

**U.S. Sentencing Commission Public Meeting Minutes**  
**January 9, 2008**

Chair Ricardo H. Hinojosa called the meeting to order at 11:33 a.m. in the Commissioners' Conference Room.

The following Commissioners were present:

Judge Ricardo H. Hinojosa, Chair  
Judge Ruben Castillo, Vice Chair  
Dabney L. Friedrich, Commissioner  
Beryl Howell, Commissioner  
Kelli Ferry, Commissioner Ex Officio  
Edward F. Reilly, Jr., Commissioner Ex Officio

The following Commissioners were not present:

Judge William K. Sessions, III, Vice Chair  
Michael E. Horowitz, Commissioner

The following staff participated in the meeting:

Judith Sheon, Staff Director  
Kenneth Cohen, General Counsel

Chair Hinojosa called on Ms. Sheon for the Staff Director's Report. Ms. Sheon recognized the efforts of the 94 district courts in submitting their sentencing documents so that the Commission may close out its fiscal year 2007 data set. She also thanked the Commission's Office of Research and Data for its work on closing out the fiscal year 2007 database.

Chair Hinojosa called on Mr. Cohen to inform the Commission on a possible vote to promulgate a temporary emergency amendment pursuant to a congressional directive.

Mr. Cohen stated that the proposed amendment, attached hereto as Exhibit A, responds to the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. 110-179. The Act includes a directive in section 5 granting the Commission emergency amendment authority and requires the Commission to promulgate an amendment within 30 days of the date of enactment of the Act. The President signed the bill on January 7, 2008. The deadline for promulgating an amendment under the directive is February 6, 2008. The proposed amendment creates a two-level enhancement at §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) if the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency, amends the application notes, and adds appropriate statutory references in §2B1.1. Mr. Cohen advised the commissioners that a motion to adopt the proposed

temporary emergency amendment would be in order, with an effective date of February 6, 2008, and with the staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to adopt the proposed temporary emergency amendment, with Commissioner Friedrich seconding. The Chair opened the floor for discussion on the motion. Vice Chair Castillo noted that while the Commission is in a position to respond to the 30 day directive, he hoped that 30 day directives did not become the norm. Hearing no further discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least four commissioners voted in favor of the motion.

Chair Hinojosa called on Mr. Cohen to inform the Commission on possible votes to publish in the Federal Register regarding a set of proposed guideline amendments and issues for public comment.

Mr. Cohen stated that the first proposed amendment, attached hereto as Exhibit B, would re-promulgate as a permanent amendment the temporary emergency amendment, effective February 6, 2008, that responded to the directive in section 5 of the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007. The proposed amendment also includes several issues for comment. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to publish the proposed amendment, with Commissioner Howell seconding. Hearing no discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit C, would implement the Honest Leadership and Open Government Act of 2007, Pub. L. 110–81, which creates a new offense at 18 U.S.C. § 227 (wrongfully influencing a private entity's employment decisions by a member of Congress). The proposed amendment amends Appendix A to reference offenses under 18 U.S.C. § 227 to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions). Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Commissioner Friedrich seconding. Hearing no discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit D, would make technical corrections to various guidelines. The proposed amendment corrects a clerical error in §2B1.1; amends §2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes and Smokeless Tobacco) to incorporate statutory language regarding failure to pay local cigarette taxes; implements the technical corrections made by Pub. L. 110–161; corrects a statutory reference included in §3C1.4 (False Registration of Domain Name); addresses statutory changes to 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant); and, refers offenses under 18 U.S.C. § 1091 (Genocide) to §2H1.1 (Offenses Involving Individual Rights) in Appendix A. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Vice Chair Castillo seconding. Hearing no discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit E, implements the Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. 110–22. The Act amends the Animal Welfare Act, 7 U.S.C. § 2156, to increase penalties for existing offenses and to create a new offense. The proposed amendment deletes the reference of 7 U.S.C. § 2156 to §2X5.2 (Class A Misdemeanors) in Appendix A because violations of 7 U.S.C. § 2156 are now felony offenses. The proposed amendment references offenses under 7 U.S.C. § 2156 to §2E3.1 (Gambling Offenses). The proposed amendment also creates a new alternative base offense level at §2E3.1(b)(2), provides an upward departure provision if an animal fighting offense involves extraordinary cruelty to an animal, and expands the title of §2E3.1 to include animal fighting offenses. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to publish the proposed amendment, with Commissioner Friedrich seconding. Hearing no discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that a proposed issue for comment, attached hereto as Exhibit F, requests comment regarding two new offenses created by the Court Security Improvement Act of 2007, Pub. L. 110–177. Additionally, in section 209 of the Act, Congress directs the Commission to review the guidelines as they apply to threats punishable under 18 U.S.C. § 115 (Influencing, Impeding, or Retaliating Against a Federal Official By Threatening or Injuring a Family Member) that occur over the Internet, and sets forth certain criteria for the study of such threats. Specifically, the proposed issue for comment solicits input regarding whether the Commission should amend Appendix A (Statutory Index) to refer these new provisions to existing guidelines,

and if so, to what guideline(s) should each new offense be referenced. The proposed issue for comment also requests input regarding how the Commission should respond to the directive. Mr. Cohen advised the commissioners that a motion to publish the proposed issue for comment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to publish the proposed issue for comment, with Commissioner Howell seconding. The Chair opened the floor for discussion on the motion. Vice Chair Castillo reported that three years had passed since his colleague, Federal District Court Judge Joan Lefkowitz, suffered unspeakable acts of violence in her home. Vice Chair Castillo stated that the Commission will do all it can in this, and possibly the next, amendment cycle to implement the provisions of the Act. Hearing no further discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit G, would address offenses involving human growth hormone (hGH) and offenses involving violations of certain food and drug safety laws. First, the proposed amendment creates guideline penalties for offenses involving the illegal distribution of hGH by amending §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), and Appendix A (Statutory Index). Second, the proposed amendment would address how violations of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.) (the “FDCA”) and the Prescription Drug Marketing Act of 1987, Pub. L. 100–293, (the “PDMA”) are treated under §2N2.1. In addition, there are issues for comment regarding hGH, FDCA, and PDMA offenses. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to publish the proposed amendment, with Commissioner Friedrich seconding. Hearing no discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit H, would address issues related to §2L1.2 (Unlawfully Entering or Remaining in the United States). The proposed amendment includes three options, which include multiple sub-options. Option 1 addresses issues related to the definitions of “crime of violence” and “drug trafficking offense” at §2L1.2. Option 2 provides for three different base offense levels and four specific offense characteristics at §2L1.2. Option 3 provides a base offense level 8 and several specific offense characteristics. The proposed amendment also includes an issue for comment. Mr. Cohen advised the

commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Vice Chair Castillo seconding. The Chair opened the floor for discussion on the motion. Vice Chair Castillo thanked staff for their multi-year efforts regarding immigration issues. Hearing no further discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit I, would modify subsection (a) of §4A1.2 (Definitions and Instructions for Computing Criminal History) to clarify the meaning of the term “arrest” as used in determining whether an intervening arrest causes two prior sentences to be counted separately or as a single sentence. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Chair Hinojosa called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Commissioner Friedrich seconding. Hearing no discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the final proposed amendment, attached hereto as Exhibit J, would modify Rules 2.2 (Voting Rules for Action by the Commission) and 4.1 (Promulgation of Amendments) of the Commission’s Rules of Practice and Procedure as they pertain to retroactivity consideration. The proposed amendment also includes an issue for comment. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

Chair Hinojosa called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to publish the proposed amendment, with Commissioner Howell seconding. The Chair opened the floor for discussion on the motion. Vice Chair Castillo stated that during the Commission’s recent deliberation concerning the retroactive application of the cocaine base (“crack”) amendment, it became obvious that the Commission’s Rules of Practice and Procedure needed to be amended. Hearing no discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Chair Hinojosa thanked the public for its interest in the Commission’s deliberations.

The Chair asked if there was any further business before the Commission and hearing none,

called for a motion to adjourn the meeting. Vice Chair Castillo made a motion to adjourn, with Commissioner Howell seconding. The Chair called for a vote on the motion, and the motion was adopted by voice vote. The meeting was adjourned at 11:58 a.m.

