacturing processes—provide U.S. businesses with an essential competitive advantage in the marketplace. These trade secrets are commonly developed over years or even decades, at enormous cost, and the theft of this information represents a tremendous loss to the business. When the trade secrets are transmitted outside of the United States, the loss implicates the national interest, potentially resulting in lost jobs, decreased competitiveness, and empowerment of adversary regimes.

For example, in March 2024, after an electric vehicle manufacturer spent at least $13 million developing trade secrets concerning battery assembly, the defendants stole the trade secrets and used those secrets in establishing competitor businesses located in China, Canada, Germany and Brazil.[72] In another example, a former Google engineer was arrested in March 2024 for stealing AI-related trade secrets while secretly working for two China-based technology companies.[73] In February 2024, a defendant was arrested for allegedly stealing trade secrets developed for use by the U.S. government to detect nuclear missile launches and track ballistic

[72] U.S. Dep't of Justice, *Owners of China-Based Company Charged with Conspiracy to Send Trade Secrets Belonging to Leading U.S.-Based Electric Vehicle Company* (March 19, 2024), https://www.justice.gov/opa/pr/owners-china-based-company-charged-conspiracy-send-trade-secrets-belonging-leading-us-based; *see also* U.S. Dep't of Justice, *Resident of China Pleads Guilty to Conspiracy to Send Leading Electric Vehicle Company's Trade Secrets to Undercover U.S. Agent* (June 13, 2024), https://www.justice.gov/opa/pr/resident-china-pleads-guilty-conspiracy-send-leading-electric-vehicle-companys-trade-secrets.

[73] U.S. Dept. of Just., *Chinese National Residing in California Arrested for Theft of Artificial Intelligence-Related Trade Secrets from Google* (March 6, 2024), https://www.justice.gov/opa/pr/chinese-national-residing-california-arrested-theft-artificial-intelligence-related-trade.

and hypersonic missiles.[74] According to the victim company, it had invested tens of millions each year for more than seven years to develop the technology.[75]

At the same time, American businesses face increasingly aggressive and sophisticated efforts to misappropriate or steal valuable confidential data by competitors, both domestic and foreign, using methods ranging from bribing, coopting, or poaching key employees privy to sensitive data, to phishing campaigns, social engineering schemes, or brute force cyber-attacks to gain access to corporate networks and exfiltrate this confidential information. Yet detection and prosecution of these violations can be difficult. Given the nature of trade secrets, a successful theft may be virtually impossible to detect. But even in cases where a theft is detected or suspected, the victims in trade secret theft cases may be reluctant to report thefts, share with government investigators and prosecutors the type of sensitive confidential information necessary to prosecute a criminal case, or disclose the estimated losses caused by the trade secret theft for fear that such information will become public as a result. Despite the use of protective orders, the potential for disclosure of confidential business information is a frequent concern, and sometimes an implicit threat defendants can use to discourage prosecution. These challenges are all the greater in economic espionage cases, where witnesses and evidence may be located abroad, and where the information needed to establish essential facts may be under the control of the same government benefitting from the trade secret theft at issue.

Currently, trade secret offenses under 18 U.S.C. §§ 1831 and 1832 are sentenced, like many other economic offenses, under §2B1.1. Trade secret offenses receive a base offense level of 6 and then an additional enhancement based on the loss resulting from the offense as specified in the table in §2B1.1(b)(1). As a result of amendments promulgated by the Commission in 2013,[76] a two-level enhancement applies if the defendant knew or intended that a trade secret would be transported or transmitted out of the United States, and a four-level enhancement (with a minimum of 14 levels) applies if the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent.[77]

To address the harms caused by these offenses, and to ensure maximum deterrent effect from prosecutions that require substantial government resources, the Department asks that the guidelines applicable to trade secret theft and economic espionage offenses be amended to provide more significant penalties. Increases are especially warranted for those offenses involving the transmission or transportation of a trade secret outside the United States and for offenses committed for the benefit of a foreign government, instrumentality, or agent. Specifically, all offenses involving theft of a trade secret should receive at least a two-level enhancement, and the existing two- and four-level enhancements applicable to defendants who knew or intended transmission outside the United States or benefit of a foreign government should be increased by another two levels.

