

**United States Sentencing Commission Public Meeting Minutes
January 11, 2011**

Chair Patti B. Saris called the meeting to order at 1:03 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- William B. Carr, Jr., Vice Chair
- Ketanji B. Jackson, Vice Chair
- Dabney L. Friedrich, Commissioner
- Judge Ricardo H. Hinojosa, Commissioner
- Beryl A. Howell, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director
- Kenneth Cohen, General Counsel

The Chair called for a motion to adopt the October 15, 2010, public meeting minutes. Vice Chair Carr made a motion to adopt the minutes, with Commissioner Howell seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote with Chair Saris abstaining.

Chair Saris reported she is pleased to be on the Commission and looks forward to working with the commissioners and staff on the matters before the Commission.

Ms. Sheon reported that the Commission's Annual National Training Seminar will be held on May 18-20, 2011, at the Manchester Grand Hyatt Hotel in San Diego, CA. On-line registration for the seminar will be available through the Commission's webpage beginning the week of January 17, 2011.

The Chair called on Mr. Cohen to inform the Commission on possible votes to publish in the *Federal Register* proposed guidelines amendments and issues for comment.

Mr. Cohen stated that the first proposed amendment, attached hereto as Exhibit A, makes certain technical and conforming changes to the guidelines. First, the proposed amendment makes

technical and conforming changes to §§8B2.1 (Effective Compliance and Ethics Program) and 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants). Second, the proposed amendment makes technical changes to §§3C1.1 (Obstructing or Impeding the Administration of Justice), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.1 (Career Offender) to promote stylistic consistency. Third, the proposed amendment makes stylistic changes throughout the *Guidelines Manual* to provide full and accurate references to the titles of Chapter Three, Part C (Obstruction and Related Offenses) and §3C1.1.

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 staff authorized to make technical and conforming changes as needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Vice Chair Jackson made a motion to publish the proposed amendment, with Commissioner Howell seconding. The Chair called for discussion on the motion. Hearing none, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit B, responds to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues. Part A of the proposed amendment updates the policy statement at §6B1.2 (Standards for Acceptance of Plea Agreements) in light of *United States v. Booker*, 543 U.S. 220 (2005), and the Federal Judiciary Administrative Improvements Act of 2010, Pub. L. 111–174 (enacted May 27, 2010) by amending §§6B1.2 and 5K2.0 (Grounds for Departure (Policy Statement)) to reflect the statutory change made to subsection (c)(2) of 18 U.S.C. § 3553 (Imposition of a sentence). Part B of the proposed amendment responds to the Coast Guard Authorization Act of 2010, Pub. L. 111–281 (enacted October 15, 2010), which provided statutory sentencing enhancements for certain offenses under 18 U.S.C. § 2237 (Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information) and created a new criminal offense at 33 U.S.C. § 3851 (Criminal enforcement [of the prohibition against the use of organotin-compounds in a vessel antifouling system]).

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 staff authorized to make technical and conforming changes as needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Vice Chair Carr seconding. The Chair called for discussion on the motion. Hearing none, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit C, addresses a circuit conflict on whether a defendant convicted of an offense involving the willful failure to pay court-ordered child support (*e.g.*, a violation of 18 U.S.C. § 228) and sentenced under

§2B1.1 (Theft, Property Destruction, and Fraud) receives the specific offense characteristic in §2B1.1(b)(8)(C). Subsection (b)(8)(C) applies if the offense involved “a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines.” Some circuits have disagreed over whether it is impermissible double counting to apply §2B1.1(b)(8)(C) in a case involving a violation of section 228. The proposed amendment resolves the conflict by amending the commentary to §2J1.1 (Contempt).

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 staff authorized to make technical and conforming changes as needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Vice Chair Jackson made a motion to publish the proposed amendment, with Vice Chair Carr seconding. The Chair called for discussion on the motion. Hearing none, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit D, responds to case law and comments received regarding the enhancement at subsections (b)(1)(A) and (B) of §2L1.2 (Unlawfully Entering or Remaining in the United States). Under these subsections, a defendant receives an enhancement if the defendant previously was deported, or unlawfully remained in the United States, after a conviction. The proposed amendment would amend §2L1.2 to provide a limitation on the use of convictions under subsections (b)(1)(A) and (B) when a defendant's predicate offense would not qualify for criminal history points under Chapter Four - Criminal History and Criminal Livelihood.

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 staff authorized to make technical and conforming changes as needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to publish the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the motion. Hearing none, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit E, would make revisions to the supervised release guidelines, §§5D1.1 (Imposition of a Term of Supervised Release) and 5D1.2 (Term of Supervised Release). The proposed amendment provides two options for revising §5D1.1 that would reduce the number of cases in which the court is required by the guidelines to impose supervised release and two options for revising §5D1.2 that would lower or eliminate the minimum lengths required by that guideline for a term of supervised release.

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 staff authorized to make technical and conforming changes as needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Vice Chair Jackson seconding. The Chair called for discussion on the motion. Hearing none, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit F, responds to the Patient Protection and Affordable Care Act, Pub. L. 111–148 (the “Act”), which contains a directive to the Commission and created a new offense. The Act directs the Commission to review the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses to ensure adequate punishment and to provide enhancements based on the aggregate dollar amount of fraudulent bills submitted to a Government health care program by a defendant. The proposed amendment implements the directive by adding two provisions to §2B1.1, both of which apply to cases in which “the defendant was convicted of a Federal health care offense involving a Government health care program.”

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 staff authorized to make technical and conforming changes as needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to publish the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the motion. Hearing none, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit G, responds to the Dodd-Frank Wall Street Reform and Protection Act, Pub. L. 111–203 (the “Act”), which contains two directives to the Commission and created certain new offenses. The Act directs the Commission to “review and, if appropriate, amend” the guidelines and policy statements applicable to “persons convicted of offenses relating to securities fraud” and “persons convicted of fraud offenses relating to financial institutions or federally related mortgage loans.” The proposed amendment includes issues for comment regarding implementation of the directives in both the current and subsequent amendment cycles. The proposed amendment also amends Appendix A (Statutory Index) of the *Guidelines Manual* to include guidelines references for the new offenses created by the Act.

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 staff authorized to make technical and conforming changes as needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Howell made a

motion to publish the proposed amendment, with Vice Chair Jackson seconding. The Chair called for discussion on the motion. Hearing none, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit H, amends the guideline for international weapons trafficking, §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) to provide higher penalties for certain cases involving small arms crossing any international border of the United States and more guidance on cases involving ammunition crossing the border.

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 staff authorized to make technical and conforming changes as needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the motion. Hearing none, the Chair called for a vote. 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, re-promulgates as permanent the emergency, temporary amendment that implemented the emergency directive in section 8 of the Fair Sentencing Act of 2010, Pub. L. 111–220 (the “Fair Sentencing Act”) (*See* Appendix C, Amendment 748 (effective November 1, 2010)), which made substantive changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and revisions to five other guidelines.

In addition to re-promulgating the emergency amendment, the proposed amendment further amends the commentary to §2D1.1 in response a directive to the Commission in the Secure and Responsible Drug Disposal Act of 2010, Pub. L. 111–273 (the “Drug Disposal Act”). The Drug Disposal Act amended 21 U.S.C. § 822 to authorize certain persons in possession of controlled substances (*e.g.*, ultimate users and long-term care facilities) to deliver the controlled substances for the purpose of disposal. The Drug Disposal Act directs the Commission to ensure that the guidelines provide an appropriate penalty of up to two-levels if a person is convicted under the new statutory provision. The proposed amendment responds to the directive by amending Application Note 8 to §2D1.1 to provide that an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) applies if a person is convicted under the new statutory provision.

The proposed amendment also solicits public comment on a series of issues arising out of the Commission’s continued work on the guidelines applicable to drug trafficking, including:

- 1) whether the Commission should make any changes to the Fair Sentencing Act emergency amendment in re-promulgating it as a permanent amendment;

- 2) whether the permanent amendment or any part thereof should be included in subsection (c) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants;
- 3) what changes, if any, should be made to the guidelines applicable to drug trafficking; and
- 4) what changes, if any, should be made to §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role) as they apply to drug trafficking cases.

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 staff authorized to make technical and conforming changes as needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to publish the proposed amendment, with Commissioner Howell seconding. The Chair called for discussion on the motion. Hearing none, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Mr. Cohen inquired whether pursuant to the Commission's Rules of Practice and Procedures, the Commission want staff to conduct a retroactivity impact analysis of the proposed permanent amendment implementing the Fair Sentencing Act.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to conduct the retroactivity impact analysis, with Vice Chair Carr seconding. The Chair called for discussion on the motion. Hearing none, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Mr. Cohen inquired whether pursuant to the Commission's Rules of Practice and Procedures, the Commission want staff to conduct a retroactivity impact analysis for any of the other proposed amendments.

Chair Saris called for a motion as suggested by Mr. Cohen. No commissioner made such motion.

Mr. Cohen inquired whether pursuant to the Commission's Rules of Practice and Procedures, the Commission wanted staff to conduct a retroactivity impact analysis for Amendment 738, which, among other things, expanded zones B and C of the sentencing table and the availability of alternatives to incarceration. Amendment 738 became effective November 1, 2010.

Chair Saris called for a motion as suggested by Mr. Cohen. No commissioner made such motion. Commissioner Howell stated she will not request that a retroactivity analysis be conducted by the staff, but believes it helpful for commissioners to make clear their reasons for or against retroactive application of amendments that reduce the term of imprisonment recommended in the

guidelines. In Commissioner Howell's opinion, Amendment 738 should not be added to the list of "covered amendments" at §1B1.10(c) that may be given retroactive effect, primarily because the amendment made no change in the guideline ranges for affected offenders. The "magnitude of the change in the guideline range made by the amendment" is one of the factors set forth in the commentary to §1B1.10 to be considered by the Commission in selecting amendments to be included in the subsection (c), and this factor is not met. Therefore, she concluded, no retroactivity analysis is warranted.

Chair Saris asked if there was any further business before the Commission. Commissioner Howell welcomed Chair Saris to the Commission and stated she looks forward to working with her. Commissioner Hinojosa echoed Commissioner Howell's comments and complemented the Chair on her first public commission meeting.

Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Hinojosa made a motion to adjourn, with Commissioner Howell seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 1:26 p.m.

EXHIBIT A

PROPOSED AMENDMENT: TECHNICAL

Synopsis of Proposed Amendment: *This proposed amendment makes various technical and conforming changes to the guidelines.*

First, the proposed amendment makes certain technical and conforming changes in connection with the amendments that the Commission submitted to Congress on April 29, 2010. See 75 Fed. Reg. 27388 (May 14, 2010); USSG App. C, Amendments 738–746. Those changes are as follows:

- (1) Amendment 744 made changes to the organizational guidelines in Chapter Eight, including a change that consolidated subsections (b) and (c) of §8D1.4 (Recommended Conditions of Probation — Organizations) into a single subsection (b). To reflect this consolidation, §8B2.1(a) is changed so that it refers to the correct subsection of §8D1.4.*
- (2) Amendment 745 expanded the scope of §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources) to cover not only cultural heritage resources, but also paleontological resources. To reflect this expanded scope, a conforming change is made to §2Q2.1(c)(1).*

Second, the proposed amendment makes technical changes to §3C1.1 (Obstructing or Impeding the Administration of Justice), §4A1.2(k)(2), and §4B1.1(b) to promote stylistic consistency in how subdivisions are designated.