## EXHIBIT A

### **Proposed Amendment: Implementation of the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007**

**Synopsis of Proposed Amendment:** *This proposed amendment addresses the emergency directive in section 5 of the "Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007," Pub. L. 110-179 (the "Act"). Section 5(a) of the Act directs the Commission to forthwith*

*promulgate sentencing guidelines or amend existing sentencing guidelines to provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5191); and*

*(2) submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives an explanation of actions taken by the Commission pursuant to paragraph (1) and any additional policy recommendations the Commission may have for combating offenses described in that paragraph . . .*

*Section 5(b) of the Act further requires the Commission to –*

- (1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses described in subsection (a) and the need for aggressive and appropriate law enforcement action to prevent such offenses;*
- (2) assure reasonable consistency with other relevant directives and with other guidelines;*
- (3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements;*
- (4) make any necessary conforming changes to the sentencing guidelines; and*
- (5) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.*

*Section 5(c) of the Act directs the Commission to "promulgate guidelines or amendments provided for under this section as soon as practicable, and in any event not later than the 30 days after the date of enactment of this Act, in accordance with the procedures set forth in section 21(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired." The deadline for promulgating an amendment under the directive is February 6, 2008.*

*The proposed amendment creates a new two-level enhancement in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit*

*Instruments Other than Counterfeit Bearer Obligations of the United States ) if the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency.*

*The proposed amendment adds a new subdivision (IV) to Application Note 3(A)(v) of §2B1.1 explaining that in disaster fraud cases, "reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable."*

*Next, the proposed amendment adds a new Application Note 15 defining the terms used in the new specific offense characteristic.*

*Finally, the proposed amendment provides a reference in Appendix A (Statutory Index) for the new offense at 18 U.S.C. § 1040, which criminalizes the commission of a fraud in connection with major disaster or emergency benefits, and is punishable by a term of imprisonment of up to thirty years. This offense is proposed to be referenced to §2B1.1. The proposed amendment addresses concerns that disaster fraud involves harms not addressed by the current guideline.*

**Proposed Amendment:**

**§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

- (a) Base Offense Level:
  - (1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
  - (2) 6, otherwise.
- (b) Specific Offense Characteristics
  - (1) If the loss exceeded \$5,000, increase the offense level as follows:

<u>Loss</u> (Apply the Greatest)	<u>Increase in Level</u>
(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$30,000	add 6
(E) More than \$70,000	add 8



(F)	More than \$120,000	add <b>10</b>
(G)	More than \$200,000	add <b>12</b>
(H)	More than \$400,000	add <b>14</b>
(I)	More than \$1,000,000	add <b>16</b>
(J)	More than \$2,500,000	add <b>18</b>
(K)	More than \$7,000,000	add <b>20</b>
(L)	More than \$20,000,000	add <b>22</b>
(M)	More than \$50,000,000	add <b>24</b>
(N)	More than \$100,000,000	add <b>26</b>
(O)	More than \$200,000,000	add <b>28</b>
(P)	More than \$400,000,000	add <b>30</b> .

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;
  - (B) involved 50 or more victims, increase by **4** levels; or
  - (C) involved 250 or more victims, increase by **6** levels.
- (3) If the offense involved a theft from the person of another, increase by **2** levels.
- (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.
- (5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.
- (6) If the offense involved theft of, damage to, or destruction of, property from a national cemetery or veterans' memorial, increase by **2** levels.
- (7) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.
- (8) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process

not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

- (9) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (10) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (11) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by **2** levels. If the offense level is less than level **14**, increase to level **14**.
- (12) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (13) (Apply the greater) If—
  - (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or
  - (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was

a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by **4** levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(13)(B) shall not exceed **8** levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

(14) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved (I) a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security; or (II) an intent to obtain personal information, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A)(i), increase by **4** levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

(15) If the offense involved—

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity

pool operator, increase by 4 levels.

- (16) If the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster OR an emergency, increase by 2 levels.

(c) Cross References

- (1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.
- (2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.
- (3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.
- (4) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

## Commentary

*Statutory Provisions:* 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1037, 1341-1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312-2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

### Application Notes:

1. Definitions.—For purposes of this guideline:

"Cultural heritage resource" has the meaning given that term in Application Note 1 of the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources).

"Equity securities" has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).

"Financial institution" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," primarily include large pension funds that serve many persons (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

"Firearm" and "destructive device" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

"Foreign instrumentality" and "foreign agent" have the meaning given those terms in 18 U.S.C. § 1839(1) and (2), respectively.

"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the

*Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.*

*"Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).*

*"Theft from the person of another" means theft, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.*

*"Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).*

*"Veterans' memorial" means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).*

*"Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.*

2. Application of Subsection (a)(1).—

(A) "Referenced to this Guideline".—For purposes of subsection (a)(1), an offense is "referenced to this guideline" if (i) this guideline is the applicable Chapter Two guideline determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of conviction; or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

(B) Definition of "Statutory Maximum Term of Imprisonment".—For purposes of this guideline, "statutory maximum term of imprisonment" means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.

(C) Base Offense Level Determination for Cases Involving Multiple Counts.—In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.

3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

- (A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.
- (i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.
- (ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).
- (iii) Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.
- (iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.
- (v) Rules of Construction in Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:
- (I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.
- (II) Procurement Fraud Cases.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.
- (III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm

*was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.*

*(IV) Disaster Fraud Cases.—In a case in which subsection (b)(16) applies, reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable.*

- (B) Gain.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.*
- (C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).*

*The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:*

- (i) The fair market value of the property unlawfully taken or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.*
  - (ii) The cost of repairs to damaged property.*
  - (iii) The approximate number of victims multiplied by the average loss to each victim.*
  - (iv) The reduction that resulted from the offense in the value of equity securities or other corporate assets.*
  - (v) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*
- (D) Exclusions from Loss.—Loss shall not include the following:*
- (i) Interest of any kind, finance charges, late fees, penalties, amounts based*



*on an agreed-upon return or rate of return, or other similar costs.*

- (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.*

(E) Credits Against Loss.—*Loss shall be reduced by the following:*

- (i) *The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.*
- (ii) *In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.*

(F) Special Rules.—*Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:*

- (i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—*In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 7(A).*
- (ii) Government Benefits.—*In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a*

value of \$150, loss is \$50.

- (iii) Davis-Bacon Act Violations.—In a case involving a Davis-Bacon Act violation (*i.e.*, a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.
- (iv) Ponzi and Other Fraudulent Investment Schemes.—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (*i.e.*, the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).
- (v) Certain Other Unlawful Misrepresentation Schemes.—In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.
- (vi) Value of Controlled Substances.—In a case involving controlled substances, loss is the estimated street value of the controlled substances.
- (vii) Value of Cultural Heritage Resources.—In a case involving a cultural heritage resource, loss attributable to that cultural heritage resource shall be determined in accordance with the rules for determining the "value of the cultural heritage resource" set forth in Application Note 2 of the Commentary to §2B1.5.

4. Application of Subsection (b)(2).—

- (A) Definition.—For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.
- (B) Applicability to Transmission of Multiple Commercial Electronic Mail

Messages.—For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.

(C) Undelivered United States Mail.—

- (i) In General.—In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.
- (ii) Special Rule.—A case described in subdivision (C)(i) of this note that involved—
  - (I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.
  - (II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.
- (iii) Definition.—"Undelivered United States mail" means mail that has not actually been received by the addressee or his agent (e.g., mail taken from the addressee's mail box).

(D) Vulnerable Victims.—If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.

5. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).—For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:

- (A) The regularity and sophistication of the defendant's activities.
- (B) The value and size of the inventory of stolen property maintained by the

*defendant.*

(C) *The extent to which the defendant's activities encouraged or facilitated other crimes.*

(D) *The defendant's past activities involving stolen property.*

6. *Application of Subsection (b)(7).*—*For purposes of subsection (b)(7), "improper means" includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.*

7. *Application of Subsection (b)(8).*—

(A) *In General.*—*The adjustments in subsection (b)(8) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.*

(B) *Misrepresentations Regarding Charitable and Other Institutions.*—*Subsection (b)(8)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable, educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(8)(A) applies, for example, to the following:*

(i) *A defendant who solicited contributions for a non-existent famine relief organization.*

(ii) *A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.*

(iii) *A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.*

(C) *Fraud in Contravention of Prior Judicial Order.*—*Subsection (b)(8)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the*

defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).

