

Sentencing for the Possession or Use of Firearms During a Crime

**Possible Commission Responses to Pub. L. No. 105-386
and Other Issues Pertaining to 18 U.S.C. § 924(c)**

EXECUTIVE SUMMARY

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EXECUTIVE SUMMARY

The Firearms Policy Team was given a broad mandate to evaluate the guidelines' approach to sentencing for 1) possession or use of a firearm during a crime of violence or drug trafficking offense, and 2) violation of the various firearm regulatory and status offenses sentenced under USSG §2K2.1 and §2K2.5. This report focuses on the first area of concern.

Part One provides an introduction to 18 U.S.C. § 924(c) and recent Supreme Court decisions and legislation relevant to the statute, specifically, Pub. L. 105-386 —the so-called “*Bailey* Fix.” It also introduces the guidelines' general approach to sentencing for possession or use of a weapon during a crime, including the specific offense characteristics (SOCs) found in seventeen different guidelines and USSG §2K2.4, the guideline applicable to convictions under section 924(c). Unique features and problems associated with §2K2.4 are reviewed, and a proposal for revamping it is introduced.

Part Two presents five specific “Action Items” for Commission consideration. Three of the items contain possible responses to the recent legislation. The fourth involves a circuit conflict over whether an offender can receive both a sentence under section 924(c) and a guideline SOC increase for a weapon. The fifth item involves an incongruity in the sentencing of convictions for conspiracy to violate section 924(c), charged under 18 U.S.C. § 924(o).

PART ONE: OVERVIEW OF SENTENCING FOR FIREARM POSSESSION AND USE

I. Introduction to 18 U.S.C. § 924(c) and recent legislation

The most recent version of 18 U.S.C. § 924(c) makes it a crime if any person, during and in relation to any crime of violence or drug trafficking offense, “uses or carries a firearm, or . . . in furtherance of any such crime, possesses a firearm . . .”. Conviction under the statute carries a minimum sentence of “not less than” five years’ imprisonment. Increased penalties of not less than seven and ten years are provided when firearms are “brandished” or “discharged,” respectively, and higher penalties apply when more dangerous weapons are involved or when the defendant has previous convictions under section 924(c).

Public Law 105-386, which became effective November 13, 1998, is the latest in a long line of revisions to the statute. It was enacted in response to *Bailey v. United States*, 516 U.S. 137 (1995), in which the Supreme Court narrowed application of the “uses” provision of the statute to instances where a firearm was “actively employed.” The legislation effectively rendered *Bailey* moot by expanding the statute to cases in which a firearm was possessed in furtherance of the crime. The legislative history makes clear that Congress was convinced *Bailey* was a setback for law enforcement and crime control.

The amendment also changed the mandated penalties from a specific term of years to a range of *not less than* five, seven, ten, or some other term of years. This “not less than” construction has the

legal effect of making the *maximum* possible sentence life in prison. This change is likely to create an issue about the proper interpretation of USSG §2K2.4, which requires that the sentence increase for section 924(c) convictions be the term that is “required by statute.” Possible Commission responses to this issue are discussed in Action Item #1 below.

The new statutory maximum of life in prison may also affect application of the career offender guideline, §4B1.1. This guideline sets offense levels for repeat violent and drug trafficking offenders based on the highest statutory maximum for any qualifying offense of conviction. Application Note 1 of §4B1.2 defines offenses that count as crimes of violence or drug trafficking, and convictions under section 924(c) appear to qualify as both prior or instant offenses. Thus, because section 924(c) carries a maximum of life, an offense level of 37—the highest possible under §4B1.1—could be applied in any case that includes a section 924(c) conviction. However, this result appears inconsistent with other provisions in the guidelines manual that call for “independent” treatment of the 924(c) count. The ambiguity in the current guidelines may lead to litigation, disparate application, and sentences that arguably are disproportionately long for some offenders. Possible Commission responses to this issue are discussed in Action Item #2.

The recent legislation also added *tiered sanctions* to the statute’s penalty structure, *i.e.*, increasingly severe penalties are provided when a firearm was brandished or discharged. The statute defines “brandish” as “to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.” This varies slightly from the definition in the *Guidelines Manual*, which requires that a “dangerous weapon (including a firearm)” be “pointed or waved about, or displayed in a threatening manner.” In addition, the guidelines define “dangerous weapon” to include objects that merely *appear* to be weapons, even if they are toys or fake guns. Under the statute, a real firearm must be present.