Finally, the proposed amendment makes a series of changes throughout the Guidelines Manual to provide full and accurate references to the titles of Chapter Three, Part C (Obstruction and Related Adjustments) and §3C1.1 (Obstructing or Impeding the Administration of Justice).

Proposed Amendment:

CHAPTER TWO - OFFENSE CONDUCT

Introductory Commentary

*Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward. Certain factors relevant to the offense that are not covered in specific guidelines in Chapter Two are set forth in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction *and Related Adjustments*); Chapter Four, Part B (Career Offenders and Criminal Livelihood); and Chapter Five, Part K (Departures).*

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§2J1.2. Obstruction of Justice

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Commentary

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Application Notes:

2. Chapter Three Adjustments.—

(A) Inapplicability of Chapter Three, Part C.—For offenses covered under this section, Chapter Three, Part C (Obstruction *and Related Adjustments*) does not apply, unless the defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.

* * *

3. Convictions for the Underlying Offense.—In the event that the defendant is convicted of an offense sentenced under this section as well as for the underlying offense (*i.e.*, the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction *and Related Adjustments*), and to §3D1.2(c) (Groups of Closely Related Counts).

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§2J1.3. Perjury or Subornation of Perjury; Bribery of Witness

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Commentary

Application Notes:

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2. For offenses covered under this section, Chapter Three, Part C (Obstruction *and Related Adjustments*) does not apply, unless the defendant obstructed the investigation or trial of the perjury count.

3. In the event that the defendant is convicted under this section as well as for the underlying offense (*i.e.*, the offense with respect to which he committed perjury, subornation of perjury, or witness bribery), see the Commentary to Chapter Three, Part C (Obstruction *and Related Adjustments*), and to §3D1.2(c) (Groups of Closely Related Counts).

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§2J1.6. Failure to Appear by Defendant

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Commentary

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Application Notes:

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2. For offenses covered under this section, Chapter Three, Part C (Obstruction *and Related Adjustments*) does not apply, unless the defendant obstructed the investigation or trial of the failure to appear count.

* * *

4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (*e.g.*, perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under §3C1.1 (Obstruction of Justice *Obstructing or Impeding the Administration of Justice*) is made because of the operation of the rules set out in Application Note 3.

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§2J1.9. Payment to Witness

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Commentary

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Application Notes:

1. For offenses covered under this section, Chapter Three, Part C (Obstruction *and Related Adjustments*) does not apply unless the defendant obstructed the investigation or trial of the payment to witness count.
2. In the event that the defendant is convicted under this section as well as for the underlying offense (*i.e.*, the offense with respect to which the payment was made), *see* the Commentary to Chapter Three, Part C (Obstruction *and Related Adjustments*), and to §3D1.2(c) (Groups of Closely Related Counts).

* * *

§2Q2.1. Offenses Involving Fish, Wildlife, and Plants

* * *

(c) Cross Reference

- (1) If the offense involved a cultural heritage resource *or paleontological resource*, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources *or Paleontological Resources*; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources *or Paleontological Resources*), if the resulting offense level is greater than that determined above.

* * *

§3C1.1. Obstructing or Impeding the Administration of Justice

If (A1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B2) the obstructive conduct related to (iA) the defendant's offense of conviction and any relevant conduct; or (iiB) a closely related offense, increase the offense level by 2 levels.

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

* * *

(k) Revocations of Probation, Parole, Mandatory Release, or Supervised Release

* * *

- (2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (iA) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (see §4A1.2(e)(1)); (iiB) in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on such sentence (see §4A1.2(d)(2)(A)); and (iiiC) in any other case, the date of the original sentence (see §4A1.2(d)(2)(B) and (e)(2)).

* * *

§4B1.1. Career Offender

* * *

- (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

<u>Offense</u>	<u>Statutory Maximum</u>	<u>Offense Level*</u>
(A1)	Life	37
(B2)	25 years or more	34
(C3)	20 years or more, but less than 25 years	32
(D4)	15 years or more, but less than 20 years	29
(E5)	10 years or more, but less than 15 years	24
(F6)	5 years or more, but less than 10 years	17
(G7)	More than 1 year, but less than 5 years	12.

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§5E1.2. Fines for Individual Defendants

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Commentary

Application Notes:

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6. *The existence of income or assets that the defendant failed to disclose may justify a larger fine than that which otherwise would be warranted under this section. The court may base its conclusion as to this factor on information revealing significant unexplained expenditures by the defendant or unexplained possession of assets that do not comport with the defendant's reported income. If the court concludes that the defendant willfully misrepresented all or part of his income or assets, it may increase the offense level and resulting sentence in accordance with Chapter Three, Part C (Obstruction **and Related Adjustments**).*

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§8A1.2. Application Instructions - Organizations

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Commentary

Application Notes:

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2. *The definitions in the Commentary to §1B1.1 (Application Instructions) and the guidelines and commentary in §§1B1.2 through 1B1.8 apply to determinations under this chapter unless otherwise specified. The adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction **and Related Adjustments**), and E (Acceptance of Responsibility) do not apply. The provisions of Chapter Six (Sentencing Procedures, Plea Agreements, and Crime Victims' Rights) apply to proceedings in which the defendant is an organization. Guidelines and policy statements not referenced in this chapter, directly or indirectly, do not apply when the defendant is an organization; e.g., the policy statements in Chapter Seven (Violations of Probation and Supervised Release) do not apply to organizations.*

* * *

§8B2.1. Effective Compliance and Ethics Program

- (a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (cb)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

* * *

§8C2.3. Offense Level

Commentary

Application Notes:

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2. *In determining the offense level under this section, apply the provisions of §§1B1.2 through 1B1.8. Do not apply the adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction *and Related Adjustments*), and E (Acceptance of Responsibility).*

* * *

EXHIBIT B

PROPOSED AMENDMENT: MISCELLANEOUS

Synopsis of Proposed Amendment: *This proposed multi-part amendment responds to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues.*

Part A of the proposed amendment updates the policy statement at §6B1.2 (Standards for Acceptance of Plea Agreements) in light of United States v. Booker, 543 U.S. 220 (2005), and the Federal Judiciary Administrative Improvements Act of 2010, Pub. L. 111–174 (enacted May 27, 2010). The proposed amendment amends §6B1.2 to provide standards for acceptance of plea agreements when the sentence is outside the applicable guideline range. The proposed amendment also responds to the Federal Judiciary Administrative Improvements Act of 2010, which amended 18 U.S.C. § 3553(c)(2) to require that the reasons for a sentence be set forth in the statement of reasons form (rather than in the judgment and commitment order). The proposed amendment amends both §6B1.2 and §5K2.0(e) to reflect this statutory change.

Part B of the proposed amendment responds to the Coast Guard Authorization Act of 2010, Pub. L. 111–281 (enacted October 15, 2010), which provided statutory sentencing enhancements for certain offenses under 18 U.S.C. § 2237 (Criminal sanctions for failure to heave to, obstruction of boarding, or providing false information) and created a new criminal offense at 33 U.S.C. § 3851.

The proposed amendment addresses the section 2237 offenses by expanding the range of guidelines to which certain section 2237 offenses are referenced. Section 2237 makes it unlawful for—

the operator of a vessel to knowingly fail to obey a law enforcement order to heave to, see 18 U.S.C. § 2237(a)(1);

a person on board a vessel to forcibly interfere with a law enforcement boarding or other law enforcement action, or to resist arrest, see 18 U.S.C. § 2237(a)(2)(A); or

a person on board a vessel to provide materially false information to a law enforcement officer during a boarding regarding the vessel's destination, origin, ownership, registration, nationality, cargo, or crew, see 18 U.S.C. § 2237(a)(2)(B).

*All three of these offenses are punishable by not more than 5 years of imprisonment. The first two are referenced in Appendix A (Statutory Index) to §2A2.4 (Obstructing or Impeding Officers); the third is referenced to §2B1.1 (Theft, Property Destruction, and Fraud). However, the Coast Guard Authorization Act of 2010 provided statutory sentencing enhancements that apply to persons convicted under either of the first two offenses under section 2237 (*i.e.*, the two offenses referenced to §2A2.4; the sentencing enhancements do not apply to the offense referenced to §2B1.1). The proposed amendment addresses these new statutory sentencing enhancements by referencing them in Appendix A (Statutory Index) to Chapter Two offense guidelines most analogous to the conduct forming the basis for the statutory sentencing enhancements.*

Proposed Amendment:

(A) Plea Agreements and Statement of Reasons

§6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)

- (a) In the case of a plea agreement that includes the dismissal of any charges or an agreement not to pursue potential charges (Rule 11(c)(1)(A)), the court may accept the agreement if the court determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.

However, a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of §1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted.

- (b) In the case of a plea agreement that includes a nonbinding recommendation (Rule 11(c)(1)(B)), the court may accept the recommendation if the court is satisfied either that:
- (1) the recommended sentence is within the applicable guideline range; or
 - (2) (A) the recommended sentence ~~departs from~~ **is outside** the applicable guideline range for justifiable reasons; and (B) those reasons are ~~specifically set forth in writing~~ **set forth with specificity** in the statement of reasons ~~form or judgment and commitment order~~.
- (c) In the case of a plea agreement that includes a specific sentence (Rule 11(c)(1)(C)), the court may accept the agreement if the court is satisfied either that:
- (1) the agreed sentence is within the applicable guideline range; or
 - (2) (A) the agreed sentence ~~departs from~~ **is outside** the applicable guideline range for justifiable reasons; and (B) those reasons are ~~specifically set forth in writing~~ **set forth with specificity** in the statement of reasons ~~form or judgment and commitment order~~.

Commentary

The court may accept an agreement calling for dismissal of charges or an agreement not to pursue potential charges if the remaining charges reflect the seriousness of the actual offense behavior. This requirement does not authorize judges to intrude upon the charging discretion of the prosecutor. If the government's motion to dismiss charges or statement that potential charges will not be pursued is not contingent on the disposition of the remaining charges, the judge should defer to the government's position except under extraordinary circumstances. Rule 48(a), Fed. R. Crim. P. However, when the dismissal of charges or agreement not to pursue potential charges is contingent on acceptance of a plea agreement, the court's authority to adjudicate guilt and impose sentence is implicated, and the court is to determine whether or not dismissal of charges will undermine the sentencing guidelines.

Similarly, the court should accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence ~~departs from~~ *is outside* the applicable guideline range for justifiable reasons (~~i.e., that such departure is authorized by 18 U.S.C. § 3553(b))~~ and those reasons are ~~specifically set forth in writing~~ *set forth with specificity* in the statement of reasons ~~or the judgment and commitment order~~ *form*. See 18 U.S.C. § 3553(c). As set forth in subsection (d) of §5K2.0 (Grounds for Departure), however, the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement with respect to the offense.

A defendant who enters a plea of guilty in a timely manner will enhance the likelihood of his receiving a reduction in offense level under §3E1.1 (Acceptance of Responsibility). Further reduction in offense level (or sentence) due to a plea agreement will tend to undermine the sentencing guidelines.