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[74] U.S. Dep't of Justice, *Justice Department Announces Charges and Arrest in Two Separate Illicit Technology Transfer Schemes to Benefit Governments of China and Iran* (February 7, 2024), https://www.justice.gov/opa/pr/justice-department-announces-charges-and-arrest-two-separate-illicit-technology-transfer.
[75] *Id*.
[76] U.S.S.G. Appendix C, Amendment 771 (eff. Nov. 1, 2013).
[77] §2B1.1(b)(14)(A) and (B).

The proposed two-level increase for trade secret offenses as a category would also align the guidelines applicable to these offenses with those applicable to other types of intellectual property offenses. For comparison, intellectual property offenses such as copyright infringement and trademark counterfeiting are sentenced under §2B5.3, which provides for a base offense level of 8, along with enhancements based on the "infringement amount" (referenced to the §2B1.1 loss table). Somewhat analogous to §2B1.1(b)(14)(A)'s enhancement for transmission—that is, export—of a stolen trade secret outside the United States, §2B5.3(b)(3) provides a two-level enhancement for offenses involving, among other things, importation of infringing items.

Computer Fraud and Abuse Act (CFAA)

The CFAA, 18 U.S.C. § 1030, provides important protections against hackers and cybercriminals, including those who cause grave harms to computer systems and individual users through the use of ransomware, malware, and other nefarious methods. Recent experience has shown, however, that the guidelines applicable to several categories of § 1030 violations are inadequate in some respects.

First, the guidelines governing some violations of § 1030 tie offense-level enhancements to the amount of monetary or property damage caused by the offense or the amount of money that the offender seeks to extort or obtain from a victim. When, however, the primary harm from the computer intrusion is injury to an individual's privacy interests, such enhancements do not apply; instead, the guidelines provide a single two-level enhancement if the court finds that the offense involved either an intent to obtain personal information or the unauthorized public dissemination of personal information.[78] The resulting guidelines range in those cases may therefore be insufficient to reflect the gravity of the harm caused and provide general deterrence. This may be true, for example, in cases where an offender unlawfully gains access to others' accounts to obtain and later share intimate images of the account holder or in ransomware cases—where a single computer intrusion could result in the unauthorized public dissemination of personal information for dozens, hundreds, or even thousands of persons. To address this deficiency, the Commission should consider amendments to the guidelines governing § 1030 violations that provide for additional offense-level increases where the harm is to one or more individuals' privacy and cannot readily be measured in monetary terms.

Second, §2B1.1 can substantially understate the seriousness of the offense in certain cases involving damage or unauthorized access to "protected computers," as defined in 18 U.S.C. § 1030(e)(2). In cases where the perpetrators have employed malware or analogous means to carry out their computer-fraud schemes, law enforcement officers often identify victim computers according to their Internet Protocol (IP) addresses. However, the overwhelming majority of Internet Service Providers in the United States (and overseas) only maintain records of which IP addresses they assigned to specific customers for a period of six months to a year. That practice often prevents law enforcement officers from identifying customers associated with the IP addresses assigned to computers that were damaged or accessed without authorization during the offense. Such victims, despite having sustained actual loss as a result of the offense, are undercounted in §2B1.1.

[78] §2B1.1(b)(18).

The Department recommends that the Commission consider potential amendments to address this systematic undercounting of harm to computer-fraud victims. Possible solutions could include (1) adding a specific offense characteristic that treats each unique IP address as a "victim" without requiring proof of "financial hardship," as do §2B1.1(b)(2)(B) and (C); (2) amending the table in §2B1.1(b) to provide that the loss for each unique IP address damaged or accessed without authorization shall be not less than a specified value (for example, the average cost of repairing a protected computer); or (3) providing a new enhancement to increase the offense level based on the number of protected computers that have been damaged or accessed without authorization. Whatever the particular solution, the undercounting of victims warrants the Commission's consideration.