The statute also created a standard of “possession in furtherance of the crime” that varies, at least linguistically, from the possession adjustment found in the guidelines. Some guidelines require an increase whenever a weapon was “possessed,” while others require that it be “possessed in connection with the offense.” Implications of these differences between statutory and guideline definitions and standards are the subject of Action Item #3.

II. Introduction to the guideline weapon SOC and USSG §2K2.4

A. The guideline approach to sentence increases for weapon possession or use

The guidelines also punish the possession or use of a firearm, but there are important differences between the statutory and guideline approaches. Section 924(c) is a substantive offense—not a mere sentence enhancement—and its mandatory sentence is imposed only if charged and proven beyond a reasonable doubt. Guideline sentence enhancements for weapon use are determined by the court at sentencing under a preponderance of the evidence standard.

Furthermore, section 924(c) increases sentences by a *fixed* minimum number of years, regardless of the underlying offense. The guidelines punish firearms *proportionately* through offense level increases, which translate into percentage increases over the prison term imposed for the underlying crime. This means there is no single set increase applicable to every offender who possesses or uses a gun, and that sometimes the guideline increase would be greater in absolute terms than the statute and sometimes less. In most cases, however, the statutory increase is greater.

The most frequently applied guideline firearm SOC is the two-level increase for possession of a weapon during a drug trafficking offense. The average increase under this provision in 1998 was 28 months—considerably less than the increase under section 924(c). The robbery guideline SOC was the next most frequently used, with an average increase of 60.4 months when a firearm was discharged. For otherwise using a weapon, the average guideline increase was 55.6 months; for brandishing, 38.5 months. Fifteen other guidelines contain SOC for possession or use of firearms or other dangerous weapons, including all the guidelines for the violent and drug trafficking offenses that can predicate section 924(c) counts.

When offenders are convicted under section 924(c), the guideline SOC described above generally do not apply. Section 924(c) convictions are indexed to a special guideline, USSG §2K2.4, and sentenced under somewhat unique procedures. An Application Note to §2K2.4 directs that the SOC applicable to the offense “underlying” the section 924(c) conviction should not be applied if the defendant will receive the statutory increase. But as discussed in Action Item #4, the circuits are split over how to interpret this application note, with some circuits permitting both increases when different weapons are used for the predicate offense and for other activity within the scope of relevant conduct.

B. USSG §2K2.4: The difficulty of integrating section 924(c) with the guidelines

Convictions under section 924(c) are indexed to USSG §2K2.4, along with two similar statutes: 18 U.S.C. § 929(c) concerning armor piercing ammunition, and 18 U.S.C. § 844(h) concerning the use of fire or an explosive as part of a crime. Guideline 2K2.4 is unique in several respects. For one, convictions under section 924(c) and for conspiracy to commit a section 924(c) offense, charged under section 924(o), are indexed to separate guidelines and not grouped as are most conspiracies and substantive offenses. This can lead to duplicative punishment specifically discouraged by the Sentencing Reform Act. This issue is the subject of Action Item #5.

More significantly, §2K2.4 is unique in that it does not specify a base offense level or contain SOC. Instead, it simply provides that “...the term of imprisonment is that required by statute” and that the term is to “run consecutively to any other term of imprisonment.” USSG §5G1.2 and accompanying commentary further direct that sentences imposed for the statutes indexed to the guideline “shall be determined by that statute and imposed independently.”

In addition, counts that are indexed to §2K2.4 are excepted from the usual operation of the grouping rules for multiple counts that apply to other convictions (*see* USSG §3D1.1(b)). The grouping rules were intended to provide incremental punishment for additional harms represented by multiple counts, while preventing “double counting” for the same conduct. In addition, they help to

prevent prosecutorial charging decisions from controlling the final sentence, and to reduce disparity created by charging variations. Counts indexed to §2K2.4, however, are “*set aside*,” and excepted from the normal operation of these rules. The term of imprisonment required by statute is simply added onto the guideline sentence for the underlying offense(s).