The second paragraph of subsection (a) provides that a plea agreement that includes the dismissal of a charge, or a plea agreement not to pursue a potential charge, shall not prevent the conduct underlying that charge from being considered under the provisions of §1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted. This paragraph prevents a plea agreement from restricting consideration of conduct that is within the scope of §1B1.3 (Relevant Conduct) in respect to the count(s) of which the defendant is convicted; it does not in any way expand or modify the scope of §1B1.3 (Relevant Conduct). Section 5K2.21 (Dismissed and Uncharged Conduct) addresses the use, as a basis for upward departure, of conduct underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement.

The Commission encourages the prosecuting attorney prior to the entry of a plea of guilty or *nolo contendere* under Rule 11 of the Federal Rules of Criminal Procedure to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines. This recommendation, however, shall not be construed to confer upon the defendant any right not otherwise recognized in law.

* * *

§5K2.0. Grounds for Departure (Policy Statement)

* * *

- (e) **REQUIREMENT OF SPECIFIC WRITTEN REASONS FOR DEPARTURE.**—If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received *in camera*, shall state those reasons with specificity in the ~~written judgment and commitment order~~ *statement of reasons form*.

Commentary

Application Notes:

* * *

3.

* * *

(C) Departures Based on Circumstances Identified as Not Ordinarily Relevant.—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (see, e.g., Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

In addition, as required by subsection (e), each circumstance forming the basis for a departure described in this subdivision shall be stated with specificity in the ~~written judgment and commitment order~~ *statement of reasons form*.

* * *

5. Departures Based on Plea Agreements.—Subsection (d)(4) prohibits a downward departure based only on the defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely on the fact that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the ~~written judgment and commitment order~~ *statement of reasons form*, as required by subsection (e).

* * *

(B) Coast Guard Authorization Act

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2237(a)(1),(a)(2)(A)	2A2.4
18 U.S.C. § 2237(a)(2)(B)	2B1.1
18 U.S.C. § 2237(a)(2)(B)	2B1.1
18 U.S.C. § 2237(b)(2)(B)(i)	[2A1.1], [2A1.2], 2A1.3, 2A1.4
18 U.S.C. § 2237(b)(2)(B)(ii)(I)	2A2.1, 2A2.2
18 U.S.C. § 2237(b)(2)(B)(ii)(II)	2A4.1
18 U.S.C. § 2237(b)(2)(B)(ii)(III)	2A3.1
18 U.S.C. § 2237(b)(3)	2A2.2
18 U.S.C. § 2237(b)(4)	2A2.1, 2A2.2, [2G1.1], 2G1.3, 2G2.1, 2H4.1, 2L1.1

* * *

33 U.S.C. § 1908	2Q1.3
33 U.S.C. § 3851	2Q1.2, 2Q1.3

EXHIBIT C

PROPOSED AMENDMENT: CHILD SUPPORT

Synopsis of Proposed Amendment: *This proposed amendment addresses a circuit conflict on whether a defendant convicted of an offense involving the willful failure to pay court-ordered child support (e.g., a violation of 18 U.S.C. § 228) and sentenced under §2B1.1 (Theft, Property Destruction, and Fraud) receives the specific offense characteristic in §2B1.1(b)(8)(C).*

Offenses under section 228 are referenced in Appendix A (Statutory Index) to §2J1.1 (Contempt), which directs the court to apply §2X5.1 (Other Offenses), which directs the court to apply the most analogous offense guideline. The commentary to §2J1.1 provides that, in a case involving a violation of section 228, the most analogous offense guideline is §2B1.1. See §2J1.1, comment. (n.2).

The specific offense characteristic in §2B1.1(b)(8)(C) applies if the offense involved "a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines". It provides an enhancement of 2 levels and a minimum offense level of level 10.

Some circuits have disagreed over whether it is impermissible double counting to apply §2B1.1(b)(8)(C) in a case involving a violation of section 228. The Second and Eleventh Circuits have held that applying §2B1.1(b)(8)(C) in a section 228 case is permissible, because the failure to pay the child support and the violation of the order are distinct harms. See United States v. Maloney, 406 F.3d 149, 153-54 (2d Cir. 2005); United States v. Phillips, 363 F.3d 1167, 1169 (11th Cir. 2004). However, the Seventh Circuit has held that applying §2B1.1(b)(8)(C) in a section 228 case is impermissible double counting. See United States v. Bell, 598 F.3d 366 (7th Cir. 2010) ("to apply both the cross-reference for § 228 and the enhancement for violation of a court or administrative order is impermissible double counting").

The proposed amendment resolves the conflict by amending the commentary to §2J1.1. Two bracketed options are provided. The first option specifies that, in a case involving a violation of section 228, apply §2B1.1(b)(8)(C); the second option specifies that, in such a case, do not apply §2B1.1(b)(8)(C).

Proposed Amendment:

§2J1.1. Contempt

Apply §2X5.1 (Other Offenses).

Commentary

Statutory Provisions: 18 U.S.C. §§ 401, 228. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. In General.—Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent, the Commission has not provided a specific guideline for this offense. In certain cases, the offense conduct will be sufficiently analogous to §2J1.2 (Obstruction of Justice)

for that guideline to apply.

2. *Willful Failure to Pay Court-Ordered Child Support.*—For offenses involving the willful failure to pay court-ordered child support (violations of 18 U.S.C. § 228), the most analogous guideline is §2B1.1 (Theft, Property Destruction, and Fraud). The amount of the loss is the amount of child support that the defendant willfully failed to pay. *In such a case, [apply][do not apply] §2B1.1(b)(8)(C) (pertaining to a violation of a prior, specific judicial order).* Note: This guideline applies to second and subsequent offenses under 18 U.S.C. § 228(a)(1) and to any offense under 18 U.S.C. § 228(a)(2) and (3). A first offense under 18 U.S.C. § 228(a)(1) is not covered by this guideline because it is a Class B misdemeanor.

3. *Violation of Judicial Order Enjoining Fraudulent Behavior.*—In a case involving a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is §2B1.1. In such a case, §2B1.1(b)(8)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply.

EXHIBIT D

PROPOSED AMENDMENT: ILLEGAL REENTRY

Synopsis of Proposed Amendment: *Section 2L1.2 (Unlawfully Entering or Remaining in the United States) contains a specific offense characteristic at subsection (b)(1) under which a defendant receives an enhancement if the defendant previously was deported, or unlawfully remained in the United States, after a conviction. The amount of the enhancement may be 16 levels, 12 levels, 8 levels, or 4 levels, depending on the nature of the underlying offense. This proposed amendment would amend §2L1.2 to provide a limitation on the use of convictions under subsections (b)(1)(A) and (B). Specifically, such a conviction would receive the 16- or 12-level enhancement, as applicable, if the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), and 8 levels if it does not. Conforming changes to the Commentary are also made.*

The proposed amendment responds to case law and comments received regarding the enhancement in §2L1.2(b)(1) when a defendant's predicate offense would not qualify for criminal history points under Chapter Four. Compare United States v. Amezcua-Vasquez, 567 F.3d 1050, 1055 (9th Cir. 2009) (defendant had two convictions that were 25 years old; court stated that the 16-level enhancement in §2L1.2(b)(1)(A) "addresses the seriousness of the offense" but "does not ... justify increasing a defendant's sentence by the same magnitude irrespective of the age of the prior conviction at the time of reentry" [emphasis in original]); with United States v. Chavez-Suarez, 597 F.3d 1137, 1139 (10th Cir. 2010) (defendant had a conviction that was 11 years old; court discussed Amezcua-Vasquez but was "not convinced that this conviction was so stale" as to require the sentencing court to vary downward from the 16-level enhancement).

The guidelines account for the age of a prior conviction in Chapter Four, which specifies when a conviction is too old to receive criminal history points. See §4A1.2(e). The guidelines contain several conviction-based enhancements that depend on whether the conviction receives criminal history points. See, e.g., §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), comment. (n.9); §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), comment. (n.10); §4B1.2, comment. (n.3). The proposed amendment would reduce the 16- and 12-level enhancement when the prior conviction is too old to qualify for criminal history points, but would not entirely eliminate the enhancement. See, e.g., Amezcua-Vasquez, 567 F.3d at 1055 (acknowledging that it is "reasonable to take some account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful reentry into the country"). See also id. at 1055 (in certain cases in which the prior conviction is "stale", an enhancement may be appropriate to address the "seriousness" of the prior conviction but need not be of the "same magnitude"); Chavez-Suarez, 597 F.3d at 1139 (same).

Proposed Amendment:

§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—

- (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) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels **if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points**;
- (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels **if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points**;
- (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.*
- (iii) *"Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other 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.*
- (iv) *"Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell 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.*
- (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).*

(C) Prior Convictions.—In determining the amount of an enhancement under subsection (b)(1), note that the amounts in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while the amounts in subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives 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 under Chapter Four.

- 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).~~
76. Departure Based on Seriousness of a Prior Conviction.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (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 possessing or transporting 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.
87. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant’s illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant’s continued residence in the United States, (4) the duration of the defendant’s presence outside the United States, (5) the nature and extent of the defendant’s familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant’s criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

EXHIBIT E

PROPOSED AMENDMENT: SUPERVISED RELEASE

Synopsis of Proposed Amendment: *The proposed amendment would make revisions to the supervised release guidelines, §5D1.1 (Imposition of a Term of Supervised Release) and §5D1.2 (Term of Supervised Release). Section 5D1.1 directs the court to order a term of supervised release when a sentence of imprisonment of more than one year is imposed, or when required by statute. For cases in which the court decides to impose a term of supervised release, §5D1.2 provides both a minimum and a maximum length of the term. Specifically, §5D1.2 requires a minimum of three years and a maximum of five years, if a Class A or B felony; a minimum of two years and a maximum of three years, if a Class C or D felony; and a term of precisely one year, if a Class E felony or Class A misdemeanor.*

The Commission is considering whether revisions to the supervised release guidelines would help courts and probation offices focus limited supervision resources on offenders who need supervision. See, e.g., Johnson v. United States, 529 U.S. 694, 709 (2000) ("Prisoners may, of course, vary in the degree of help needed for successful reintegration. Supervised release [has given] district courts the freedom to provide postrelease supervision for those, and only those, who needed it. ... Congress aimed ... to use the district court's discretionary judgment to allocate supervision to those releasees who needed it most."); S. Rep. No. 98-225, p. 125 ("[P]robation officers will only be supervising those releasees from prison who actually need supervision, and every releasee who does need supervision will receive it."). The Commission's recent report, Federal Offenders Sentenced to Supervised Release (July 2010), found that supervised release is imposed in almost every case, including in more than 99 percent of cases where the guidelines require imposition of a term of supervised release but there is no statutory requirement to do so. When supervised release is imposed, the length of the term is within the ranges provided by §5D1.2 in over 94 percent of cases. Id. at 52, 57.

The Commission is also reviewing the imposition of supervised release on non-citizens, who represent a significant percentage of the overall population of federal offenders. See 2009 Sourcebook of Federal Sentencing Statistics 19 (Table 9, showing 44.7% of federal offenders in fiscal year 2009 were non-citizens). Supervised release is imposed in more than 91 percent of cases in which the defendant is a non-citizen. See Federal Offenders Sentenced to Supervised Release at 60. However, a "vast number of non-citizens convicted of crimes" are "now virtually inevitable" to be deported, Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010), and likely would face prosecution for a new offense if they were to return illegally to the United States.