(D) College Scholarship Fraud.—For purposes of subsection (b)(8)(D):

"Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.

"Institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).

(E) Non-Applicability of Enhancements.—

(i) Subsection (b)(8)(A).—If the conduct that forms the basis for an enhancement under subsection (b)(8)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under §3B1.3.

(ii) Subsection (b)(8)(B) and (C).—If the conduct that forms the basis for an enhancement under subsection (b)(8)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under §3C1.1.

8. Sophisticated Means Enhancement under Subsection (b)(9).—

(A) Definition of United States.—For purposes of subsection (b)(9)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(B) Sophisticated Means Enhancement.—For purposes of subsection (b)(9)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

(C) Non-Applicability of Enhancement.—If the conduct that forms the basis for an enhancement under subsection (b)(9) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.

9. Application of Subsection (b)(10).—

(A) Definitions.—For purposes of subsection (b)(10):

"Authentication feature" has the meaning given that term in 18 U.S.C. § 1028(d)(1).

"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.

"Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).

"Device-making equipment" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (*i.e.*, not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

"Produce" includes manufacture, design, alter, authenticate, duplicate, or assemble. "Production" includes manufacture, design, alteration, authentication, duplication, or assembly.

"Unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3).

(B) Authentication Features and Identification Documents.—Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.

(C) Application of Subsection (b)(10)(C)(i).—

(i) *In General.*—Subsection (b)(10)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

(ii) *Examples.*—Examples of conduct to which subsection (b)(10)(C)(i) applies are as follows:

(I) A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.

(II) A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.

(iii) *Nonapplicability of Subsection (b)(10)(C)(i).*—Examples of conduct to which subsection (b)(10)(C)(i) does not apply are as follows:

(I) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.

(II) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.

(D) *Application of Subsection (b)(10)(C)(ii).*—Subsection (b)(10)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.

10. *Application of Subsection (b)(11).*—Subsection (b)(11) provides a minimum offense level in the case of an ongoing, sophisticated operation (e.g., an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft. A "cargo shipment" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.

11. *Gross Receipts Enhancement under Subsection (b)(13)(A).*—

- (A) *In General.*—For purposes of subsection (b)(13)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.
- (B) *Definition.*—"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

12. *Application of Subsection (b)(13)(B).*—

- (A) *Application of Subsection (b)(13)(B)(i).*—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:
  - (i) *The financial institution became insolvent.*
  - (ii) *The financial institution substantially reduced benefits to pensioners or insureds.*
  - (iii) *The financial institution was unable on demand to refund fully any deposit, payment, or investment.*
  - (iv) *The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.*
- (B) *Application of Subsection (b)(13)(B)(ii).*—
  - (i) *Definition.*—For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).
  - (ii) *In General.*—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:
    - (I) *The organization became insolvent or suffered a substantial reduction in the value of its assets.*
    - (II) *The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).*
    - (III) *The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement*



accounts.

- (IV) The organization substantially reduced its workforce.
- (V) The organization substantially reduced its employee pension benefits.
- (VI) The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.

13. Application of Subsection (b)(14).—

- (A) Definitions.—For purposes of subsection (b)(14):

"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).

"Personal information" means sensitive or private information (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.

- (B) Subsection (b)(14)(iii).—If the same conduct that forms the basis for an enhancement under subsection (b)(14)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(13)(B), do not apply the enhancement under subsection (b)(13)(B).

14. Application of Subsection (b)(15).—

- (A) Definitions.—For purposes of this subsection:

"Commodities law" means (i) the Commodities Exchange Act (7 U.S.C. § 1 et seq.); and (ii) includes the rules, regulations, and orders issued by the Commodities Futures Trading Commission.

"Commodity pool operator" has the meaning given that term in section 1a(4) of the Commodities Exchange Act (7 U.S.C. § 1a(4)).

"Commodity trading advisor" has the meaning given that term in section 1a(5) of the Commodities Exchange Act (7 U.S.C. § 1a(5)).

"Futures commission merchant" has the meaning given that term in section 1a(20) of the Commodities Exchange Act (7 U.S.C. § 1a(20)).

"Introducing broker" has the meaning given that term in section 1a(23) of the Commodities Exchange Act (7 U.S.C. § 1a(23)).

"Investment adviser" has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(11)).

"Person associated with a broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(18)).

"Person associated with an investment adviser" has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(17)).

"Registered broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(48)).

"Securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.

- (B) In General.—A conviction under a securities law or commodities law is not required in order for subsection (b)(15) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.
- (C) Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(15) applies, do not apply §3B1.3.

15. Application of Subsection (b)(16).—

- (A) Definitions.—For purposes of this subsection:

*"Major disaster" has the meaning given that term in 42 U.S.C. § 5122.*

*"Emergency" has the meaning given that term in 42 U.S.C. § 5122.*

156. Cross Reference in Subsection (c)(3).—Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).
167. Continuing Financial Crimes Enterprise.—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise".
178. Partially Completed Offenses.—In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 of the Commentary to §2X1.1.
189. Multiple-Count Indictments.—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).
1920. Departure Considerations.—
- (A) Upward Departure Considerations.—There may be cases in which the offense

level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

- (i) *A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.*
- (ii) *The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.*
- (iii) *The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).*
- (iv) *The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).*
- (v) *In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.*
- (vi) *In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:*
  - (I) *The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.*
  - (II) *An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.*

(III) *The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.*

(B) *Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(14)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.*

(C) *Downward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.*

*Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).*

*Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.*

*The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.*

*Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under §2B3.1 (Robbery).*

*A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting a minimum offense level.*

*Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm.*

*In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.*

*Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.*

*Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101.*

*Subsection (b)(8)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106–420.*

*Subsection (b)(9) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.*

*Subsections (b)(10)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.*

*Subsection (b)(10)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding", in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification", the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.*

*Subsection (b)(12)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.*

*Subsection (b)(13)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.*

*Subsection (b)(13)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.*

*Subsection (b)(14) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(14)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.*

*Subsection (b)(16) implements the directive in section 5 of Public Law \_\_\_\_.*

#### **APPENDIX A - STATUTORY INDEX**

\* \* \*

18 U.S.C. § 1039	2H3.1
18 U.S.C. § 1040	2B1.1
18 U.S.C. § 1071	2X3.1

\* \* \*

## EXHIBIT B

### Repromulgation of the Emergency Disaster Fraud Amendment

The following proposed amendment was promulgated as a temporary, emergency amendment with an effective date of February 6, 2008. The Commission has proposed to repromulgate this temporary, emergency amendment as a permanent amendment to be submitted to the Congress on May 1, 2008 with an effective date of November 1, 2008

**Synopsis of Proposed Amendment:** *This proposed amendment repromulgates the temporary emergency amendment, effective February 6, 2008, that responded to the directive in section 5 of the "Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007," Pub. L. 110-179 (the "Act"). The directive, which required the Commission to promulgate an amendment under emergency amendment authority by February 6, 2008, provides that the Commission forthwith shall—*

*promulgate sentencing guidelines or amend existing sentencing guidelines to provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5191); and*

*(2) submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives an explanation of actions taken by the Commission pursuant to paragraph (1) and any additional policy recommendations the Commission may have for combating offenses described in that paragraph . . .*

*Section 5(b) of the Act further requires the Commission to –*

*(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses described in subsection (a) and the need for aggressive and appropriate law enforcement action to prevent such offenses;*

*(2) assure reasonable consistency with other relevant directives and with other guidelines;*

*(3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements;*

*(4) make any necessary conforming changes to the sentencing guidelines; and*

*(5) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.*

*The emergency amendment created a new two-level enhancement in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) if the offense involved fraud or theft involving any benefit authorized, transported,*



*transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency, and added a corresponding application note.*

*The emergency amendment added a new subdivision (IV) to Application Note 3(A)(v) of §2B1.1 providing that in disaster fraud cases, "reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable."*

*The emergency amendment also provided a reference to §2B1.1 in Appendix A (Statutory Index) for the new offense at 18 U.S.C. § 1040, which criminalizes the commission of a fraud in connection with major disaster or emergency benefits, and is punishable by a maximum term of imprisonment of thirty years.*

*The proposed amendment would repromulgate the emergency amendment as a permanent amendment to §2B1.1.*

*Several issues for comment follow the proposed amendment.*

**Proposed Amendment:**

**§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

\* \* \*

(b) Specific Offense Characteristics

(16) If the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency, increase by 2 levels.