Third, the Department requests a technical fix to the guidelines to ensure that two existing enhancements apply equally to those who scheme to violate § 1030. Specifically, the enhancements in §§2B1.1(b)(18) and (19) have been held to apply only if "the defendant was convicted of an offense under 18 U.S.C. § 1030," not where the defendant was convicted under the general conspiracy statute of conspiring to violate § 1030.[79] Prosecutors often charge hacking and other computer-intrusion schemes under that general conspiracy statute (18 U.S.C. § 371) because § 1030 itself does not prescribe a separate penalty range for conspiracies. Yet because of that charging practice and the language of §2B1.1, the guidelines range can differ substantially in cases involving the same conduct merely because the offenses resulted in convictions under different statutes—§ 371 instead of § 1030—even where the object of the § 371 conspiracy is a violation of § 1030. The Commission could avoid that discrepancy, and ensure an advisory range that adequately reflects the severity of the offense conduct, by amending §§2B1.1(b)(18) and (19) to apply to convictions for an offense under § 1030 or a conspiracy to commit such an offense.

Foreign Agents Registration Act (FARA)

In our September 2022 and July 2023 annual letters to you, the Department recommended creating a new guideline for offenses related to the actions of agents of foreign principals and governments in violation of the Foreign Agents Registration Act (FARA) and 18 U.S.C. § 951 (agents of foreign governments). The Commission declined to consider the issue during the two previous amendment cycles. We again ask that the Commission create a new guideline for these offenses and add enhancements for disseminating information using a means of mass communication without the required disclosure of a foreign agent's status and for false and misleading statements or submissions to the Department of Justice. The Department has demonstrated a renewed focus on bringing prosecutions under FARA, and several recent prosecutions have also involved defendants acting as agents of a foreign government and allegations of bribery.[80]

[79] *See United States v. Nicolescu*, 17 F.4th 706, 730 (6th Cir. 2021).
[80] *See* U.S. Dep't of Justice, Foreign Agents Registration Act Home, Recent Cases (updated May 31, 2024), https://www.justice.gov/nsd-fara/recent-cases. *See also United States v. Chaoquin*, No. 23-1262, 2024 WL3355141, at *12 (7th Cir. July 10, 2024) (noting the parties' agreement that no guideline applied to the defendant's violation of 18 U.S.C. § 951).

III. Additional Proposals: Technical Fixes and Implementing Legislation

Technical Fixes

New Exceptions to §4C1.1 (Adjustment for Certain Zero-Point Offenders) created April 2023

The Department asks that the Commission revisit the exceptions it included for the new §4C1.1 (Adjustment for Certain Zero-Point Offenders) created in April of 2023. We suggest the following situations should exclude eligibility because the defendants in such situations do not warrant a reduction for being a first-time offender:

The defendant received an adjustment under §3B1.3 (Abuse of a Position of Trust or Use of a Special Skill). Defendants who receive an abuse of position of trust enhancement, per the guideline provision itself, are those who used their position of trust or special skill in a manner that facilitated the commission or concealment of the offense. The professional skills or managerial discretion that these individuals used to commit the offense sets them apart from the routine criminal. The adjustment covers such categories of offenders as a physician who runs a "pill mill," a prison guard who abuses his position to illegally transport and sell drugs, a high-ranking law enforcement officer who creates a scheme to defraud a state or local government out of overtime funds, or a bank president who embezzles millions of dollars. Typically, these individuals—as required to gain the positions of trust that they occupy—do not have criminal histories, and should not benefit from a reduction as a result.

The defendant's instant offense of conviction is covered by Chapter 2, Part M (Offenses involving National Defense and Weapons of Mass Destruction). Defendants convicted of national-security offenses such as treason, espionage, and providing material support to terrorism should not benefit from a reduction.

The defendant received an adjustment under §3C1.1 (obstruction or impeding the Administration of Justice). Defendants who receive an adjustment under §3C1.1, where the obstructive conduct related to the defendant's offense of conviction and any relevant conduct, should not benefit from a reduction.