Section 5D1.1

The proposed amendment provides two options for revising §5D1.1 that would reduce the number of cases in which the court is required by the guidelines to impose supervised release:

*Under **Option 1A**, the court would be required to order a term of supervised release when a sentence of imprisonment of 15 months or more is imposed, or when required by statute. An issue for comment is also included on whether the Commission should instead set this threshold at a higher number of months of imprisonment.*

*Under **Option 1B**, the court would be required to order a term of supervised release only when*

required by statute.

The proposed amendment would also add a provision to §5D1.1 indicating that for certain deportable aliens, the court ordinarily should not impose a term of supervised release unless required by statute.

Section 5D1.2

The proposed amendment provides two options for revising §5D1.2 that would lower or eliminate the minimum lengths required by that guideline for a term of supervised release:

*Under **Option 2A**, the minimum term for a Class A, B, C, or D felony would be one year, and the guidelines would impose no minimum term for a Class E felony or a Class A misdemeanor.*

*Under **Option 2B**, the guidelines would impose no minimum term for any felony or misdemeanor.*

*Both **Options 2A and 2B** would preserve §5D1.2(b) and (c), which apply to cases in which the length of the term of supervised release is governed by specific statutory provisions. While the proposed amendment would affect only the minimum terms, an issue for comment is included on whether the maximum terms should also be lowered.*

In addition, the proposed amendment inserts commentary into §§5D1.1 and 5D1.2 to provide guidance on what a court should consider in deciding whether to order a term of supervised release and, if so, how long such a term should be. Finally, the proposed amendment makes technical and conforming changes to §§5D1.1 and 5D1.2 to reflect requirements imposed by the supervised release statute, 18 U.S.C. § 3583.

Proposed Amendment:

[Option 1A:

§5D1.1. Imposition of a Term of Supervised Release

- (a) The court shall order a term of supervised release to follow imprisonment **when required by statute (see 18 U.S.C. § 3583(a)) or, except as provided in subsection (c), when a sentence of imprisonment of ~~more than one year~~ 15 months or more is imposed, or when required by statute.**
- (b) The court may order a term of supervised release to follow imprisonment in any other case. See 18 U.S.C. § 3583(a).
- (c) **The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment and likely will not be permitted to return to the United States in a legal manner.**

Commentary

Application Notes:

1. Application of Subsection (a).—Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment if a sentence of imprisonment of ~~more than one year~~ **15 months or more** is imposed or if a term of supervised release is required by a specific statute. The court may depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: ~~(1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute.~~ **supervised release is not required by statute and the court determines, after considering the factors set forth in Note 3, that supervised release is not necessary.**
2. Application of Subsection (b).—Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment of ~~one year or less for any of the reasons set forth in Application Note 1.~~ **in any other case, after considering the factors set forth in Note 3.**
3. Factors to Be Considered.—
 - (A) Statutory Factors.—In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:
 - (i) *the nature and circumstances of the offense and the history and characteristics of the defendant;*
 - (ii) *the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment*

in the most effective manner;

(iii) *the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and*

(iv) *the need to provide restitution to any victims of the offense.*

See 18 U.S.C. § 3583(c).

(B) Criminal History.—*The court should give particular consideration to the defendant's criminal history (which is one aspect of the "history and characteristics of the defendant" in subparagraph (A)(i), above). Research indicates that, on average, the lower the criminal history category a defendant has, the greater the likelihood that the defendant will successfully complete supervision without revocation. Therefore, in general, the more serious the defendant's criminal history, the greater the need for supervised release.*

(C) Substance Abuse.—*In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is "highly recommended" that a term of supervised release also be imposed. See §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).*

4. Guideline Ranges in Zones B and C.—*In a case in which the applicable guideline range is in Zone B or C of the Sentencing Table, a term of supervised release with a condition that substitutes community confinement or home detention may be imposed to satisfy part of the minimum term. See §5C1.1(c)(2), (d)(2).*

5. Application of Subsection (c).—*In a case in which the defendant is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution.]*

[Option 1B:

§5D1.1. Imposition of a Term of Supervised Release

- (a) The court shall order a term of supervised release to follow imprisonment ~~when a sentence of imprisonment of more than one year is imposed, or when required by statute.~~ See 18 U.S.C. § 3583(a).
- (b) The court may order a term of supervised release to follow imprisonment in any other case. See 18 U.S.C. § 3583(a).

Commentary

Application Notes:

1. Application of Subsection (a).—~~Under subsection (a), the court is required to impose a term of supervised release to follow imprisonment if a sentence of imprisonment of more than one year is imposed or if a term of supervised release is required by a specific statute. The court may depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: (1) to protect the public welfare, (2) to enforce a financial condition, (3) to provide drug or alcohol treatment or testing, (4) to assist the reintegration of the defendant into the community, or (5) to accomplish any other sentencing purpose authorized by statute.~~
2. Application of Subsection (b).—~~Under subsection (b), the court may impose a term of supervised release to follow a term of imprisonment of one year or less for any of the reasons set forth in Application Note 1.~~ in any other case, after considering the factors set forth in Note 3.
3. Factors to Be Considered.—
 - (A) Statutory Factors.—In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:
 - (i) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (ii) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
 - (iii) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
 - (iv) the need to provide restitution to any victims of the offense.

See 18 U.S.C. § 3583(c).

- (B) Criminal History.—The court should give particular consideration to the defendant's criminal history (which is one aspect of the "history and characteristics of the defendant" in subparagraph (A)(i), above). Research indicates that, on average, the lower the criminal history category a defendant has, the greater the likelihood that the defendant will successfully complete supervision without revocation. Therefore, in general, the more serious the defendant's criminal history, the greater the need for supervised release.
- (C) Substance Abuse.—In a case in which a defendant sentenced to imprisonment is an abuser of controlled substances or alcohol, it is "highly recommended" that a term of supervised release also be imposed. See §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).
- (D) Certain Deportable Aliens.—The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment and likely will not be permitted to return to the United States in a legal manner. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution.
4. Guideline Ranges in Zones B and C.—In a case in which the applicable guideline range is in Zone B or C of the Sentencing Table, a term of supervised release with a condition that substitutes community confinement or home detention may be imposed to satisfy part of the minimum term. See §5C1.1(c)(2), (d)(2).]

§5D1.2. Term of Supervised Release

(a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:

[Option 2A: (1) At least ~~three years~~ **[one] year** but not more than five years for a defendant convicted of a Class A or B felony. See 18 U.S.C. § 3583(b)(1).

(2) At least ~~two years~~ **[one] year** but not more than three years for a defendant convicted of a Class C or D felony. See 18 U.S.C. § 3583(b)(2).

[Option 2B: (1) ~~At least three years but not~~ **Not** more than five years for a defendant convicted of a Class A or B felony. See 18 U.S.C. § 3583(b)(1).

(2) ~~At least two years but not~~ **Not** more than three years for a defendant convicted of a Class C or D felony. See 18 U.S.C. § 3583(b)(2).

(3) ~~One~~ **Not more than one** year for a defendant convicted of a Class E felony or a Class A misdemeanor. See 18 U.S.C. § 3583(b)(3).

(b) Notwithstanding ~~subdivisions~~ **subsections** (a)(1) through (3), the length of the term of supervised release shall be ~~not less than the minimum term of years specified for the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—~~

(1) **any term of years or life, if the offense is** any offense listed in 18 U.S.C. § 2332b(g)(5)(B), ~~the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person,~~ see 18 U.S.C. § 3583(j); or

(2) **any term of years not less than 5 or life, if the offense is** ~~a sex offense~~ **any offense under section 1201 involving a minor victim, or any offense under 18 U.S.C. §§ 1591, 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425,** see 18 U.S.C. § 3583(k).

(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.

(c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

"Sex offense" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 109B of such title; (iii) chapter 110 of such title, not including a recordkeeping offense; (iv) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (v) an offense under 18 U.S.C. § 1201; or (vi) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (vi) of this note.

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

2. Safety Valve Cases.—A defendant who qualifies under §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. See 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).
3. Substantial Assistance Cases.—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute ~~or the guidelines~~. See 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).
4. Factors Considered.—The factors to be considered in determining the length of a term of supervised release are the same as the factors considered in determining whether to impose such a term. See 18 U.S.C. § 3583(c); Application Note 3 to §5D1.1 (Imposition of a Term of Supervised Release). The court should ensure that the term imposed on the defendant is long enough to address the purposes for imposing supervised release on the defendant. Research indicates that the majority of defendants who violate a condition of supervised release do so during the first year of the term of supervised release.
5. Early Termination and Extension.—The court has authority to terminate or extend a term of supervised release. See 18 U.S.C. § 3583(e)(1), (2). The court is encouraged to exercise this authority in appropriate cases. The prospect of exercising this authority is a factor the court may wish to consider in determining the length of a term of supervised release. For example, the court may wish to consider early termination of supervised release if the defendant is an abuser of narcotics, other controlled substances, or alcohol who, while on supervised release, successfully completes a treatment program, thereby reducing the risk to the public from further crimes of the defendant.

Background: This section specifies the length of a term of supervised release that is to be imposed. Subsection (c) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.

Issues for Comment:

1. The proposed amendment to §5D1.1 contains an Option 1A under which the court would be

required to order a term of supervised release when a sentence of imprisonment of 15 months or more is imposed, or when required by statute. A possible basis for setting this threshold at 15 months (rather than 12 months, as the guideline currently provides) is to reflect the Commission's recent amendment to the Sentencing Table in Chapter Five, Part A. See Appendix C, Amendment 738 (effective November 1, 2010). Before that amendment, a defendant in Zone D of the Sentencing Table was required to be sentenced to at least 12 months imprisonment; the amendment changed that threshold to 15 months imprisonment.

Should the Commission instead set this threshold at a number of months of imprisonment higher than 15 months, such as 24 months or 36 months? If so, what would be the basis for doing so?

2. *The proposed amendment to §5D1.2 would either reduce or eliminate the minimum terms of supervised release required by the guidelines, but would not affect the maximum terms of supervised release required by the guidelines or by statute. If the defendant was convicted of a Class A or B felony, the maximum term of supervised release is five years; for a Class C or D felony, three years; and for a Class E felony or a Class A misdemeanor, one year. See §5D1.2(a)(1), (2), (3).*

Should the Commission lower the maximum terms of supervised release required by these provisions? If so, what lower maximum terms of supervised release should the Commission provide? What would be the basis for doing so?

EXHIBIT F

PROPOSED AMENDMENT: PATIENT PROTECTION ACT

Synopsis of Proposed Amendment: *This proposed amendment responds to the Patient Protection and Affordable Care Act, Pub. L. 111–148 (the "Act"), which contained a directive to the Commission and created a new offense.*

First, the proposed amendment responds to section 10606(a)(2) of the Act, which directs the Commission to—

- (A) *review the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses;*
- (B) *amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs to provide that the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss by the defendant; and*
- (C) *amend the Federal Sentencing Guidelines to provide—*
 - (i) *a 2-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than \$1,000,000 and less than \$7,000,000;*
 - (ii) *a 3-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than \$7,000,000 and less than \$20,000,000;*
 - (iii) *a 4-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than \$20,000,000; and*
 - (iv) *if appropriate, otherwise amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs.*

Section 10606(a)(3) of the Act requires the Commission, in implementing this directive, to—

- (A) *ensure that the Federal Sentencing Guidelines and policy statements—*
 - (i) *reflect the serious harms associated with health care fraud and the need for aggressive and appropriate law enforcement action to prevent such fraud; and*
 - (ii) *provide increased penalties for persons convicted of health care fraud offenses in appropriate circumstances;*
- (B) *consult with individuals or groups representing health care fraud victims, law*

enforcement officials, the health care industry, and the Federal judiciary as part of the review described in paragraph (2);

- (C) ensure reasonable consistency with other relevant directives and with other guidelines under the Federal Sentencing Guidelines;*
- (D) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the Federal Sentencing Guidelines, as in effect on the date of enactment of this Act, provide sentencing enhancements;*
- (E) make any necessary conforming changes to the Federal Sentencing Guidelines; and*
- (F) ensure that the Federal Sentencing Guidelines adequately meet the purposes of sentencing.*

The proposed amendment implements the directive by adding two provisions to §2B1.1 (Theft, Property Destruction, and Fraud), both of which apply to cases in which "the defendant was convicted of a Federal health care offense involving a Government health care program".