\* \* \*

Commentary

\* \* \*

Application Notes:

3.

\* \* \*

(III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(IV) Disaster Fraud Cases.—In a case in which subsection (b)(16) applies, reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable.

\* \* \*

15. Application of Subsection (b)(16).—For purposes of this subsection:

"Emergency" has the meaning given that term in 42 U.S.C. § 5122.

'Major disaster' has the meaning given that term in 42 U.S.C. § 5122.

156.

\* \* \*

167.

\* \* \*

178.

\* \* \*

189.

\* \* \*

1920.

\* \* \*

Background:

\* \* \*

Subsection (b)(14) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(14)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.

Subsection (b)(16) implements the directive in section 5 of Public Law 110–179.

## APPENDIX A - STATUTORY INDEX

\* \* \*

18 U.S.C. § 1039	2H3.1
18 U.S.C. § 1040	2B1.1
18 U.S.C. § 1071	2X3.1

\* \* \*

### Issues for comment

1. *Should the proposed amendment repromulgating the emergency amendment, effective February 6, 2008, that responded to the directive in section 5 of the "Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007," Pub. L. 110–179 (the "Act"), include a minimum offense level in the specific offense characteristic? If so, what would be the appropriate level for the minimum offense level?*
2. *Should the proposed amendment repromulgating the emergency amendment expand the scope of the enhancement to cover fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid "in connection with any procurement of property or services related to any emergency or major disaster declaration as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States"? Such conduct was criminalized by the new offense at 18 U.S.C. § 1040 created by the Act, but was not specifically included within the scope of the directive granting emergency amendment authority to the Commission.*
3. *Are there any aggravating or mitigating circumstances existing in disaster fraud cases that might justify additional amendments to the guidelines?*

# EXHIBIT C

## Honest Leadership and Open Government Act of 2007

**Synopsis of Proposed Amendment:** *This proposed amendment implements the Honest Leadership and Open Government Act of 2007, Pub. L. 110–81 (the "Act"). The Act creates a new offense at 18 U.S.C. § 227 (Wrongfully influencing a private entity's employment decisions by a member of Congress), which provides: "Whoever, being a Senator or Representative in, or a Delegate or Resident Commissioner to, the Congress or an employee of either House of Congress, with the intent to influence, solely on the basis of partisan political affiliation, an employment decision or employment practice of any private entity – (1) takes or withholds, or offers or threatens to take or withhold, an official act, or (2) influences, or offers or threatens to influence, the official act of another, shall be fined under this title or imprisoned for not more than 15 years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States".*

*The proposed amendment amends Appendix A to reference offenses under 18 U.S.C. § 227 to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).*

**§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions**

\* \* \*

Commentary

*Statutory Provisions:* 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 226, 227, 371 (if conspiracy to defraud by interference with governmental functions), 872, 1341 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1342 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

\* \* \*

### APPENDIX A - STATUTORY INDEX

\* \* \*

18 U.S.C. § 226	2C1.1
18 U.S.C. § 227	2C1.1
18 U.S.C. § 228	2J1.1

\* \* \*

## EXHIBIT D

### Technical Amendment

**Synopsis of Proposed Amendment:** *This proposed amendment makes technical corrections to various guidelines.*

*First, the proposed amendment modifies §2B1.1(b)(11) to correct a clerical error.*

*Second, the proposed amendment addresses section 121 of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177, (the "USA PATRIOT Act"). The USA PATRIOT Act changed the definition of "contraband cigarette" in subsection (2) of 21 U.S.C. § 2341 (Trafficking in Contraband Cigarettes and Smokeless Tobacco) to include the failure to pay local cigarette taxes. Prior to the USA PATRIOT Act, the definition covered only the failure to pay state cigarette taxes. Section 121 of the PATRIOT Act also reduced the number of contraband cigarettes necessary to violate the substantive offenses set forth in 18 U.S.C. §§ 2342 (Unlawful acts) and 2344 (Penalties) from 60,000 to 10,000.*

*Violations involving contraband cigarettes are referenced to §2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes and Smokeless Tobacco) in Appendix A (Statutory Index). The Commission amended the background commentary at §2E4.1 to reflect the change in the number of contraband cigarettes and expanded the headings of Chapter Two, Part E, Subpart 4 and §2E4.1 to include smokeless tobacco. See Amendment 700, USSG App. C. However, the amendment to §2E4.1 did not reflect the statutory inclusion of failure to pay local cigarette taxes in 21 U.S.C. § 2341.*

*The proposed amendment amends §2E4.1 to incorporate the statutory language regarding failure to pay local cigarette taxes. Currently, Application Note 1 at §2E4.1 provides that the "tax evaded" refers to state excise tax. The proposed amendment expands the meaning of "tax evaded" at Application Note 1 to include local excise taxes. The proposed amendment also amends the background commentary at §2E4.1 to include local excise taxes.*

*Third, the proposed amendment implements the technical corrections made by Pub. L. 110–161.*

*Fourth, the proposed amendment corrects a statutory reference included in §3C1.4 (False Registration of Domain Name), which provides a two-level adjustment for a case in which a particular statutory enhancement applies. At the time of promulgation of this guideline, the referenced statutory enhancement was at 18 U.S.C. § 3559(f)(1). See Amendment 689, USSG App. C. The Adam Walsh Child Protection and Safety Act of 2006 (the "Adam Walsh Act"), Pub. L. 109–248, amended 18 U.S.C. § 3559 by redesignating subsection (f) as subsection (g) and inserting a new subsection (f). This proposed amendment changes the statutory reference in §3C1.4 to reflect the redesignation of subsection (f) to subsection (g) of section 3359.*

*Fifth, the proposed amendment addresses statutory changes to 18 U.S.C. § 1512. In 2002, Congress amended 18 U.S.C. § 1512(a) and (b) (Tampering with a witness, victim, or an informant) as part of the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act (the "Act"), Pub. L. 107–273. Section 3001 of the Act moved the elements of "physical force"*

and "threat of physical force" from 18 U.S.C. § 1512(b) into subsection (a). Thus, section 1512(b) now punishes only intimidation, threats, corrupt persuasion, misleading conduct, and attempts. The Act also added at 18 U.S.C. § 1512(a)(3)(C) a ten-year statutory maximum penalty in the case of "the threat of physical force against any person". In order to reflect the statutory changes, the proposed amendment modifies the statutory index by deleting the references in Appendix A to §§2A1.2 (Second Degree Murder) and 2A2.2 (Aggravated Assault) for 18 U.S.C. § 1512(b), and adding those guidelines as references for 18 U.S.C. § 1512(a). The proposed amendment also adds a reference to §2J1.2 (Obstruction of Justice) for 18 U.S.C. § 1512(a) to reflect the broad range of obstructive conduct now covered in that section, including the threat of physical force against a witness.

Sixth, the proposed amendment refers offenses under 18 U.S.C. § 1091 to §2H1.1 (Offenses Involving Individual Rights) in Appendix A. Appendix A currently refers offenses under 18 U.S.C. § 1091 (Genocide) to §2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property), but this guideline no longer exists. Amendment 521, which became effective November 1, 1995, consolidated §§2H1.2 (Conspiracy to Interfere with Civil Rights), 2H1.3, 2H1.4 (Interference with Civil Rights Under Color of Law) and 2H1.5 (Other Deprivations of Rights or Benefits in Furtherance of Discrimination) into §2H1.1. This proposed amendment would make a conforming change to Appendix A.