The defendant has significant ties to cartels or human smuggling organizations. It is not uncommon in prosecutions of largely extraterritorial conduct that the defendant may be eligible for a two-level decrease because they have no qualifying criminal history. For example, a defendant may have only foreign convictions, which are excluded under §4A1.2(h). Or it may be impossible to ascertain whether or not the defendant has a criminal record, due to an absence of law enforcement or judicial information-sharing or record-keeping. Such defendants should not benefit from a reduction.

The defendant committed COVID fraud while a public employee. Although public servants are not likely to have criminal histories, public employees who commit fraud in connection with major disaster economic relief programs, in a manner analogous to the

abuse of public or private trust adjustment under §3B1.3, should not benefit from a reduction.

The defendant is a government employee or has a security clearance. Defendants with security clearances are not likely to have criminal histories, but such defendants who use their employment and or clearances to commit a crime should not benefit from a reduction.

Technical Fix: Illegal Export of Certain Firearms

On March 9, 2020, certain non-automatic and semi-automatic firearms equal to .50 caliber or less, including rifles, handguns, shotguns, and ammunition were transferred from the U.S. Munitions List,[81] to the Commerce Control List, Supplement 1 to Part 774 of the Export Administration Regulations (EAR).[82] As a result, such firearms are now controlled through the Export Control Reform Act (ECRA), 50 U.S.C. § 4819, and the EAR, rather than the Arms Export Control Act (AECA), 22 U.S.C. § 2778, and the International Traffic in Arms Regulations. A technical edit is in order to add 50 U.S.C. § 4819 to the Statutory Provisions listed in §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) and to update Application Note 1 to make clear that §2M5.2 continues to apply to the illegal export of non-fully automatic small arms and related ammunition now controlled through ECRA and the EAR.

Technical Fix: Evasion of Export Controls

On August 13, 2018, Congress passed the Export Control Reform Act, 50 U.S.C. §§ 4801-4852, providing permanent statutory authority for the Export Administration Regulations (EAR), 15 C.F.R. parts 730-774. A technical edit is in order to add 50 U.S.C. § 4819 to the Statutory Provisions listed in §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism) and to delete reference to the repealed Export Administration Act, 50 U.S.C. § 4601 *et seq*.

Implementing New Legislation into the Guidelines

Implement New Offense of Animal Crushing Created by Preventing Animal Cruelty and Torture Act of 2019

In our September 2022 annual report, we recommended that the Commission amend the guidelines to implement the then-recent Prevention of Animal Cruelty and Torture Act ("PACT Act").[83] The Commission did not address the issue then, nor during the following amendment year. The PACT Act created a new offense of animal crushing,[84] in addition to the distinct

[81] Section 121.1 of the International Traffic in Arms Regulations (UTAR), 22 C.F.R. parts 120-130.
[82] 15 C.F.R. parts 730-774; *see* 85 Fed. Reg. 4136 (Jan. 23, 2020).
[83] Pub. L. No. 116-72, 133 Stat. 1151 (Nov. 25, 2019).
[84] 18 U.S.C. § 48(a)(1).

offenses of creating and distributing animal crush videos.[85] Although § 48 is already referenced to §2G1.3 under the Statutory index (Appendix A), §2G1.3 is intended to address the *creation and distribution* of obscene material,[86] and not the illegal act of crushing animals. Additionally, §2G3.1 is inconsistent with the statutory maximum penalty of seven years per offense and with the guideline applicable to the comparable offense of animal fighting. Because the Commission has not acted and because the new offense is treated just like the existing offense in the guidelines, the courts are faced with an advisory range that equates the two crimes.

In 2016, the Commission raised the offense level for most animal-fighting offenses, which have a five-year statutory-maximum sentence. The Commission has previously adopted specified guidelines resulting from animal-cruelty legislation, increasing the corresponding offense level of those acts.[87] As recognized by Congress through this legislation and by the Commission in other guideline amendments involving violence against animals,[88] sentences must adequately reflect this egregious conduct as well as its distribution.[89] Because the Commission has not yet implemented the PACT Act, we recommend the Commission add a new subsection to §2G3.1 to include the offenses covered under 18 U.S.C. § 48 in order to provide appropriate guideline penalties and address existing sentencing disparities.