The first provision is a tiered enhancement that applies in such cases if the loss is more than \$1,000,000. The enhancement would be inserted at subsection (b)(8) of §2B1.1 and would provide 2 levels if the loss was more than \$1,000,000, 3 levels if the loss is more than \$7,000,000, and 4 levels if the loss is more than \$20,000,000. This tiered enhancement implements paragraph (2)(C) of the directive. To "ensure reasonable consistency" with the guidelines, as required by section 10606(a)(3)(C) of the Act, the tiers of the enhancement apply to loss amounts "more than" than the dollar amounts specified in the directive, rather than to loss amounts "not less than" the dollar amounts specified in the directive. The consistent practice in the Guidelines Manual is to apply enhancements to loss amounts "more than" dollar amounts. That practice is followed in §2B1.1, both in the loss table in subsection (b)(1) and in the enhancement in subsection (b)(14)(A). It is also followed by each of the guidelines that utilize the loss table in §2B1.1(b)(1), as well as by other guidelines with enhancements based on dollar amounts. See, e.g., §§2B2.1(b)(2), 2B3.1(b)(7), 2B3.2(b)(2), 2B4.1(b)(2), 2R1.1(b)(2), 2S1.3(b)(2), 2T1.1(b)(1), 2T3.1(a), 2T4.1 (Tax Table).

The second provision is a new special rule in Application Note 3(F) for determining intended loss in a case in which the defendant is convicted of a Federal health care offense involving a Government health care program. This new special rule implements paragraph (2)(B) of the directive.

In addition, the proposed amendment specifies that "Federal health care offense" has the same meaning as in 18 U.S.C. § 24 and provides two options for defining "Government health care program":

Option 1 *provides a list of programs consistent with section 1501 of the Act, which lists the "Government sponsored programs" that provide health care coverage satisfying the individual mandate established by the Act. See 26 U.S.C. § 5000A(f)(1)(A), as established by section 1501 of the Act.*

Option 2 *provides a definition consistent with section 1128B of the Social Security Act (42 U.S.C. § 1320a-7b), which defines "Federal health care program" to mean (1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly,*

in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5, United States Code); or (2) any State health care program, as defined in 42 U.S.C. § 1320a-7(h).

An issue for comment is also included on whether a different definition of "Government health care program" should be used.

Second, the proposed amendment responds to section 6601 of the Act, which established a new offense at 29 U.S.C. § 1149 for making a false statement in connection with the marketing or sale of a multiple employer welfare arrangement under the Employee Retirement Income Security Act. A person who commits this new offense is subject to a term of imprisonment of not more than 10 years. The proposed amendment references this new offense in Appendix A (Statutory Index) to §2B1.1.

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 10
(G) More than \$200,000	add 12
(H) More than \$400,000	add 14
(I) More than \$1,000,000	add 16
(J) More than \$2,500,000	add 18
(K) More than \$7,000,000	add 20
(L) More than \$20,000,000	add 22
(M) More than \$50,000,000	add 24

- (N) More than \$100,000,000 add **26**
- (O) More than \$200,000,000 add **28**
- (P) More than \$400,000,000 add **30**.

- (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, destruction of, or trafficking in, 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 defendant was convicted of a Federal health care offense involving a Government health care program and the loss under subsection (b)(1) was (A) more than \$1,000,000, increase by 2 levels; (B) more than \$7,000,000, increase by 3 levels; or (C) more than \$20,000,000, increase by 4 levels.**
- (89) 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~~**10**) 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~~**11**) 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~~**12**) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (~~12~~**13**) 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**.
- (~~13~~**14**) 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**.
- (~~14~~**15**) (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)(~~4~~**15**)(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**.

(~~15~~**16**) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

(~~16~~**17**) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved 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, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), 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**.

(~~17~~**18**) 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.

(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 or a paleontological resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological 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, 1040, 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 or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological 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)).

"Federal health care offense" has the meaning given that term in 18 U.S.C. § 24.

"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.

[Option 1: "Government health care program" means (A) the Medicare program under part A of title XVIII of the Social Security Act, (B) the Medicaid program under title XIX of the Social Security Act, (C) the CHIP program under title XXI of the Social Security Act, (D) the TRICARE for Life program, (E) the veteran's health care program under chapter 17 of title 38, United States Code, or (F) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers).]

[Option 2: "Government health care program" means (A) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5, United States Code); or (B) any State health care program, as defined in 42 U.S.C. § 1320a-7(h).]

"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).

"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.

"Paleontological 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 or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).

"Personal information" means sensitive or private information involving an identifiable individual (including such information in the possession of a third party), including (A) medical records; (B) wills; (C) diaries; (D) private correspondence, including e-mail; (E) financial records; (F) photographs of a sensitive or private nature; or (G) similar information.

*"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.*
- (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, copied, 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) *In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.*
 - (iii) *The cost of repairs to damaged property.*
 - (iv) *The approximate number of victims multiplied by the average loss to each victim.*
 - (v) *The reduction that resulted from the offense in the value of equity securities or other corporate assets.*
 - (vi) *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 9(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. § 3142, 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 or Paleontological Resources.*—*In a case involving a cultural heritage resource or paleontological resource, loss attributable to that resource shall be determined in accordance with the rules for determining the "value of the resource" set forth in Application Note 2 of the Commentary to §2B1.5.*
- (viii) *Federal Health Care Offenses Involving Government Health Care Programs.*—*In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, i.e., is evidence sufficient to establish the amount of the intended loss, if not rebutted.*

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 the addressee's 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.

(E) Cases Involving Means of Identification.—For purposes of subsection (b)(2), in a case involving means of identification "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.

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)(89).—
- (A) In General.—*The adjustments in subsection (b)(89) 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)(89)(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)(89)(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)(89)(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)(89)(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 Chapter Three Adjustments.—

(i) Subsection (b)(89)(A).—If the conduct that forms the basis for an enhancement under subsection (b)(89)(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)(89)(B) and (C).—If the conduct that forms the basis for an enhancement under subsection (b)(89)(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)(910).—

(A) Definition of United States.—For purposes of subsection (b)(910)(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)(910)(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 Chapter Three Adjustment.—If the conduct that forms the basis for an enhancement under subsection (b)(910) 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)(1011).—

(A) Definitions.—For purposes of subsection (b)(1011):

"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.

"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).

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

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

"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)(~~11~~)(C)(i).—

(i) In General.—Subsection (b)(~~11~~)(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)(~~11~~)(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) Non-Applicability of Subsection (b)(~~11~~)(C)(i).—*Examples of conduct to which subsection (b)(~~11~~)(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)(~~11~~)(C)(ii).—*Subsection (b)(~~11~~)(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)(~~213~~).—*Subsection (b)(~~213~~) 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)(~~415~~)(A).—
- (A) In General.—*For purposes of subsection (b)(~~415~~)(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)(~~415~~)(B).—
- (A) Application of Subsection (b)(~~415~~)(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)(~~4~~15)(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)(~~6~~17).—

(A) Definitions.—*For purposes of subsection (b)(~~6~~17):*

"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).

- (B) Subsection (b)(~~6~~17)(A)(iii).—If the same conduct that forms the basis for an enhancement under subsection (b)(~~6~~17)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(~~4~~15)(B), do not apply the enhancement under subsection (b)(~~4~~15)(B).

14. Application of Subsection (b)(~~7~~18).—

- (A) Definitions.—For purposes of subsection (b)(~~7~~18):

"Commodities law" means (i) the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*) and 18 U.S.C. § 1348; and (ii) includes the rules, regulations, and orders issued by the Commodity Futures Trading Commission.

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

"Commodity trading advisor" has the meaning given that term in section 1a(6) of the Commodity Exchange Act (7 U.S.C. § 1a(6)).

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

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

"Investment adviser" has the meaning given that term in section 202(a)(11) 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)(18) 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(a)(17) 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)(~~7~~18) 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)(~~7~~18) applies, do not apply §3B1.3.
15. *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).
16. *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".
17. *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.
18. *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).
19. *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)(~~17~~)(A)(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.
- (D) Downward Departure for Major Disaster or Emergency Victims.—If (i) the minimum offense level of level 12 in subsection (b)(~~12~~) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, 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 and the directive to the Commission in section 3 of Public Law 110-384.

Subsection (b)(8) implements the directive to the Commission in section 10606 of Public Law 111-148.

Subsection (b)(9)(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)(10) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184.

Subsections (b)(11)(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)(11)(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)(~~H~~12) implements the directive in section 5 of Public Law 110–179.

Subsection (b)(~~H~~14)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(~~H~~15)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (b)(~~H~~15)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(~~H~~16) implements the directive in section 209 of Public Law 110–326.

Subsection (b)(~~H~~17) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(~~H~~17)(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.

* * *

APPENDIX A - STATUTORY INDEX

* * *

29 U.S.C. § 1131(a) 2E5.3

29 U.S.C. § 1141 2B1.1, 2B3.2

29 U.S.C. § 1149 2B1.1

Issue for Comment:

1. *The proposed amendment provides two options for defining the term "Government health care program". Which, if any, of these options should the Commission use? If the Commission were to use one of these options, should the Commission add other specific programs or categories of programs to the definition and, if so, what programs or categories of programs? For example, are there other Federal or State programs that should be included? Alternatively, should private health care programs also be included?*

EXHIBIT G

PROPOSED AMENDMENT: DODD-FRANK ACT

Synopsis of Proposed Amendment: *The Dodd-Frank Wall Street Reform and Protection Act, Pub. L. 111–203 (the "Act"), contains two directives to the Commission and created certain new offenses.*

The proposed amendment responds to the directives in Part A and the new offenses in Part B, as follows:

(A) Directives

Issue for Comment:

1. *The Act contained two directives to the Commission, one on securities fraud, the other on bank fraud and other frauds relating to financial institutions. Each directive requires the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to the offenses covered by the directive and consider whether the guidelines appropriately account for the potential and actual harm to the public and the financial markets from those offenses. Each directive also requires the Commission to ensure that the guidelines reflect (i) the serious nature of the offenses, (ii) the need for deterrence, punishment, and prevention, and (iii) the effectiveness of incarceration in furthering those objectives.*

A. Directive on Securities Fraud

Section 1079A(a)(1)(A) of the Act directs the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to "persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses."