These unique features of §2K2.4 were viewed as legally or politically necessary to strictly implement the fixed, mandatory, *and* consecutive punishment contemplated by section 924(c) and the other statutes indexed to the guideline. But they have created a number of practical and policy dilemmas. They complicate the guidelines and can confuse users because they depart from normal procedures. And they do not address the shift of discretion from judges to prosecutors, and the potential resulting disparity, which led to the creation of the grouping rules.

Offenders whose violent or drug trafficking crimes involve firearms are charged in three different ways: 1) only for the underlying offense; 2) both for the underlying offense and section 924(c); or 3) only for section 924(c). The final sentence can be dramatically affected by these charging decisions and disparity among offenders committing similar offenses can arise. If an applicable section 924(c) or an underlying offense is not charged, a sharp reduction of sentence is possible.

Several research studies over the past nine years have shown that section 924(c) convictions are obtained in only a fraction of the cases in which the defendant’s conduct appears to qualify for the charge. These findings suggest that the goals of proportionate, uniform, and honest sentencing may not have been achieved by the present statutes and guidelines for offenses involving firearms. The recent legislation, by widening the scope of conduct covered by the statute and increasing penalties, could exacerbate some of these problems.

C. Proposals for a new guideline and more fully integrated penalties

The Commission has sometimes strictly accommodated statutory language—such as the set aside procedures developed to ensure consecutive punishment for 924(c) counts. But at other times, the Commission has tried to avoid “cliffs,” “tariffs,” and other anomalies identified in the 1991 *Mandatory Minimum Penalties* report, which are created by the interaction of mandatory minimum penalties with the guidelines. Proposals for better integration of section 924(c) and the guidelines are somewhat complicated to explain and may involve a substantial policy change. But long-standing concerns about §2K2.4 have led to proposals for new approaches, which could also address several issues raised by the recent legislation. Because these proposals are more sweeping than most options presented in Part Two, and are relevant to several different Action Items, we briefly introduce them here.

One such proposal is the creation of a new guideline for section 924(c) offenses. A new guideline could include alternative base offense levels incorporating the tiered sanctions found in the revised statute. For example, the base offense level could be set at 26 for possession of a weapon (with a corresponding sentencing range of 63-78 months for a first offender). For brandishing and discharge the levels could be 29 and 32, respectively. A new guideline could also include SOCs

for additional aggravating factors (such as use of stolen weapons) or cross-references to other guidelines, as does the other major firearms guideline, USSG §2K2.1.

A new guideline could be designed to address some of the long-standing concerns with section 924(c) convictions. For example, the effects of charging variations on sentence disparity would be reduced by including cross-references. If an offender possessed a firearm as part of a drug trafficking offense, but was charged only with a section 924(c) violation, the offense level for the underlying offense could be applied if it were greater than the level under the new guideline.

The unusual set aside procedures applicable to the current guideline might also be eliminated. Section 924(c) counts could be treated in the normal way, with Chapter 3 adjustments, including the grouping rules, applied as they are to other counts. The combined offense level would integrate all of the offenses of conviction. A new guideline might provide that sentences should be imposed using the “combined guideline approach” now used for other statutes that call for mandatory consecutive sentences. *See*, USSG §2J1.6, Application Note 3, paragraph 2. This would reduce the “tariff” and “cliff” effects associated with section 924(c) counts.

Depending on how it were structured, a new guideline for section 924(c) offenses could increase penalties for some offenders, but would decrease penalties for others. It might best be considered along with other options for reform of the firearms guidelines. For example, weapon-use tiers could be added to more guidelines, the offense level increases associated with various types of use could be changed, or alternative minimum base offense levels could be created to guarantee a certain amount of punishment for all offenders who possess or use weapons. More details about these alternatives are provided in the full report. The Team seeks the Commission’s guidance as to which, if any, of these options should be pursued.

PART TWO: OPTIONS FOR AMENDMENTS

Because §2K2.4 simply directs judges to impose the term of imprisonment required by statute, any changes in the statute are self-executing and arguably no Commission action is required. But some practical and policy considerations suggest that a response to the legislation may be desirable. In Part Two, five Action Items are presented for the Commission's consideration, each with several options.

I. ACTION ITEM #1: What, if any, amendments to §2K2.4 are needed to address the change in section 924(c) from fixed terms to sentences of “not less than” a term of years?