## Proposed Amendment

**§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

- (11) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

\* \* \*

**§2E4.1. Unlawful Conduct Relating to Contraband Cigarettes and Smokeless Tobacco**

\* \* \*



\* \* \*

**Appendix A (Statutory Index)**

\* \* \*

18 U.S.C. § 1511	2E3.1, 2J1.2
18 U.S.C. § 1512(a)	2A1.1, 2A1.2, 2A1.3, 2A2.1, 2A2.2, 2A2.3, 2J1.2
18 U.S.C. § 1512(b)	<del>2A1.2, 2A2.2, 2J1.2</del>
18 U.S.C. § 1512(c)	
18 U.S.C. § 1512(d)	

**Appendix A (Statutory Index)**

\* \* \*

18 U.S.C. § 1091	<del>2H1.1</del> 32H1.1
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## EXHIBIT E

### Animal Fighting Prohibition Enforcement Act of 2007

**Synopsis of Proposed Amendment:** *This proposed amendment implements the Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. 110–22 (the "Act"). The Act amends the Animal Welfare Act, 7 U.S.C. § 2156, to increase penalties for existing offenses and to create a new offense. Specifically, the Act increases penalties for criminal violations of 7 U.S.C. § 2156 from a maximum term of one year of imprisonment to a maximum term of not more than three years of imprisonment. The penalties are now set forth in section 49 of title 18, United States Code. In addition, the Act created a new offense at 7 U.S.C. § 2156(e) which makes it unlawful to "sell, buy, transport, or deliver in interstate or foreign commerce a knife, a gaff, or any other sharp instrument attached, or designed or intended to be attached, to the leg of a bird for use in an animal fighting venture." The term "animal fighting venture", an element of each criminal offense in 7 U.S.C. § 2156, is defined at subsection (g) as ". . . any event which involves a fight between at least two animals and is conducted for purposes of sport, wagering, or entertainment . . .".*

*The proposed amendment deletes the reference of 7 U.S.C. § 2156 to §2X5.2 (Class A Misdemeanors) in Appendix A because violations of 7 U.S.C. § 2156 are now felony offenses. The proposed amendment references offenses under 7 U.S.C. § 2156 to §2E3.1 (Gambling Offenses).*

*The proposed amendment also creates a new alternative base offense level at §2E3.1(b)(2) that provides a base offense level of [8][10] if the offense involved an "animal fighting venture", which is defined in proposed Application Note 1 as having the meaning given that term in 7 U.S.C. § 2156(g). Additionally, the proposed amendment adds an instruction to apply the greatest applicable base offense level at §2E3.1(a) because an offense involving an animal fighting venture may also involve conduct covered by subsection (a)(1).*

*The proposed amendment also provides an upward departure provision if an animal fighting offense involves extraordinary cruelty to an animal.*

*Finally, the proposed amendment expands the title of §2E3.1 to include animal fighting offenses.*

#### **§2E3.1. Gambling Offenses; Animal Fighting Offenses**

- (a) **Base Offense Level: (Apply the greatest)**
- (1) **12**, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation; or
  - (2) **[8][10]**, if the offense involved an animal fighting venture; or
  - (23) **6**, otherwise.

Commentary

Statutory Provisions: 7 U.S.C. § 2156; 15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953, 1955; 31 U.S.C. § 5363. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"Animal fighting venture" has the meaning given that term in 7 U.S.C. § 2156(g).*
2. *In the case of an animal fighting offense that involves extraordinary cruelty to an animal, an upward departure may be warranted.*

Appendix A - Statutory Index

7 U.S.C. § 2156      ~~2X5.22E3.1~~

## EXHIBIT F

### Court Security Improvement Act of 2007

#### Issues for Comment

1. *The Commission requests comment regarding two new offenses created by the Court Security Improvement Act of 2007, Pub. L. 110–177. Specifically, the Commission requests comment regarding whether the Commission should amend Appendix A (Statutory Index) to refer these new provisions to existing guidelines, and if so, to what guideline(s) should each new offense be referenced?*

*The new provision at 18 U.S.C. § 1521 prohibits the filing of, attempts, or conspiracies to file, any false lien or encumbrance against the real or personal property of officers or employees of the United States Government, on account of that individual's performance of official duties. The offense is punishable by a maximum term of 10 years of imprisonment. Are there existing guidelines that would be appropriate to cover violations of the new provision at 18 U.S.C. § 1521? For example, should violations of 18 U.S.C. § 1521 be referenced to §2J1.2 (Obstruction of Justice), or alternatively or additionally to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States)? What, if any, specific offense characteristics should be added? Should an application note be added instructing courts to apply §3A1.2 (Official Victim)?*

*The new provision at 18 U.S.C. § 119 prohibits the public disclosure of restricted personal information about a federal officer or employee, witness, juror, or the immediate family member of such persons, with the intent to threaten or facilitate a crime of violence against such person. The offense is punishable by a maximum term of 5 years of imprisonment. Are there existing guidelines that would be appropriate to cover violations of the new provision at 18 U.S.C. § 119 (Protection of individuals performing certain official duties)? For example, should the new provision be referenced to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information); or alternatively or additionally to the assault guidelines in Chapter Two, Part A (Offenses Against the Person)? What, if any, specific offense characteristics should be added? Should an application note be added instructing courts to apply §3A1.2 (Official Victim)?*

2. *Section 209 of the Act directs the Commission to “review the Sentencing Guidelines as they apply to threats punishable under section 115 of title 18, United States Code, that occur over the Internet, and determine whether and by how much that circumstance should aggravate the punishment pursuant to section 994 of title 28, United States Code. In conducting the study, the Commission shall take into consideration the number of such threats made, the intended number of recipients of such threats, and whether the initial senders of such threats were acting in an individual capacity or as part of a larger group.” How should the Commission respond to the directive? What are the aggravating circumstances in such offenses, and how should the Commission address those circumstances?*

# EXHIBIT G

## Miscellaneous Food and Drug Offenses

**Synopsis of Proposed Amendment:** *This proposed amendment addresses offenses involving human growth hormone (hGH) and offenses involving violations of certain food and drug safety laws.*

*First, the proposed amendment creates guideline penalties for offenses involving the illegal distribution of hGH by amending §§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), 2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), and Appendix A (Statutory Index). Specifically, the proposed amendment adds references to §§2D1.1 and 2D1.2 in Appendix A for violations of 21 U.S.C. §§333(e)(1) and (e)(2), respectively; amends the specific offense characteristic at §2D1.1(b)(6) to include hGH offenses; and deletes language in the commentary to §2N2.1 stating that the Commission has not established a guideline for hGH offenses. In addition, there are issues for comment regarding hGH offenses.*

*Second, the proposed amendment addresses how violations of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.) (the “FDCA”) and the Prescription Drug Marketing Act of 1987, Pub. L. 100–293, (the “PDMA”) are treated under §2N2.1. Specifically, the proposed amendment adds a specific offense characteristic at §2N2.1 that applies if the defendant committed any part of the instant offense after sustaining a conviction of an offense under 21 U.S.C. § 331. Because PDMA offenses at 21 U.S.C. §§ 353 and 381 are incorporated into the FDCA at 21 U.S.C. § 331 the proposed specific offense characteristic also is applicable to a second or subsequent violation of the PDMA. The proposed amendment also amends the commentary to §2N2.1 to include substantial risk of bodily harm or death as a basis for an upward departure. In addition, there is an issue for comment regarding violations of the FDCA and PDMA.*

### Proposed Amendment:

**§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy**

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

- (6) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance or human growth hormone through mass-marketing by means of an interactive computer service, increase by **2** levels.

\* \* \*

Commentary

Statutory Provisions: 21 U.S.C. §§ 333(e)(1), 841(a), (b)(1)-(3), (7), (g), 860a, 865, 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

\* \* \*

10. Use of Drug Equivalency Tables.—

\* \* \*

(E) Drug Equivalency Tables.—

\* \* \*

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Schedule III Substances (except ketamine)\*\*\*

1 unit of a Schedule III Substance = 1 gm of marihuana

\*\*\**Provided*, that the combined equivalent weight of all Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

---

[Human Growth Hormone\*\*\*\*

1 unit of Human Grown Hormone = 1 gm of marihuana

\*\*\*\**Provided*, that the combined equivalent weight of all human growth hormone units, Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.]

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Ketamine

1 unit of ketamine = 1 gm of marihuana

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Schedule IV Substances (except flunitrazepam)\*\*\*\*\*

1 unit of a Schedule IV Substance (except Flunitrazepam)= 0.0625 gm of marihuana

\*\*\*\*\**Provided*, that the combined equivalent weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 4.99 kilograms of marihuana.