Section 1079A(a)(1)(B) of the Act provides that, in promulgating any such amendment, the Commission shall—

- (i) *ensure that the guidelines and policy statements, particularly section 2B1.1(b)(14) and section 2B1.1(b)(17) (and any successors thereto), reflect—*
 - (I) *the serious nature of the offenses described in subparagraph (A);*
 - (II) *the need for an effective deterrent and appropriate punishment to prevent the offenses; and*
 - (III) *the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);*
- (ii) *consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;*
- (iii) *ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;*
- (iv) *make any necessary conforming changes to guidelines; and*
- (v) *ensure that the guidelines adequately meet the purposes of sentencing, as set forth*

in section 3553(a)(2) of title 18, United States Code.

B. Directive on Bank Frauds, Mortgage Frauds, and Other Frauds Relating to Financial Institutions

Section 1079A(a)(2)(A) of the Act directs the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to "persons convicted of fraud offenses relating to financial institutions or federally related mortgage loans and any other similar provisions of law, to reflect the intent of Congress that the penalties for the offenses under the guidelines and policy statements ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions."

Section 1079A(a)(2)(B) of the Act provides that, in promulgating any such amendment, the Commission shall—

- (i) ensure that the guidelines and policy statements reflect—
 - (I) the serious nature of the offenses described in subparagraph (A);
 - (II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and
 - (III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);
- (ii) consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;
- (iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;
- (iv) make any necessary conforming changes to guidelines; and
- (v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

C. Prior Commission Work

In conducting the reviews required by the directives, the Commission is also studying its prior work in these areas. In 2001, for example, after a multi-year review of economic crimes, the Commission promulgated its "Economic Crime Package," a six-part amendment to the guidelines applicable to economic crimes. See USSG App. C, Amendment 617 (effective November 1, 2001). Among other things, the Economic Crime Package consolidated the theft and fraud guidelines into a single guideline, §2B1.1 (Theft, Property Destruction, and Fraud); provided a 2-level enhancement for offenses involving 10 to 49 victims and a 4-level enhancement for offenses involving 50 or more victims; revised the definition of "loss"; and revised and expanded the loss table to account for higher loss amounts and "provide substantial increases in penalties for moderate and higher loss amounts." See id. (Reason for Amendment).

In 2003, the Commission implemented directives relating to fraud offenses, obstruction of justice offenses, and other economic crimes in the Sarbanes-Oxley Act of 2002, Pub. L. 107–204. The directives required the Commission to promulgate, under emergency amendment authority, amendments addressing fraud

offenses committed by officers and directors of publicly traded companies; fraud offenses that endanger the solvency or financial security of a substantial number of victims; fraud offenses that involve significantly greater than 50 victims; and obstruction of justice offenses that involve destruction of evidence. The Commission first promulgated a temporary, emergency amendment and then an expanded, permanent amendment. *See* USSG App. C, Amendments 647 (effective January 25, 2003) and 653 (effective November 1, 2003). Among other things, the Commission provided a higher alternative base offense level of level 7 if the defendant was convicted of an offense referenced to §2B1.1 and the offense carried a statutory maximum term of imprisonment of 20 years or more; expanded the loss table to add enhancements of 28 and 30 levels for losses of more than \$200 million and \$400 million, respectively; added the reduction in value of equity securities or other corporate assets as a factor to be considered in determining loss; expanded the victims table to include a 6-level enhancement for offenses involving 250 or more victims; expanded the specific offense characteristic on financially endangering a financial institution to also apply when the offense financially endangered either a substantial number of victims or an organization that is publicly traded or has more than 1,000 employees; and added a 4-level enhancement if the offense involved a violation of securities law or commodities law and the defendant was in certain specified positions of heightened responsibility (*e.g.*, a corporate officer or director; a registered broker or dealer; an investment adviser; an officer of director of a futures commission merchant; a commodities trading advisor; a commodity pool operator). *See id.*

In reviewing the guidelines and offenses covered by the directives, the Commission has observed that cases sentenced under §2B1.1 involving relatively large loss amounts calculated under the loss table in subsection (b)(1) have a relatively high rate of non-government-sponsored, below-range sentences. The Commission also has received public comment and reviewed judicial opinions suggesting that a more comprehensive review of §2B1.1 may be appropriate.

D. Possible Multi-Year Review

In light of this information, the Commission is considering conducting a more comprehensive review of §2B1.1 and related guidelines, not only of the specific offense characteristics referred to in the directives (§2B1.1(b)(14) and (17)), but also of certain other aspects of the guidelines (*e.g.*, the loss table and the definition of loss; the victims table and the definition of victim; and the interactions between these tables and definitions). Given the complexity and scope of such a review, the Commission anticipates that such a review could not be completed in the amendment cycle ending May 1, 2011.

E. Response to Directives

Given that such a review likely could not be completed this year (*i.e.*, during the amendment cycle ending May 1, 2011), should the Commission respond to the directives this year? If so, what, if any, specific changes to the guidelines should be made this year to respond to the directives in the Act?

1. Directive on Securities Fraud

The Commission requests comment regarding whether the Guidelines Manual provides penalties for these offenses that appropriately account for the potential and actual harm to the public and the financial markets from these offenses and, if not, what changes to the Guidelines Manual would be appropriate to respond to the directive in section 1079A(a)(1) of the Act.

Securities fraud is prosecuted under 18 U.S.C. § 1348 (Securities and commodities fraud), which makes it unlawful to knowingly execute, or attempt to execute, a scheme or artifice (1) to defraud any person in connection with a security or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of a security. The statutory maximum term of imprisonment for an offense under section 1348 is 25 years. Offenses under section 1348 are referenced in Appendix A (Statutory Index) to §2B1.1.

Securities fraud is also prosecuted under 18 U.S.C. § 1350 (Failure of corporate officers to certify financial reports), violations of the provisions of law referred to in 15 U.S.C. § 78c(a)(47), and violations of the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to those provisions of law. See §2B1.1, comment. (n.14(A)). In addition, there are cases in which the defendant committed a securities law violation but is prosecuted under a general fraud statute. In general, these offenses are likewise referenced to §2B1.1.

Some of the more pertinent provisions in §2B1.1 addressing these offenses are as follows:

- (1) Section 2B1.1(a)(1) provides an alternative base offense level of 7 (rather than 6) if the offense of conviction has a statutory maximum term of imprisonment of 20 years or more.*
- (2) Section 2B1.1(b)(1) provides an enhancement of up to 30 levels based on the amount of loss.*
- (3) Section 2B1.1(b)(2) provides an enhancement of up to 6 levels if the offense involved 10 or more victims or was committed through mass-marketing.*
- (4) Section 2B1.1(b)(14) provides an enhancement of either (A) 2 levels, if the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions, or (B) 4 levels, if 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 (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. Subsection (b)(14)(C) provides that the cumulative adjustments from (b)(2) and (b)(14)(B) shall not exceed 8 levels, except as provided in subdivision (D). Subdivision (D) provides a minimum offense level of level 24, if either (A) or (B) applies.*
- (5) Section 2B1.1(b)(17) provides an enhancement of 4 levels if the offense involved a violation of securities law and the defendant was an officer or director of a publicly traded company, a registered broker or dealer (or person associated with a broker or dealer), or an investment adviser (or person associated with an investment adviser). Similarly, this enhancement also applies if the offense involved a violation of commodities law and the defendant was an officer or director of a futures commission merchant or an introducing broker, a commodities trading advisor, or a commodity pool operator. A conviction under a securities law or commodities law is not required for subsection (b)(17) to apply. See §2B1.1, comment. (n.14(B)).*

Are offenses relating to securities fraud adequately addressed by these provisions? If not, how should the Commission amend the Guidelines Manual to account for "the potential and actual harm to the public and the financial markets" from these offenses? Should the Commission increase the amount, or the scope, of

the alternative base offense level, the enhancements, or the minimum offense level, or any combination of those? If so, what should the new amount or scope of such provisions be?

Should the Commission amend the Commentary to the Guidelines Manual to provide new departure provisions, or revise the scope of existing departure provisions, applicable to such offenses? For example, should the Commission specify that an upward departure would be warranted in a case involving securities fraud or any similar offense, if the disruption to a financial market is so substantial as to have a debilitating impact on that market?

Similarly, should the Commission amend the Commentary to the Guidelines Manual to provide additional guidance for such offenses? For example, Application Note 12 to §2B1.1 lists factors to be considered in determining whether to apply the enhancement in subsection (b)(14) for jeopardizing a financial institution or organization. Currently, the court is directed to consider whether the financial institution or organization suffered one or more listed harms as a result of the offense, such as becoming insolvent. Should the Commission direct the court to consider any other factors, such as whether one of the listed harms was likely to result from the offense but did not result from the offense because of federal government intervention?

2. Directive on Bank Frauds, Mortgage Frauds, and Other Frauds Relating to Financial Institutions

The Commission requests comment regarding whether the Guidelines Manual provides penalties for these offenses that appropriately account for the potential and actual harm to the public and the financial markets from these offenses and ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions and, if not, what changes to the Guidelines Manual would be appropriate to respond to section 1079A(a)(2) of the Act.

The most specific statute on bank fraud is 18 U.S.C. § 1344 (Bank fraud), which makes it unlawful to knowingly execute a scheme or artifice (1) to defraud a financial institution or (2) to obtain any of the property of a financial institution by means of false or fraudulent pretenses, representations, or promises. The statutory maximum term of imprisonment for an offense under section 1344 is 30 years. Offenses under section 1344 are referenced in Appendix A (Statutory Index) to §2B1.1. Other statutes relating to financial institution fraud or mortgage fraud include 18 U.S.C. §§ 215, 656, 657, 1005, 1006, 1010, 1014, 1029, and 1033.

Some of the more pertinent provisions in §2B1.1 addressing these offenses are as follows:

- (1) Section 2B1.1(a)(1) provides an alternative base offense level of 7 (rather than 6) if the offense of conviction has a statutory maximum term of imprisonment of 20 years or more.*
- (2) Section 2B1.1(b)(1) provides an enhancement of up to 30 levels based on the amount of loss.*
- (3) Section 2B1.1(b)(2) provides an enhancement of up to 6 levels if the offense involved 10 or more victims or was committed through mass-marketing.*
- (4) Section 2B1.1(b)(14) provides an enhancement of either (A) 2 levels, if the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions, or (B) 4 levels, if 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 (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. Subsection (b)(14)(C) provides that the cumulative adjustments from (b)(2) and (b)(14)(B) shall not exceed 8 levels, except as provided in subdivision (D). Subdivision (D) provides a minimum offense level of level 24, if either (A) or (B) applies.

Are bank frauds, mortgage frauds, and other frauds relating to financial institutions adequately addressed by these provisions? If not, how should the Commission amend the Guidelines Manual to account for "the potential and actual harm to the public and the financial markets" from these offenses and "ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions"? Should the Commission increase the amount, or the scope, of the alternative base offense level, the enhancements, or the minimum offense level, or any combination of those? If so, what should the new amount or scope of such provisions be?

Should the Commission amend the Commentary to the Guidelines Manual to provide new departure provisions, or revise the scope of existing departure provisions, applicable to such offenses? For example, should the Commission specify that an upward departure would be warranted in a case involving financial institution fraud, fraud related to federally related mortgage loans, or any similar offense, if the disruption to a financial market is so substantial as to have a debilitating impact on that market?

Similarly, should the Commission amend the Commentary to the Guidelines Manual to provide additional guidance for such offenses? For example, Application Note 12 to §2B1.1 lists factors to be considered in determining whether to apply the enhancement in subsection (b)(14) for jeopardizing a financial institution or organization. Currently, the court is directed to consider whether the financial institution or organization suffered one or more listed harms as a result of the offense, such as becoming insolvent. Should the Commission direct the court to consider any other factors, such as whether one of the listed harms was likely to result from the offense but did not result from the offense because of federal government intervention?