If left unchanged, the guideline's directive to impose “the term of imprisonment...required by statute” may lead to confusion, and its meaning might even be litigated if the Commission does nothing. The weight of argument appears to support the view that the term “required” by the guideline is the *minimum* set forth in the statute is (*e.g.*, 5 years for possession, 7 years for brandishing, etc.). Any other interpretation violates the spirit, if not the letter, of the Sentencing Reform Act's 25 percent rule (28 U.S.C. § 994(b)(2)), which requires that the range of imprisonment provided by the guidelines shall not exceed six months or 25 percent of the minimum of the range. Under this view, any sentence greater than the statutory minimum would be a departure and could be appealed by the defendant. This view also appears consistent with the general rule of lenity that calls for ambiguity in a provision to be construed in favor of the defendant.

To avoid confusion, litigation, and potential disparity of application, the Commission may wish to clarify the guideline. In addition, if the Commission makes the statutory minimum the guideline sentence in the ordinary case, it may wish to specify under what circumstances a more severe sentence would be appropriate.

A. Option A: Clarify that the *minimum* term required by statute is the guideline sentence

B. Option B: Develop amendments that will provide guidance as to when a sentence greater than the minimum provided by statute is appropriate

Some offenders' sentences will be based on the aggravating elements found in the statute (*e.g.*, brandishing or discharge of the firearm), and some may receive upward departures based on other aggravating factors identified by the courts.

Past Commissions have identified additional aggravating factors in firearms offenses in addition to those found in the statute. These are found both in SOCs to the other major firearms guideline, §2K2.1, and in guideline commentary—including commentary in §2K2.4 itself (*see* Application Note 2). These additional factors include: 1) other offense conduct not covered by the counts of conviction, such as drug trafficking by an offender who was convicted only of section 924(c); and 2) other types

of aggravated gun use, such as use of multiple firearms, stolen firearms, or firearms with obliterated serial numbers.

If the Commission decides that crimes sentenced under §2K2.4 should receive additional punishment if they involve these factors, it could expand the current commentary to encourage upward departure in appropriate cases. Alternatively, a new guideline with tiered base offense levels for various types of firearm use and SOCs for other aggravating circumstances could be created, as described in Part One.

II. ACTION ITEM#2: How, if at all, should the new section 924(c) statutory maximum of life in prison affect application of the career offender guideline §4B1.1?

The increased statutory maximum for section 924(c) raises questions about how the career offender guidelines (§§4B1.1 and 4B1.2) should treat convictions under the statute. These questions involve a technical interplay of guideline provisions, therefore the explanation of the problem below is more detailed than for the other Action Items. Further explanation will be presented at the briefing and in the full report.

A defendant qualifies under the career offender guideline if (1) he was at least eighteen years old at the time he committed the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. “Crime of violence” and “controlled substance offense” are defined in §4B1.2.

The career offender guidelines in Chapter Four increase a defendant’s offense level if the level determined under Chapters Two and Three is less than the level provided in the guideline, which is based on the highest statutory maximum for any qualifying offense of conviction. For offenses with a maximum of life, the offense level is set at 37. In addition, the criminal history category for career offenders is in every case set at Category VI, the highest category in the guidelines. The guideline range for criminal history category VI and offense level 37, is 360 months-life. For offense level 34 (for offenders receiving a 3-point reduction for acceptance of responsibility) it is 262-327 months. Under at least one possible interpretation of the current guideline rules, the consecutive penalty required by section 924(c) would then be added to these already-substantial guideline ranges.

In 1997, the Commission amended Application Note 1 to §4B1.2 to clarify that “[p]ossessing a firearm... (18 U.S.C. § 924(c)) is a ‘crime of violence’ or ‘controlled substance offense’...” The reason for this amendment, however, was to ensure that *prior* convictions for section 924(c) would count as prior felony convictions under the career criminal guideline. The question of whether section 924(c) should count as an *instant* offense under the guideline appears not to have arisen, because in 1997 the statutory maximum for section 924(c) was low relative to other crimes; there was little likelihood that it would set the offense level under the guideline. A consequence of the 1997 amendment, however, in conjunction with the recent legislation, is that section 924(c) convictions may be considered instant offenses for purposes of the career criminal guideline, and the life maximum would be used to set the offense level for qualifying offenders.