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Schedule V Substances\*\*\*\*\*

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

\*\*\*\*\**Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.

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List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)\*\*\*\*\*

1 gm of Ephedrine = 10 kg of marihuana  
1 gm of Phenylpropanolamine = 10 kg of marihuana

1 gm of Pseudoephedrine =

10 kg of marihuana

\*\*\*\*\**Provided*, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

\* \* \*

**§2D1.2. Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy**

\* \* \*

Commentary

Statutory Provisions: 21 U.S.C. §§ 333(e)(2), 859 (formerly 21 U.S.C. § 845), 860 (formerly 21 U.S.C. § 845a), 861 (formerly 21 U.S.C. § 845b).

\* \* \*

**§2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product**

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
  - (1) If the defendant committed any part of the instant offense after sustaining a conviction of an offense under 21 U.S.C. § 331, increase by [2]-[7] levels.
- (b)(c) Cross References

Application Notes:

\* \* \*

3. Upward Departure Provisions.—*The following are circumstances in which an upward departure may be warranted:*

- (A) *The offense created a substantial risk of bodily injury or death, ~~Death~~ or bodily injury, extreme psychological injury, property damage, or monetary loss resulted from the offense. See Chapter Five, Part K (Departures).*

\* \* \*

4. *The Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving human growth hormones).—Offenses involving anabolic steroids are covered by Chapter Two, Part D (Offenses Involving Drugs and Narco-Terrorism). In the case of an offense involving a substance purported to be an anabolic steroid, but not*

containing any active ingredient, apply §2B1.1 (Theft, Property Destruction, and Fraud) with "loss" measured by the amount paid, or to be paid, by the victim for such substance.

\* \* \*

## Appendix A (Statutory Index)

21 U.S.C. § 333(b) 2N2.1  
21 U.S.C. § 333(e)(1) 2D1.1  
21 U.S.C. § 333(e)(2) 2D1.2

## Issues for Comment

1. *The Commission requests comment regarding how human growth hormone (hGH) should be quantified under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)). Human growth hormone typically is distributed in vials of varying sizes. The vials may specify the amount of hGH they contain in International Units (IU) or milligrams (mg). For certain controlled substances (including some Schedule I and II depressants, Schedule III, Schedule IV, and Schedule V controlled substances) the base offense level is determined based on the number of "units" involved in the offense. A "unit" is defined generally as "one pill, capsule or tablet" or, if in liquid form (other than GHB), one "unit" means 0.5 ml. See Note F of the Drug Quantity Table in §2D1.1(c).*
2. *The existing definition of "unit" applies to trafficking in steroids, which is a Schedule III controlled substance with a penalty scheme similar to distribution offenses involving human growth hormone (hGH). The Commission requests comment regarding the harmfulness of hGH offenses relative to steroid offenses. Are hGH trafficking offenses more harmful, less harmful, or of approximately equal harm? Based on that comparison, what quantity of vials, IU, or mg of hGH should be used to determine a "unit" for purposes of calculating the base offense level (e.g., one vial, 3 IUs, 1 mg)?*
3. *The Commission requests comment regarding whether a maximum base offense level should apply in §2D1.1 for an offense involving the distribution of human growth hormone (hGH). For certain types of controlled substances, the marijuana equivalencies in the Drug Equivalency Table in §2D1.1(c) are "capped" at specified amounts. For example, anabolic steroids and other Schedule III controlled substances, which also have a statutory maximum of 5 years' imprisonment, are subject to a maximum base offense level of 20. Should the Commission similarly provide a maximum base offense level for offenses involving the distribution of hGH and, if so, what maximum base offense level should apply?*
4. *The Commission requests comment regarding whether it should expand the scope of the enhancements in §2D1.1(b)(6) (pertaining to masking agents) and §2D1.1(b)(7) (pertaining to distribution of a steroid to an athlete) to include hGH. Also, should the Commission amend the commentary to §2D1.1 in Application Note 8 to cover offenses involving human growth hormone (hGH)? Specifically, the enhancement at §2D1.1(b)(6) defines "masking agent" as "a product added to, or taken with, an anabolic steroid to prevent the detection of the anabolic steroid in an individual's body."*

*Masking agents also can be taken to prevent the detection of other controlled substances, including hGH. Should the Commission expand the definition of masking agent, and thus application of the enhancement, in a manner that covers hGH? Human growth hormone also may be used to enhance an individual's performance. Should the Commission expand the scope of the enhancement at §2D1.1(b)(7) pertaining to distribution to an athlete to cover offenses involving hGH? Application Note 8 instructs the court on how to apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in a case in which a coach used his or her position to influence an athlete to use an anabolic steroid. Similarly, a coach may use his or her position to influence an athlete to use hGH. Should the Commission modify Application Note 8 to include cases involving hGH?*

5. *The Commission requests comment regarding whether §2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product) adequately addresses the numerous statutes referenced to that guideline. The statutes referenced to §2N2.1 prohibit conduct ranging from regulatory offenses with a statutory maximum penalty of 1 year imprisonment (e.g., 21 U.S.C. § 642 (Recordkeeping requirements [for meat processors])) to violations of the Prescription Drug Marketing Act of 1987 that carry a statutory maximum penalty of 10 years imprisonment. Should the Commission provide alternative base offense levels, specific offense characteristics identifying aggravating factors warranting an enhanced sentence, or some combination of these to more adequately address these offenses? If so, what should be the offense levels associated with alternative base offense levels and/or specific offense characteristics?*



## EXHIBIT H

### Immigration

**Synopsis of Proposed Amendment:** *The following proposed amendment addresses issues related to §2L1.2 (Unlawfully Entering or Remaining in the United States).*

*Option 1 addresses discrete application issues identified through comment to the Commission as well as through an analysis of applicable circuit case law. Specifically, Option 1 addresses issues related to the definitions of “crime of violence” and “drug trafficking offense.”*

*Within Option 1, sub-option A (Crime of Violence) provides new language in §2L1.2(b)(1)(A)(iii) and (b)(1)(B) to provide a graduated enhancement of 16 or 12 levels for “an offense that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.” Specific offense characteristic (b)(1)(A)(iii) provides an increase of 16 levels if the sentence imposed for such conviction exceeded 13 months. Specific offense characteristic (b)(1)(B) provides an increase of 12 levels if the sentence imposed for such conviction was 13 months or less. Sub-option A (Crime of Violence) also adds a definition to Application Note 1(B)(iii) for “forcible sex offenses.”*

*Sub-option B (Crime of Violence) deletes the definition of “crime of violence” in Application Note 1(B)(iii) and defines “crime of violence” as “an offense described in 8 U.S.C. § 1101(a)(43)(A) and (F), except an offense against the property of another.” The aggravated felony definition at 8 U.S.C. § 1101(a)(43)(A) includes convictions for murder, rape and sexual abuse of a minor, and 8 U.S.C. § 1101(a)(43)(F) refers to the definition of “crime of violence” found at 18 U.S.C. § 16. The definition of “crime of violence” at 18 U.S.C. § 16 is “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” Option B limits the scope of 8 U.S.C. § 1101(a)(43)(F) to exclude “an offense against the property of another” for purposes of the enhancement.*

*Option 1 provides two sub-options regarding the definition of “drug trafficking offense” in Application Note 1(B)(iv). Sub-option A (Drug Trafficking Offenses) amends the definition of “drug trafficking offense” in Application Note 1(B)(iv) by adding the terms “[transportation,] or offer to sell” to the definition. Sub-option B (Drug Trafficking Offenses) amends the definition of “drug trafficking offense” by deleting the current definition in Application Note 1(B)(iv) and referring to the aggravated felony definition of “drug trafficking crime” as defined in 18 U.S.C. § 924(c).*

*Option 1 also provides a new departure provision that “in a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for a drug possession [Sub-option A (Drug Trafficking Offenses): or transportation] [Sub-option B (Drug Trafficking Offenses): , transportation, or offer to sell] offense involving a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted.”*

*Option 1 also provides a new downward departure provision for cases in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8*

U.S.C. § 1101(a)(43).