(B) New Offenses

Synopsis of Proposed Amendment: *This part of the proposed amendment responds to certain new offenses created by the Act.*

First, the proposed amendment responds to the new offense at 12 U.S.C. § 5382. Under authority granted by the Act, the Secretary of the Treasury may make a "systemic risk determination" regarding a financial company and, if the company fails the determination, may commence the orderly liquidation of the company by appointing the Federal Deposit Insurance Corporation as receiver. See sections 202-203 of the Act. Before making the appointment, the Secretary must either obtain the consent of the company or petition under seal for district court approval. The Act makes it a crime, classified to 12 U.S.C. § 5382, to recklessly disclose such a determination or the pendency of court proceedings on such a petition. A person who violates 12 U.S.C. § 5382 is subject to imprisonment for not more than 5 years. The proposed amendment references this new offense to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

Second, the proposed amendment responds to the new offense at 15 U.S.C. § 78jjj(d). The Act makes it a crime, classified to 15 U.S.C. § 78jjj(d), for a person to falsely represent that he or she is a member of the Security Investor Protection Corporation or that any person or account is protected or eligible for protection under the Security Investor Protection Act. See section 929V of the Act. A person who violates section 78jjj(d) is subject to imprisonment for not more than 5 years. Section 78jjj also contains two other offenses, at subsections (c)(1) and (c)(2), that are not currently referenced in Appendix A (Statutory Index). The proposed amendment references all these offenses under section 78jjj to §2B1.1 (Theft, Property Destruction, and Fraud).

Proposed Amendment:

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12 U.S.C. § 4641 2J1.1, 2J1.5

12 U.S.C. § 5382 2H3.1

* * *

15 U.S.C. § 78u(c) 2J1.1, 2J1.5

15 U.S.C. § 78jjj(c)(1),(2) 2B1.1

15 U.S.C. § 78jjj(d) 2B1.1

EXHIBIT H

PROPOSED AMENDMENT: FIREARMS

Synopsis of Proposed Amendment: *This proposed amendment amends the guideline for international weapons trafficking, §2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). As described more fully below, the proposed amendment provides higher penalties for certain cases involving small arms crossing the border and more guidance on cases involving ammunition crossing the border.*

In addition to proposing these revisions to cross-border offenses under §2M5.2, the Commission is conducting a more comprehensive review of firearms offenses to determine whether changes to the primary firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), may also be appropriate to address concerns about firearms crossing the border. The complexity and scope of the review is such that it likely could not be completed this year (i.e., during the amendment cycle ending May 1, 2011), but the Commission is considering what revisions, if any, to §2K2.1 and related guidelines may be appropriate this year. This proposed amendment concludes with issues for comment on what revisions, if any, to §2K2.1 and related guidelines may be appropriate this year.

Cases Involving Cross-Border Trafficking in Small Arms or Ammunition

First, the proposed amendment amends §2M5.2 to narrow the scope of the alternative base offense level of 14. This raises penalties for certain cases involving cross-border trafficking of small arms, because certain defendants who currently receive the alternative base offense level of 14 would instead receive the higher alternative base offense level of 26. The base offense level of 14 currently applies "if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns) and the number of weapons did not exceed ten." See §2M5.2(a)(1),(2). The proposed amendment would reduce the threshold number of small arms in subsection (a)(2) from ten to [two]-[five] and require that all such small arms be possessed solely for personal use.

The proposed amendment also amends §2M5.2 to address cases in which the defendant possesses ammunition, either in an ammunition-only case or in a case involving ammunition and small arms. There appear to be disparities in how §2M5.2 is being applied in these cases. Under the proposed amendment, a defendant with ammunition would receive the alternative base offense level of 14 if the ammunition consisted of not more than [200]-[500] rounds of ammunition for small arms and was possessed solely for personal use.

In addition, the proposed amendment provides factors for the court to consider in determining whether the small arms were possessed solely for personal use; these factors are similar to the factors used in §2K2.1 in determining whether the downward adjustment at §2K2.1(b)(2) for "lawful sporting purposes or collection" applies. See §2K2.1, comment. (n.6).

References in Appendix A (Statutory Index)

Finally, the proposed amendment amends Appendix A (Statutory Index) to address certain offenses.

First, it amends Appendix A (Statutory Index) to expand the number of guidelines to which offenses

under 50 U.S.C. § 1705 are referenced. Section 1705 makes it unlawful to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under the International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.). Any person who willfully commits, willfully attempts or conspires to commit, or aids or abets in the commission of such an unlawful act may be imprisoned for not more than 20 years. See 50 U.S.C. § 1705(e). Appendix A (Statutory Index) currently contains two separate entries: the criminal offense, 50 U.S.C. § 1705, is referenced to §2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose), while another statute that contains no criminal offense, 50 U.S.C. § 1701, is referenced to §2M5.3 as well as to §§2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License). The proposed amendment revises the entry for 50 U.S.C. § 1705 to include all three guidelines, §§2M5.1, 2M5.2, and 2M5.3, and deletes as unnecessary the entry for 50 U.S.C. § 1701. Conforming changes are made to the Statutory Provisions part of the commentary to each of §§2M5.1, 2M5.2, and 2M5.3.

Second, the proposed amendment addresses a new offense created by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111–195. Section 103 of that Act (22 U.S.C. § 8512) makes it unlawful to import into the United States certain goods or services of Iranian origin, or export to Iran certain goods, services, or technology, and provides that the penalties under 50 U.S.C. § 1705 apply to a violation. The proposed amendment amends Appendix A (Statutory Index) to reference the new offense at 22 U.S.C. § 8512 to §§2M5.1, 2M5.2, and 2M5.3.

Proposed Amendment:

§2M5.1. Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism

- (a) Base Offense Level (Apply the greater):
- (1) **26**, if (A) national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; or (B) the offense involved a financial transaction with a country supporting international terrorism; or
 - (2) **14**, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. § 2332d; **50 U.S.C. § 1705**; 50 U.S.C. App. §§ 2401-2420.

Application Notes:

1. *In the case of a violation during time of war or armed conflict, an upward departure may be warranted.*
2. *In determining the sentence within the applicable guideline range, the court may consider the*

degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. See Chapter Five, Part K (Departures).

3. *In addition to the provisions for imprisonment, 50 U.S.C. App. § 2410 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is \$250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or \$1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.*
4. *For purposes of subsection (a)(1)(B), "a country supporting international terrorism" means a country designated under section 6(j) of the Export Administration Act (50 U.S.C. App. 2405).*

§2M5.2. Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License

- (a) Base Offense Level:
- (1) **26**, except as provided in subdivision (2) below;
 - (2) **14**, if the offense involved only (A) non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ~~ten~~[two]-[five], (B) ammunition for such small arms, and the number of rounds did not exceed [200]-[500], or (C) both, and all such small arms and ammunition were possessed solely for personal use.

Commentary

Statutory Provisions: 18 U.S.C. § 554; 22 U.S.C. §§ 2778, 2780; 50 U.S.C. § 1705.

Application Notes:

1. Under 22 U.S.C. § 2778, the President is authorized, through a licensing system administered by the Department of State, to control exports of defense articles and defense services that he deems critical to a security or foreign policy interest of the United States. The items subject to control constitute the United States Munitions List, which is set out in 22 C.F.R. Part 121.1. Included in this list are such things as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, vessels of war, explosives, military and space electronics, and certain firearms.

The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted. In the case of a violation during time of war or armed conflict, an upward departure may be warranted. See Chapter Five, Part K (Departures).

2. *For purposes of subsection (a)(2), whether small arms and ammunition were "possessed solely for personal use" is determined by the surrounding circumstances. Relevant surrounding circumstances include the amount and type of small arms and ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), the intended destination, and the extent to which possession was restricted by local law.*
23. *In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted.*

§2M5.3. Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose

- (a) Base Offense Level: **26**
- (b) Specific Offense Characteristic
 - (1) If the offense involved the provision of (A) dangerous weapons; (B) firearms; (C) explosives; (D) funds with the intent, knowledge, or reason to believe such funds would be used to purchase any of the items described in subdivisions (A) through (C); or (E) funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in the commission of a violent act, increase by **2** levels.
- (c) Cross References
 - (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.
 - (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.
 - (3) If the offense involved the provision of (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2283, 2284, 2339B, 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(B)); 50 U.S.C. §§ ~~1701~~, 1705.

Application Notes:

1. Definitions.—For purposes of this guideline:

"Biological agent", "chemical weapon", "nuclear byproduct material", "nuclear material", "toxin", and "weapon of mass destruction" have the meaning given those terms in Application

Note 1 of the Commentary to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).

"Dangerous weapon", "firearm", and "destructive device" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"Explosives" has the meaning given that term in Application Note 1 of the Commentary to §2K1.4 (Arson; Property Damage by Use of Explosives).

"Foreign terrorist organization" has the meaning given the term "terrorist organization" in 18 U.S.C. § 2339B(g)(6).

"Material support or resources" has the meaning given that term in 18 U.S.C. § 2339B(g)(4).

"Specially designated global terrorist" has the meaning given that term in 31 C.F.R. § 594.513.

2. Departure Provisions.—

(A) In General.—*In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the funds or other material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. In a case in which such factors are present in an extreme form, a departure from the guidelines may be warranted. See Chapter Five, Part K (Departures).*

(B) War or Armed Conflict.—*In the case of a violation during time of war or armed conflict, an upward departure may be warranted.*

* * *

APPENDIX A - STATUTORY INDEX

* * *

22 U.S.C. § 4221 2B1.1

22 U.S.C. § 8512 2M5.1, 2M5.2, 2M5.3

* * *

50 U.S.C. § 1701 ~~2M5.1, 2M5.2, 2M5.3~~

50 U.S.C. § 1705 2M5.1, 2M5.2, 2M5.3

Issue for Comment:

1. The Commission is conducting a review of firearms offenses to determine whether changes to the primary firearms guideline, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) may be appropriate to address concerns about firearms crossing the border. Firearms that cross the border may be purchased away from the border by a so-called "straw purchaser", then delivered to a firearms trafficker and brought across the border. Concerns have been raised that §2K2.1 and §2M5.2 do not comprehensively address these activities and, in particular, that §2K2.1 does not adequately address (1) offenses involving firearms crossing the border and (2) offenses committed by "straw purchasers".

The complexity and scope of the review is such that it likely could not be completed this year (*i.e.*, during the amendment cycle ending May 1, 2011), but the Commission is considering what revisions, if any, to §2K2.1 and related guidelines may be appropriate this year.

Firearms Crossing the Border

The crossing of an international border is not currently used as a factor in determining the offense level in §2K2.1. Instead, the crossing of a border is accounted for in the guidelines in §2M5.2, the guideline to which arms export offenses are referenced. Should the crossing of a border be incorporated as a factor in §2K2.1? If so, how? Are there aggravating or mitigating factors in cases involving firearms crossing a border that the Commission should take into account in the guidelines? If so, what are the factors, and how should the Commission amend the guidelines to take them into account?

In particular, should the Commission amend §2K2.1 to incorporate the crossing of a border as the basis for a new alternative base offense level, a new enhancement, a new upward departure provision, or a new cross-reference (*e.g.*, to §2M5.2), or some combination of these? What should the amount of such a new alternative base offense level or enhancement be?