This interpretation is, however, inconsistent with other guideline provisions and may be litigated if the Commission does nothing to clarify the current guidelines. Convictions for section 924(c) are covered by §2K2.4, which states that the term of imprisonment “is that required by statute.” The section 924(c) count is “set aside,” and under the normal sequence of application Chapters 3 and 4 are not applied. Furthermore, other rules of guideline application clearly state that violations of section 924(c) are to be sentenced “independently” of the guideline sentence on any other count. *See* §§3D1.1 and 5G1.2(a) and Commentary; §2K2.4, Application Note 2. If the section 924(c) count is used to determine the offense level under §4B1.1, it has been combined with other offenses and guideline determinations.

The recent legislation raises a question not considered in 1997—Should, as a matter of policy, section 924(c) convictions count as an instant offense for purposes of the career offender guideline? Thus far, there have been no cases where such convictions have been counted, but the issue seems sure to arise. If a section 924(c) count is paired with an underlying offense carrying a life maximum, the question is moot. But in two contexts, considering a section 924(c) count as the most serious instant offense can have a substantial effect on sentences: 1) Where other counts of conviction carry shorter maximums, which include most violent offenses and drug trafficking offenses involving amounts below the 10-year mandatory minimum threshold; and even more dramatically 2) Where section 924(c) is the only count of conviction. The full report contains examples of the disparate sentences resulting in different contexts from various interpretations of these guidelines.

The options to address this issue range from a fairly simple change in Application Note 1 to §4B1.2 to the creation of a whole new guideline. The Commission may wish to consider what might be accomplished through guideline amendment in the short or long terms, and also what might be achieved through the Commission’s ongoing training and technical assistance operations.

A. Option A: Amend the Application Note to §4B1.2 to exclude section 924(c) convictions for purposes of the career offender guideline.

One solution is to amend the Application Note to exclude section 924(c) convictions, either as instant offenses, or as both instant and prior offenses. Different treatment of instant and prior convictions may be hard to justify. Both alternatives would return career offenders convicted of both section 924(c) and an underlying offense to the position they held prior to the recent legislation—the statutory maximum for the underlying count would control application of the career offender guideline and the offender would receive a consecutive sentence for the section 924(c) count.

For offenders convicted of section 924(c) alone, the career offender guideline would not apply. However, no offenders convicted of section 924(c) alone were sentenced as career offenders in 1998. If the Commission also excluded section 924(c) as prior convictions, only offenders previously convicted under section 924(c) alone would be affected, and this too appears to be extremely rare.

B. Option B: Amend the guidelines to clarify that section 924(c) convictions are included as instant offenses for purposes of the career offender guideline.

If the Commission decides that the statutory maximum for section 924(c) convictions are to be used to set the offense level under the career offender guideline, several changes in the Guidelines Manual should be made. Application Note 1 to §4B1.2 should be amended to clarify that section 924(c) convictions count as both prior and instant offenses. In addition, an application note may need to be added to §2K2.4 directing judges to apply the career offender guideline in these cases. Other conforming amendments may also be desirable to clarify the sequence of application to be followed for section 924(c) counts.

The Commission may also wish to consider adding commentary to §4B1.1 encouraging downward departure in any circumstances in which simultaneous application of both §4B1.1 and the consecutive punishment required by section 924(c) results in sentences that are disproportionately long.

C. Option C: Create a new guideline for section 924(c) offenses that better integrates the statutory and guideline penalties.

Creating a new guideline for section 924(c) convictions would make available a range of approaches for integrating these convictions with the career offender guideline. For example, if the set aside were eliminated, the statutory maximum for the section 924(c) conviction could be used to determine the offense level under the career offender guideline, without resulting in duplicative, “tariff” punishment when the statutory term is also imposed consecutive to the guideline sentence. Details of these approaches can be found in the full report.

III. ACTION ITEM #3: Should the guidelines be amended to track the statutory language for “brandish” and “possession in furtherance”?

Pub. L. 105-386 does not contain directives to the Commission to change its definitions. But it does adopt a definition of “brandish” that varies from the guidelines, and a different standard for when possession of a firearm should increase an offender’s sentence. While there are some advantages to consistency between the statutes and the guidelines, there have also been many instances when the Commission has chosen not to track statutory language for policy or practical reasons.