*Option 2 provides a base offense level of [12] [14] [16] and four specific offense characteristics. Subsection (b)(1) provides an increase of [4] [6] levels if the defendant previously was deported or unlawfully remained in the United States after a conviction for which the sentence imposed exceeded 24 months. Subsection (b)(2) provides an increase of 4 levels, and a minimum offense level of 24, if the defendant previously was deported or unlawfully remained in the United States after a conviction for a national security or terrorism offense, or an offense of murder, rape, or sexual abuse of a minor as described in 8 U.S.C. § 1101(a)(43)(A). Subsection (b)(3) provides an increase of [4] [6] levels if the offender sustained a conviction for another felony offense subsequent to illegally reentering the United States. This enhancement does not apply to convictions for reentry (8 U.S.C. §§ 1325 or 1326) as Application Note 3 defines “another felony offense” as “any federal, state, or local offense, punishable by imprisonment for a term exceeding one year, other than a conviction under 8 U.S.C. §§ 1325 or 1326.” Finally, subsection (b)(4) provides a decrease of [4] [6] [8] levels if the defendant does not have any prior felony convictions.*

*Two departure considerations are also provided in Application Note 4. First, a departure may be warranted in “a case in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction.” Second, “an upward departure may be warranted in a case in which the defendant has been removed multiple times prior to committing the instant offense.”*

*Option 3 provides a base offense level 8. The specific offense characteristics include a 20 level increase for a prior felony conviction for a national security or terrorism offense under §2L1.2(b)(1)(A). A prior felony conviction for murder, rape, child pornography, or child sexual abuse offense results in a 16 level increase under §2L1.2(b)(1)(B)(i). The option also has bracketed two enumerated offenses that result in a 16 level increase under §2L1.2(b)(1)(B)(i), kidnapping and human trafficking offenses. Additionally, a prior felony conviction resulting in a sentence of 48 months, or two prior felony convictions each resulting in a sentence of imprisonment exceeding [12][13] months, results in a 16 level increase under §2L1.2(b)(1)(B)(ii) and (iii). If the prior felony conviction resulted in a sentence less than 48 months but more than 24 months, an increase of 12 levels applies under §2L1.2(b)(1)(C). A prior felony conviction resulting in a sentence of imprisonment exceeding [12] [13] months results in an 8 level increase under §2L1.2(b)(1)(D). Finally, under §2L1.2(b)(1)(E) any prior felony conviction, regardless of the sentence imposed, or any three prior convictions, each resulting in a sentence of imprisonment of at least 60 days, results in a 4 level increase.*

*This proposed amendment also includes an issue for comment.*

## **Option 1**

### **§2L1.2. Unlawfully Entering or Remaining in the United States**

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic
  - (1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

**[Sub-option 1(A)(Crime of Violence):**

- (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) an offense that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense, for which the sentence imposed exceeded 13 months; (iv) a firearms offense; (~~iv~~ v) a child pornography offense; (~~v~~ vi) a national security or terrorism offense; (~~vi~~ vii) a human trafficking offense; or (~~vii~~ viii) an alien smuggling offense, increase by **16** levels;
- (B) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed was 13 months or less; or (ii) an offense that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense, for which the sentence imposed was 13 months or less, increase by **12** levels;
- (C) a conviction for an aggravated felony, increase by **8** levels;
- (D) a conviction for any other felony, increase by **4** levels; or
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

*Statutory Provisions:* 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

- (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

- (ii) *A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.*
- (iii) *A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.*
- (iv) *Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*

(B) Definitions.—For purposes of subsection (b)(1):

- (i) *"Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).*
- (ii) *"Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*

**[Sub-option A (Crime of Violence):**

- (iii) “Crime of violence” means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. “Forcible sex offense” includes any sex offense in which consent to the conduct was not given, or was not given voluntarily and/or competently.

**[Sub-option B (Crime of Violence):**

- (iii) "Crime of violence" means ~~any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another~~ an offense described in 8 U.S.C. § 1101(a)(43)(A) or (F), except an offense against the property of another.

**[Sub-option A (Drug Trafficking Offenses):**

- (iv) "Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, ~~or~~ dispensing, [transportation,] or offer to sell of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

**[Sub-option B (Drug Trafficking Offenses):**

- (iv) ~~"Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.~~ means a "drug trafficking crime" as defined in 18 U.S.C. § 924(c).
- (v) *"Firearms offense" means any of the following:*
  - (I) *An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).*
  - (II) *An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).*
  - (III) *A violation of 18 U.S.C. § 844(h).*
  - (IV) *A violation of 18 U.S.C. § 924(c).*
  - (V) *A violation of 18 U.S.C. § 929(a).*
  - (VI) *An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
- (vi) *"Human trafficking offense" means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
- (vii) *"Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed*

*includes any term of imprisonment given upon revocation of probation, parole, or supervised release.*

(viii) *"Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).*

2. *Definition of "Felony"*.—*For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*
3. *Application of Subsection (b)(1)(C)*.—
  - (A) *Definitions*.—*For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.*
  - (B) *In General*.—*The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).*
4. *Application of Subsection (b)(1)(E)*.—*For purposes of subsection (b)(1)(E):*
  - (A) *"Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.*
  - (B) *"Three or more convictions" means at least three convictions for offenses that are not counted as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).*
5. *Aiding and Abetting, Conspiracies, and Attempts*.—*Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.*
6. *Computation of Criminal History Points*.—*A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*
7. *Departure Considerations*.—
  - (A) *In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for a drug possession [Sub-option A (Drug Trafficking Offenses): or transportation] [Sub-option B (Drug Trafficking Offenses): , transportation, or offer to sell] offense involving a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted.*
  - (B) *In a case in which subsection (b)(1)(A) applies, and the prior conviction does not*

*meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.]*

## Option 2

Chapter Two, Part L, Subpart One, is amended by striking §2L1.2 and its accompanying commentary and inserting the following:

### **§2L1.2. Unlawfully Entering or Remaining in the United States**

- (a) Base Offense Level: **[12] [14] [16]**
- (b) Specific Offense Characteristics
  - (1) If the defendant previously was deported, or unlawfully remained in the United States, after a conviction for a felony for which the sentence imposed exceeded 24 months, increase by **[4] [6]** levels.
  - (2) If the defendant previously was deported, or unlawfully remained in the United States after a conviction for a felony that is (A) a national security or terrorism offense; or (B) an offense described in 8 U.S.C. § 1101(a)(43)(A); increase by **4** levels. If the resulting offense level is less than level **24**, increase to level **24**.
  - (3) If the defendant has sustained a conviction for another felony offense that was committed subsequent to illegally reentering the United States, increase by **[4][6]** levels.
  - (4) If the defendant does not have any prior felony convictions, decrease the offense level by **[4][6][8]** levels.

#### Commentary

*Statutory Provisions:* 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Notes:

1. Definition.— For purposes of this guideline, ‘felony’ means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.
2. Computation of Criminal History Points.—A conviction taken into account under subsection (b) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).
3. Application of Subsection (b)(3).—

*"Another felony offense" means any federal, state, or local offense, punishable by imprisonment for a term exceeding one year, other than a conviction under 8 U.S.C. §§ 1325 or 1326.*

[Option A: For purposes of applying subsection (b)(3), do not consider any conviction taken into account under subsection (b)(1) or (b)(2).][Option B: A prior conviction taken into account under subsection (b)(1) or (b)(2) is not excluded from consideration under subsection (b)(3).]

4. *Departure Considerations.*

- (A) *In a case in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction, a departure may be warranted.*
- (B) *In a case in which the defendant has been removed multiple times prior to committing the instant offense, an upward departure may be warranted.*

**Option 3**

Chapter Two, Part L, Subpart One, is amended by striking §2L1.2 and its accompanying commentary and inserting the following:

**§2L1.2. Unlawfully Entering or Remaining in the United States**

- (a) **Base Offense Level: 8**
- (b) **Specific Offense Characteristic**
  - (1) **(Apply the Greatest):**

If the defendant previously was removed, deported, or unlawfully remained in the United States, after—

- (A) a prior felony conviction for a national security offense or terrorism offense, increase by **20** levels;
- (B) (i) a prior felony conviction for murder, rape, [kidnapping,][a human trafficking offense,] a child pornography offense, or an offense of child sexual abuse; (ii) a prior felony conviction resulting in a sentence of imprisonment of at least 48 months; or (iii) two prior felony convictions each resulting in a sentence of imprisonment exceeding **[12][13]** months, increase by **16** levels;
- (C) a prior felony conviction resulting in a sentence of imprisonment of at least **24** months, increase by **12** levels;
- (D) a prior felony conviction resulting in a sentence of



imprisonment exceeding [12][13] months, increase by 8 levels;

- (E) a prior felony conviction not covered by subdivisions (A) through (D), or any three prior convictions each resulting in a

sentence of imprisonment of at least 60 days, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1325(a) (second or subsequent offense only), 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

- (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
- (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.
- (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.
- (iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was 18 years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

- (i) "Child pornography offense" means an offense (I) described in 18 U.S.C. §§ 2251, 2251A, 2252, 2252A, or 2260; or (II) under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States.
- (ii) "Felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding 12 months.

