

## Proposed Amendments on "Prohibited Persons"

**(A) Expansion of "Prohibited Person" to Include Person Convicted of Misdemeanor Crime of Domestic Violence:** This amendment addresses section 658 of the Treasury, Postal Service, and General Government Appropriations Act, 1997 (contained in the Omnibus Consolidated Appropriations Act for Fiscal Year 1997). Section 658 amended 18 U.S.C. § 922(d) to prohibit the sale of a firearm or ammunition to a person who has been convicted in any court of a misdemeanor crime of domestic violence. It also amended 18 U.S.C. § 922(g) to prohibit a person who has been convicted in any court of a misdemeanor crime of domestic violence from transporting or receiving a firearm or ammunition. Section 922(s)(3)(B)(i), which lists what a person not licensed under 18 U.S.C. § 923 must include in a statement to the handgun importer, manufacturer, or dealer, is amended to require certification that the person to whom the gun is transferred was not convicted in any court of a misdemeanor crime of domestic violence.<sup>1</sup>

Violations of 18 U.S.C. § 922(d) and (g) are covered by the firearms guideline, §2K2.1. The new provisions at § 922(d) (sale of a firearm to a "prohibited person") and § 922(g) (transporting, possession, and receipt of a firearm by a "prohibited person") affect Application Note 6 of §2K2.1, which defines "prohibited person". The proposed amendment amends Application Note 6 to include a person convicted of a misdemeanor crime of domestic violence within the scope of "prohibited person". It also defines "misdemeanor crime of domestic violence" by reference to the new statutory definition of that term.

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<sup>1</sup>Section 658 also amended 18 U.S.C. § 921(a) to define "misdemeanor crime of domestic violence" as an offense that (1) is a misdemeanor under Federal or State law; and (2) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. The definition further provides that a person shall not be considered to have been convicted of such an offense unless (1) the person was represented by counsel or knowingly waived right to counsel; and (2) in the case of a prosecution for which a person was entitled to a jury trial, that the case was tried by a jury, or the person knowingly waived the right to a jury trial, by guilty plea or otherwise. Finally, the new definition provides that a person shall not be considered to have been convicted of a misdemeanor crime of domestic violence if the conviction was expunged or set aside, or if the person received a pardon, or had civil rights restored, unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

**Proposed Amendment:**

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

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Commentary

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Application Notes:

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6. *"Prohibited person," as used in subsections (a)(4)(B) and (a)(6), means anyone who: (i) is under indictment for, or has been convicted of, a "crime punishable by imprisonment for more than one year," as defined by 18 U.S.C. § 921(a)(20); (ii) is a fugitive from justice; (iii) is an unlawful user of, or is addicted to, any controlled substance; (iv) has been adjudicated as a mental defective or involuntarily committed to a mental institution; (v) being an alien, is illegally or unlawfully in the United States; or (vi) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child as defined in 18 U.S.C. § 922(d)(8); or (vii) has been convicted in any court of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 922(a)(33).*

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**(B) Increased Base Offense Level for Defendant Who Knowingly Sells to Prohibited Person:** This proposal is presented in response to a proposed directive contained in juvenile justice legislation approved by the Senate Judiciary Committee earlier this year. That legislation is likely to be considered by the Senate early in 1997. The House of Representatives passed two juvenile justice bills in 1997; however, no House passed bill includes this specific proposal, which originated with the Department of Justice. The legislative provision would require the Commission to increase the base offense level for offenses subject to the firearms guideline, §2K2.1, to assure that a person who transferred a firearm and who knew that the transferee was a prohibited person is subject to the same base offense level as the transferee.

This proposal amends the two alternative base offense levels that pertain to prohibited persons in the firearms guideline to carry out the legislative provision described above. The pertinent base offense level structure under the current firearms guideline is as follows:

- (1) A base offense level of 14 applies if the defendant is a prohibited person.
- (2) A base offense level of 12 applies to a defendant who transferred a firearm to a prohibited person (and to a variety of other firearms offenses).
- (3) A base offense level of 20 applies if the defendant is a prohibited person and the

offense involved certain modified shotguns, other unusual weapons, or semiautomatic assault weapons.

(4) A base offense level of 18 applies to a defendant who transferred such a weapon to a prohibited person.

The proposed amendment makes level 14 (instead of level 12) applicable to a defendant who knowingly transfers a firearm to a prohibited person and makes level 20 (instead of level 18) applicable to a defendant who transfers a weapon described in paragraph (3) above to a prohibited person.

Note that the pending legislative directive would require the specified offense level increases only in those cases in which the defendant transferor knew that the transferee was a prohibited person. The draft amendment presented below also raises the policy option, shown in brackets, of whether the same, heightened offense levels should apply if the transferor lacked actual knowledge but did have "reasonable cause to believe" that the transferee was a prohibited person. The latter, less demanding mental state suffices for conviction under the relevant statute (18 U.S.C. 922(d)).

### **Proposed Amendment:**

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

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

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(4) **20**, if ~~the defendant~~ --

(A) **the defendant** had one prior felony conviction of either a crime of violence or a controlled substance offense; or

(B) ~~is a prohibited person, and~~ the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); **and the defendant (i) is a prohibited person; or (ii) transferred the firearm to a prohibited person and knew [or had reasonable cause to believe] that the transferee was a prohibited person; or**

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); or

(6) **14**, if the defendant (A) is a prohibited person; or (B) **transferred the firearm to a prohibited person and knew [or had reasonable cause to believe] that the transferee was a prohibited person; or**

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