A. Option A: Amend the guideline definition of “brandish” to conform to the statute

The new definition of “brandish” in section 924(c) does not require that a firearm be displayed or even be visible, while the guideline definition does. The statutory definition *does* require that a firearm actually be present, while the guideline definition of “dangerous weapon” applies to toys or fakes that appear to be dangerous. Adopting the statutory language would broaden application of the SOC for brandishing, both in the drug and violent offense guidelines subject to the statute and in every other guideline in which the term appears. An expanded guideline definition would also potentially apply to all dangerous weapons and not merely to firearms. Close examination of the guidelines suggests, however, that such broadening is likely to affect sentences in only a very small number of cases.

B. Option B: Adopt for guideline purposes the statutory requirement that weapon possession be “in furtherance” of the crime

Public Law 105-386 limits application of the statute to possession “*in furtherance*” of a crime, and legislative history shows that this limitation was intentional. The House Committee Report states that the requirement was meant to be slightly more stringent than the requirement for application of possession SOC’s under the guidelines. The drug trafficking guideline, for example, explicitly adopts a low threshold for application of the SOC (*see* §2D1.1, Application Note 3), directing that the increase should be applied whenever weapons are present, unless the defendant proves that it is “clearly improbable that the weapon was connected with the offense.”

The practical difference between the two standards may be negligible, because most courts appear to require some showing of a nexus between the firearm and the crime before the SOC will be applied. On the other hand, adopting the statutory standard might send a signal that would cause judges to require a stronger showing. For example, it might be required that weapons found in a home where drugs were sold be shown to be a part of the criminal activity.

If the Commission favors uniformity between the statute and guidelines, the guidelines could be amended in several ways to adopt the statutory standard. For example, a definition for “possessed” could be added to §1B1.1, which already defines “dangerous weapon,” “firearm,” “brandished,” and “otherwise used.”

IV. ACTION ITEM #4: Should guideline commentary to USSG §2K2.4 be amended to resolve the circuit conflict over when offenders may receive increases for both section 924(c) and weapon SOC’s?

Application Note 2 to the current section 924(c) guideline, USSG §2K2.4, specifies that “[w]here a sentence under this section is imposed in conjunction with a sentence for an *underlying offense*, any [weapon SOC] is not to be applied in respect to the guideline for the underlying offense” [emphasis supplied]. This was designed to prevent “double counting” of the weapon for the same crime. Different interpretations have arisen, however, regarding the scope of conduct considered part of the “underlying offense,” and some circuits have identified circumstances when both adjustments might apply.

Four circuits have narrowly interpreted “underlying offense” to mean only the specific violent or drug trafficking offense that is the predicate for the section 924(c) violation; any other gun possession or use may result in an additional SOC increase. For example, one circuit held that offenders convicted under section 924(c) for use of a gun on one occasion may also receive the guideline adjustment if they possessed a different gun on a different occasion. Several circuits held that a defendant convicted under section 924(c) for personal use of a gun may also be held accountable under the guidelines’ relevant conduct rules for a co-defendant’s possession of a gun. Thus, a drug trafficking offender who receives a five-year consecutive sentence under section 924(c) for possessing

a firearm may also receive a two-point increase for a co-defendant's use of a gun under guideline §2D1.1. This would result in a minimum guideline range that is approximately 25 percent longer than a defendant who received only the section 924(c) increase.

This narrow interpretation of “underlying offense” in §2K2.4 differs from the interpretation urged by defense attorneys—who would provide a single firearm increase for all offenses sentenced at the same sentencing hearing.

It also differs from the Commission staff's understanding that a section 924(c) conviction covers all weapon use that is within the scope of the relevant conduct associated with the predicate offense. This is consistent with the definition of “offense” found in commentary to USSG §1B1.1 (Application Note 1(*I*)), which includes the offense of conviction and all relevant conduct. The general guideline rule is that a single weapon SOC adjustment is applied for all weapon use for which an offender is accountable, regardless of the number of weapons involved.

Because a large number of offenses each year involve drugs and weapons, these split interpretations can lead to significant disparity among offenders who engage in similar conduct. The recent legislation expanding the scope of section 924(c) is likely to increase the number of cases raising this issue.