*[(iii) "Human trafficking offense" means (I) any offense described in 18 U.S.C. §§ 1581, 1582, 1583, 1584, 1585, 1588, 1589, 1590, or 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense*

*under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.]*

*(iv) "Murder" means an offense (I) covered by §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder); or (II) under state or local law consisting of conduct that would have been an offense under 18 U.S.C. § 1111 if the offense had taken place within the territorial or maritime jurisdiction of the United States.*

*(v) "National security offense" means an offense covered by Chapter Two, Part M (Offenses Involving National Defense and Weapons of Mass Destruction).*

*(vi) "Offense of child sexual abuse" means an offense in which the victim had not attained the age of 18 years and that is any of the following: (I) an offense described in 18 U.S.C. § 2242; (II) a forcible sex offense; or (III) sexual abuse of a minor, except that this term does not include statutory rape.*

*(vii) "Sentence of imprisonment" has the meaning given that term in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment imposed upon revocation of probation, parole, or supervised release.*

*(viii) "Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).*

- 2. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiracy to commit, and attempting to commit such offenses.*
- 3. Multiple Prior Sentences.—Sentences of imprisonment are counted separately or as a single sentence as provided by §4A1.2.*
- 4. Interaction with Chapter Four.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History)."*

**Issue for Comment**

1. Should any of the specific offense characteristics and departure provisions in one option be adopted by the Commission as part of another option? If so, which provisions should be incorporated into which option?

# EXHIBIT I

## Criminal History

**Synopsis of Proposed Amendment:** *The proposed amendment modifies §4A1.2(a) to clarify the meaning of the term “arrest” as used in determining whether an intervening arrest causes two prior sentences to be counted separately or as a single sentence. First, the proposed amendment provides that an intervening arrest includes an attempted service of an arrest warrant where the defendant escapes the arrest or the service of the arrest warrant. Second, the proposed amendment provides that the issuance of a summons or complaint does not constitute an arrest.*

## Proposed Amendment:

### §4A1.2. Definitions and Instructions for Computing Criminal History

#### (a) Prior Sentence

\* \* \*

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

An "arrest" includes an attempted service of an arrest warrant where the defendant escapes the arrest or the service of the arrest warrant. The issuance of a summons or a complaint does not constitute an "arrest".

\* \* \*

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#### Commentary

#### Application Notes:

\* \* \*

3. Multiple Prior Sentences Upward Departure Provision.—Counting multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant’s criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were counted as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant’s criminal history or the frequency with which the defendant has committed crimes.

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# EXHIBIT J

## Commission's Rules of Practice and Procedure

**Synopsis of Proposed Amendment:** *This proposed amendment modifies the Commission's Rules of Practice and Procedure pertaining to retroactivity consideration. Currently, Rule 4.1 (Promulgation of Amendments) provides that "in those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants, it shall decide whether to make the amendment retroactive at the same meeting at which it decides to promulgate the amendment.". Deciding whether to make an amendment retroactive at the same meeting at which the amendment is promulgated, however, often is impracticable. A complete retroactivity analysis typically cannot be prepared until the Commission has decided to promulgate a specific amendment option, which may not occur until the meeting at which the amendment is promulgated. Similarly, the public often cannot provide fully informed comment on possible retroactivity until the Commission has narrowed its consideration of a proposed amendment to a specific option, again a decision which may not occur until the meeting at which the amendment is promulgated. As a result, the proposed amendment deletes the requirement in Rule 4.1 that the retroactivity decision be made at the same meeting as promulgation of an amendment.*

*The proposed amendment also amends Rule 4.1 to more clearly set forth the Commission's statutory requirement to consider retroactivity under 28 U.S.C. § 994(u).*

*The proposed amendment also modifies the process by which the Commission instructs staff to prepare a retroactivity impact analysis. Currently, Rule 2.2 (Voting Rules for Action by the Commission) provides that "[t]he decision to instruct staff to prepare a retroactivity impact analysis for a proposed amendment shall require the affirmative vote of at least three members at a public meeting." The proposed amendment would delete this requirement by amending Rule 4.1 to provide that "[p]rior to final action on the retroactive application of an amendment, staff shall prepare and the Commission shall review a retroactivity impact analysis of the amendment". The proposed amendment therefore, deletes the procedural requirement that the Commission instruct staff to prepare a retroactivity analysis and instead requires that such an analysis be prepared prior to final action on retroactivity.*

*Finally, one issue for comment follows the proposed amendment.*

### Rule 2.2 – Voting Rules for Action by the Commission

Except as otherwise provided in these rules or by law, action by the Commission requires the affirmative vote of a majority of the members at a public meeting at which a quorum is present. A quorum shall consist of a majority of the members then serving. Members shall be deemed "present" and may participate and vote in meetings from remote locations by electronic means, including telephone, satellite, and video conference devices.

Promulgation of guidelines, policy statements, official commentary, and amendments thereto shall require the affirmative vote of at least four members at a public meeting. See 28 U.S.C. § 994(a).

Publication for comment of proposed amendments to guidelines, policy statements, or official commentary shall require the affirmative vote of at least three members at a public meeting.

~~The decision to instruct staff to prepare a retroactivity impact analysis for a proposed amendment shall require the affirmative vote of at least three members at a public meeting.~~

Action on miscellaneous matters may be taken without a meeting based on the affirmative vote, by written or oral communication, of a majority of the members then serving. Such matters include the approval of budget requests, legal briefs, staff reports, analyses of legislation, administrative and personnel issues, notices regarding Commission amendment priorities, technical and clerical amendments to these rules, and decisions to hold a nonpublic meeting.

A motion to reconsider Commission action may be made only by a commissioner on the prevailing side of the vote for which reconsideration is sought, or who did not vote on the matter. Four votes are necessary to reconsider a Commission vote on any question on which a four-vote majority is required.

#### Rule 4.1 – Promulgation of Amendments

The Commission may promulgate and submit to Congress amendments to the guidelines after the beginning of a regular session of Congress and not later than May 1 of that year. Amendments shall be accompanied by an explanation or statement of reasons for the amendments. Unless otherwise specified, or unless Congress legislates to the contrary, amendments submitted for review shall take effect on the first day of November of the year in which submitted. 28 U.S.C. § 994(p). At other times, pursuant to special statutory enactment, the Commission may promulgate amendments to accomplish identified congressional objectives.

Amendments to policy statements and commentary may be promulgated and put into effect at any time. However, to the extent practicable, the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress and put them into effect on the same November 1 date as any guideline amendments issued in the same year. Generally, promulgated amendments will be given prospective application only. ~~However, in those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants, it shall decide whether to make the amendment retroactive at the same meeting at which it decides to promulgate the amendment. Prior to final Commission action on the retroactive application of an amendment, the Commission shall review the retroactivity impact analysis prepared pursuant to Rule 2.2, supra.~~ The Commission shall, however, consider whether to give retroactive application to an amendment that reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses. See 28 U.S.C. § 994(u). Prior to final action on the retroactive application of an amendment, staff shall prepare and the Commission shall review a retroactivity impact analysis of the amendment.

#### Issue for Comment

*Should the Commission amend the Commission's Rules of Practice and Procedure to provide a specified time frame governing final action with respect to retroactive application of an amendment pursuant to 28 U.S.C. § 994(u), and, if so, what should the time frame be? For example, should the rules provide a time frame that begins at the date of promulgation or the effective date of the amendment? Should the time frame specify a certain period of days by which final action should be taken, or should the time frame be more general in nature?*