The Department also notes that we agree with a 2024 letter to the Commission from 48 nonprofit organizations recommending an increase to the base level of §2Q2.1 from 6 to 8, and recommending a new enhancement under §2Q2.1 for being "engaged in the business," in order to adequately deter organized crime involved in transnational Wildlife and Plant Trafficking.

Further Incorporate 18 U.S.C. § 250 into Existing Guidelines

In March 2022, when Congress reauthorized the Violence Against Women Act (VAWA), it enacted 18 U.S.C. § 250 (penalties for civil rights offenses involving sexual misconduct). When charged in conjunction with Chapter 13 substantive civil rights offenses, Section 250 calls for felony penalties consistent with the gravity of the type of sexual assault underlying the civil rights offense. This statute is most often used when government actors commit sexual assault in violation of 18 U.S.C. § 242, though it also applies to other civil rights offenses, such as federal hate crimes.

On April 5, 2023, the Commission integrated this statute and other new sexual abuse offenses enacted under the 2022 VAWA. The changes included adding the new § 250 penalty

[85] 18 U.S.C. § 48(a)(2).
[86] §2G3.1, cmt. bkgnd ("Most federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain.")
[87] *See* U.S. Sent'g Comm'n, Amendment 800, 81 Fed. Reg. 2295 (Nov. 1, 2016) ("This amendment responds to two legislative changes" and "increases the base offense level for offenses involving an animal fighting venture from 10 to 16" to "better accounts for the cruelty and violence that is characteristic of these crimes"); U.S. Sent'g Comm'n, Amendment 721, 73 Fed. Reg. 26923 (Nov. 1, 2008).
[88] *See* 18 U.S.C. § 48(a)(1)-(2); U.S.S.G. §2E3.1, Upward Departure Provision ("an upward departure may be warranted if . . . the offense involved extraordinary cruelty to an animal").
[89] *See, e.g.*, Gov't Sent. Mem. at 10, *United States v. Scott*, No. 1:21-cr-49 (S.D. Ind. Nov. 4, 2021) ("Defendant asphyxiated the pregnant cat she acquired from Person 1 by placing a ligature around its neck, and strangling the cat until it died. Defendant then removed the unborn kittens from inside the cat's body, and used Social Media Application B to post a series of images depicting the animal crushing act.").

statute to the general guideline for civil rights offenses under §2H1.1. Notably, §2H1.1 cross references to §2A3.1 and §2A3.4, which govern the Chapter 109A offenses of sexual abuse and abusive sexual contact, when the underlying conduct involves the conduct covered by those two sections. The Department would propose that the Commission integrate § 250 into the entire guidelines scheme, consistent with how Chapter 109A sex offenses are integrated.

Implement the Protecting Lawful Streaming Act (PLSA)

As we noted in our September 2022 letter to you, the Protecting Lawful Streaming Act of 2020 (PLSA), Pub. L. No. 116-260, 134 Stat. 1182, created a new felony offense at 18 U.S.C. § 2319C for operating an "illicit transmission service"—that is, for providing infringing content via streaming. Last year the Commission referred § 2319C offenses to §2B5.3. However, other changes are necessary to implement the PLSA or otherwise to address streaming offenses.

First, revisions to the application notes to §2B5.3 to address the calculation of "infringement amount" in streaming cases are critical for the guidelines to address § 2319C cases, as well as streaming cases prosecuted under the criminal copyright statute in § 2319. Second, the PLSA provided enhanced penalties for offenses involving "works being prepared for commercial public performance," a new term distinct from the existing term "work being prepared for commercial distribution" already used in §2B5.3. Revision to the guidelines are necessary to implement the PLSA as Congress intended, and to accurately track distinct, non-overlapping parts of copyright law.

* * *

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

Sincerely,

Scott Meisler

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