A. Option A: Clarify that the “underlying offense” includes only conduct that provides the predicate for the section 924(c) conviction.

This is the interpretation adopted by circuits who have addressed the issue. They interpret “underlying offense” to mean the specific crime of violence or drug trafficking that gave rise to the section 924(c) violation.

B. Option B: Clarify that the “underlying offense” includes the conduct providing the predicate for the section 924(c) conviction and all other relevant conduct to that offense.

This is the interpretation that the Commission has provided in training and technical assistance. Under this approach, a single section 924(c) increase punishes for all weapons within the scope of conduct relevant to the offense predating the section 924(c) count. Because multiple charges of drug trafficking are aggregated under the grouping rules, a single section 924(c) increase would punish for all weapon use relevant to the drug trafficking. However, violent offenses, such as multiple bank robberies, are not grouped. Offenders who receive a section 924(c) increase for using a gun during one particular bank robbery could receive SOC increases for guns used during other robberies, even if no section 924(c) count were charged for those robberies. Incremental punishment for the additional instances of gun use would be imposed under the multiple count rules.

C. Option C: Clarify that the “underlying offense” includes all conduct that is sentenced at the same time as the section 924(c) conviction, and to which the section 924(c) increase will run consecutively.

Rather than attempt to define the scope of conduct included within the “underlying offense,” an arguably simpler is to direct that if a section 924(c) consecutive sentence is imposed, no weapon SOC’s should be applied for *any* other violent or drug trafficking offenses included within the total sentence. The section 924(c) increase would punish for all weapon use being sentenced at that time. Many sentences would be shorter under this approach than under Options A or B, but they would also be closer to what the guidelines would require for use of a firearm absent a section 924(c) conviction.

D. Option D: Create a new guideline for section 924(c) offenses that does not require suspension of the normal weapon SOC’s when determining offense levels for underlying offenses.

Creating a new guideline for section 924(c) convictions in the manner described in Part One could avoid this problem entirely by making the rule in §2K2.4 unnecessary. If the normal grouping rules applied to section 924(c) offenses, these counts could be grouped with the underlying offense and the normal weapon SOC’s applied. Possession or use of a firearm would then be punished through the SOC for the underlying offense, or through the alternative base offense level provided by the new guideline.

V. ACTION ITEM #5: Should the guidelines be revised to prevent double counting of sections 924(c) and 924(o) conspiracy counts?

Convictions for conspiracy to commit most crimes are indexed to the guideline for the underlying substantive offense. *See* USSG §2X1.1. They are then grouped with any charges for that substantive offense under the rule at USSG §3D1.2(b). This satisfies the directive in the Sentencing Reform Act (SRA) that the guidelines should reflect “. . . the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.” 28 U.S.C. § 994(l)(2).

Conspiracies to violate section 924(c) are charged under section 924(o). This section does not contain mandatory minimum and consecutive penalties like the other statutes indexed to USSG §2K2.4, so it was instead indexed to §2K2.1, the general firearms guideline. Further, because section 924(c) counts are set aside from the normal grouping rules, a conspiracy count under section 924(o) and a substantive count under section 924(c) will *not* be grouped. The result is that offenders convicted under both sections 924(o) and 924(c) would get punished separately for both the conspiracy and the substantive offense. While the potential impact of this type of “double counting” can be dramatic in theory, it has not been a problem in practice because no cases have yet been affected. However, the guidelines’ current treatment of sections 924(c) and 924(o) appears to contradict the directive in the SRA.

A. Option A: Amend the commentary to §2K2.4 to encourage downward departure if the defendant is convicted under both sections 924(c) and 924(o).

Amending the commentary to §2K2.4 to provide for downward departure in this situation appears to be the simplest solution.

B. Option B: Create a new guideline for section 924(c) offenses and index section 924(o) counts to it.

Creating a new guideline for section 924(c) convictions in the manner described in Part One could avoid this problem by adopting the same approach used for other conspiracies. The conspiracy count would be indexed to the guideline for the underlying substantive offense, the section 924(c) conviction. Elimination of the set aside would then ensure that the counts were grouped and duplicative punishment would be avoided, as directed in the SRA.