One approach would be to provide a new enhancement in §2K2.1, such as the following:

- (#) If the defendant possessed any firearm or ammunition while crossing or attempting to cross the border or otherwise departing or attempting to depart the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States, increase by [2]-[5] levels.

Should the Commission consider such an enhancement?

Another approach would be to amend one or more of the existing provisions in §2K2.1 to provide higher penalties for cases involving the crossing of a border. In particular, §2K2.1 has a 4-level enhancement at subsection (b)(5) that applies if the defendant engaged in the trafficking of firearms, and a 4-level enhancement (and minimum offense level of 18) at subsection (b)(6) that applies if the defendant used or possessed any firearm or ammunition in connection with another felony offense, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense. Should the Commission revise subsection (b)(5) or (b)(6), or both, to account for cases in which firearms cross the border? For example, should the Commission amend the commentary to §2K2.1 to specify that subsection (b)(5) always applies in a case involving one or more firearms crossing the border (*e.g.*, a case in which the defendant transported a

firearm across the border or transferred a firearm to another individual with knowledge or reason to believe that the firearm would be transported across the border)? Should the Commission amend subsection (b)(6) to raise the minimum offense level from 18 to 20?

If the Commission were to provide a new provision in §2K2.1 to account for firearms crossing the border, how should that provision interact with the specific offense characteristics in subsections (b)(5) and (b)(6)? In particular, should all these provisions be cumulative, or should they interact in some other way?

If the Commission were to make any such changes to §2K2.1, what conforming changes, if any, should the Commission make elsewhere in §2K2.1? What changes, if any, should the Commission make to related guidelines — in particular, to §2K1.3 and §2M5.2 — to maintain proportionality?

Straw Purchasers

Defendants who operate as straw purchasers may be convicted under any of several different statutes. One such statute is 18 U.S.C. § 922(d), which makes it unlawful to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that the person meets any of nine statutory criteria. See 18 U.S.C. § 922(d)(1)–(9). See also 18 U.S.C. § 922(g), (n) (making it unlawful for a person meeting any of the same nine criteria to transport, possess, or receive a firearm or ammunition). Such a person is referred to in the guidelines as a "prohibited person". See §2K2.1, comment. (n.3) (defining "prohibited person" as "any person described in 18 U.S.C. § 922(g) or §922(n)"). The nine criteria that make a person a "prohibited person" can be summarized as whether the person is a (1) felon, (2) fugitive, (3) substance abuser, (4) mental defective, (5) illegal alien, (6) person dishonorably discharged from the Armed Forces, (7) person who has renounced U.S. citizenship, (8) person under a restraining order not to engage in domestic violence, or (9) person convicted of a misdemeanor crime of domestic violence. See 18 U.S.C. § 922(d), (g), (n). A person convicted under section 922(d) is subject to imprisonment for not more than 10 years. See 18 U.S.C. § 924(a)(2).

A second statute used for straw purchasers is 18 U.S.C. § 922(a)(6), which makes it unlawful, in connection with the acquisition of or attempted acquisition of any firearm or ammunition from a licensed dealer, to knowingly make any false statement intended or likely to deceive the dealer with respect to the lawfulness of the transaction. A person convicted under section 922(a)(6) is subject to imprisonment for not more than 10 years. See 18 U.S.C. § 924(a)(2).

A third statute used for straw purchasers is 18 U.S.C. § 924(a)(1)(A), which makes it unlawful to knowingly make any false statement with respect to information required to be kept by a firearms licensee or information required in applying for a firearms license. A person convicted under section 924(a)(1)(A) is subject to imprisonment for not more than 5 years. See 18 U.S.C. 924(a)(1).

All three of these statutes used for straw purchasers are referenced to §2K2.1. The guideline assigns a base offense level of 14 to cases involving prohibited persons, whether the defendant (A) is a prohibited person or (B) is convicted under section 922(d) of transferring to a prohibited person. See §2K2.1(a)(6)(A), (B). The guideline assigns a base offense level of 12 for most offenses, including convictions under sections 922(a)(6) and 924(a)(1)(A). See §2K2.1(a)(7). Higher base offense levels may apply based on the type of firearm involved or the defendant's criminal history.

Are the guidelines adequate as they apply to straw purchasers? If not, what changes would be

appropriate? Are there aggravating or mitigating factors in cases involving straw purchasers that the Commission should take into account in the guidelines? If so, what are the factors, and how should the Commission amend the guidelines to take them into account?

Should the Commission provide higher penalties for cases involving straw purchasers? In particular, should the Commission raise by 2 levels the alternative base offense levels applicable to defendants convicted of 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A)? Under such an approach, the alternative base offense level in §2K2.1(a)(6) would be raised from 14 to 16 (for cases in which the defendant is a prohibited person as well as cases in which the defendant is convicted under section 922(d) of transferring to a prohibited person). Also, a new alternative base offense level of 14 would be established for defendants convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A).

As described above, a defendant convicted under section 922(d) receives a higher base offense level (14 vs. 12) than a defendant convicted under section 922(a)(6) or 924(a)(1)(A). How, if at all, should the Commission revise §2K2.1 to address a case in which a defendant convicted under section 922(a)(6) or 924(a)(1)(A) has engaged in the same conduct as a defendant convicted under section 922(d)? One approach would be to provide a new enhancement in §2K2.1, such as the following:

- (#) If the defendant is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and the defendant sold or otherwise disposed of any firearm or ammunition to any person knowing or having reasonable cause to believe that the person was a prohibited person, increase by 2 levels.*

Should the Commission consider such an enhancement?

If the Commission were to make any such changes to §2K2.1, what conforming changes, if any, should the Commission make elsewhere in §2K2.1? What changes, if any, should the Commission make to related guidelines — in particular, to §2K1.3 and §2M5.2 — to maintain proportionality?

§2M5.2

In addition to the changes in the proposed amendment, are there any other aggravating or mitigating factors in cases involving firearms trafficking that the Commission should take into account in §2M5.2? If so, what are the factors, and how should the Commission amend §2M5.2 to take them into account? In particular, should the Commission consider establishing in §2M5.2 a specific offense characteristic similar to the specific offense characteristic in §2K2.1(b)(6), which provides a 4-level enhancement if the defendant used or possessed any firearm or ammunition in connection with another felony offense, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense?

EXHIBIT I

PROPOSED AMENDMENT: DRUGS

Synopsis of Proposed Amendment: *In October 2010, the Commission promulgated an emergency, temporary amendment to implement the emergency directive in section 8 of the Fair Sentencing Act of 2010, Pub. L. 111–220 (the "Fair Sentencing Act"). See Appendix C, Amendment 748 (effective November 1, 2010). The emergency amendment made a number of substantive changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), including changes to the Drug Quantity Table for offenses involving cocaine base ("crack" cocaine), new enhancements to account for certain aggravating factors, and new reductions to account for certain mitigating factors. The emergency amendment also made revisions to five other guidelines: §§2D1.14 (Narco-Terrorism), 2D2.1 (Unlawful Possession; Attempt or Conspiracy), 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), 3B1.4 (Using a Minor To Commit a Crime), and 3C1.1 (Obstructing or Impeding the Administration of Justice). The proposed amendment re-promulgates these guidelines without change.*

In addition to re-promulgating the emergency amendment, the proposed amendment further amends the Commentary to §2D1.1 in response to the Secure and Responsible Drug Disposal Act of 2010, Pub. L. 111–273 (the "Drug Disposal Act"). Section 3 of the Drug Disposal Act amended 21 U.S.C. § 822 to authorize certain persons in possession of controlled substances (e.g., ultimate users and long-term care facilities) to deliver the controlled substances for the purpose of disposal. Section 4 of the Drug Disposal Act contained a directive to the Commission to "review and, if appropriate, amend" the guidelines to ensure that the guidelines provide "an appropriate penalty increase of up to 2 offense levels above the sentence otherwise applicable in Part D of the Guidelines Manual if a person is convicted of a drug offense resulting from the authorization of that person to receive scheduled substances from an ultimate user or long-term care facility as set forth in the amendments made by section 3." The proposed amendment responds to the directive by amending Application Note 8 to §2D1.1 to provide that an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) applies in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility.

The proposed amendment concludes with a series of issues for comment arising out of the Commission's continued work on the guidelines applicable to drug trafficking, including issues for comment on—

- (1) whether the Commission should make any changes to the Fair Sentencing Act emergency amendment in re-promulgating it as a permanent amendment;*
- (2) whether the permanent amendment or any part thereof should be included in subsection (c) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants;*
- (3) what changes, if any, should be made to the guidelines applicable to drug trafficking; and*
- (4) what changes, if any, should be made to §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role) as they apply to drug trafficking cases.*

Proposed Amendment:

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

- (a) Base Offense Level (Apply the greatest):
- (1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
 - (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
 - (3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
 - (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
 - (5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. **If the resulting offense level is greater than level 32 and the defendant receives the 4-level ("minimal participant") reduction in §3B1.2(a), decrease to level 32.**
- (b) Specific Offense Characteristics
- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
 - (2) **If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by 2 levels.**
 - (23) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the

controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

- (34) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
- (45) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.
- (56) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
- (67) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (78) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.
- (89) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.
- (910) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.
- (11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.
- (12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.
- (13) (Apply the greatest):
 - (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
 - (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute,

methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

- (C) If—
- (i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or
 - (ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

- (D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

(14) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

- (A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;
- (B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;
- (C) the defendant was directly involved in the importation of a controlled substance;
- (D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by **2** levels.

(15) If the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a) and the offense involved all of the following factors:

(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) the defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by **2** levels.

(~~H~~16) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a

controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

- (1) ● 30 KG or more of Heroin; **Level 38**
● 150 KG or more of Cocaine;
● ~~4.5~~**8.4** KG or more of Cocaine Base;
● 30 KG or more of PCP, or 3 KG or more of PCP (actual);
● 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice";
● 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual);
● 300 G or more of LSD;
● 12 KG or more of Fentanyl;
● 3 KG or more of a Fentanyl Analogue;
● 30,000 KG or more of Marihuana;
● 6,000 KG or more of Hashish;
● 600 KG or more of Hashish Oil;
● 30,000,000 units or more of Ketamine;
● 30,000,000 units or more of Schedule I or II Depressants;
● 1,875,000 units or more of Flunitrazepam.
- (2) ● At least 10 KG but less than 30 KG of Heroin; **Level 36**
● At least 50 KG but less than 150 KG of Cocaine;
● At least ~~1.5~~**2.8** KG but less than ~~4.5~~**8.4** KG of Cocaine Base;
● At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
● At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice";
● At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);
● At least 100 G but less than 300 G of LSD;
● At least 4 KG but less than 12 KG of Fentanyl;
● At least 1 KG but less than 3 KG of a Fentanyl Analogue;
● At least 10,000 KG but less than 30,000 KG of Marihuana;
● At least 2,000 KG but less than 6,000 KG of Hashish;
● At least 200 KG but less than 600 KG of Hashish Oil;
● At least 10,000,000 but less than 30,000,000 units of Ketamine;
● At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
● At least 625,000 but less than 1,875,000 units of Flunitrazepam.
- (3) ● At least 3 KG but less than 10 KG of Heroin; **Level 34**
● At least 15 KG but less than 50 KG of Cocaine;
● At least ~~500~~**840** G but less than ~~1.5~~**2.8** KG of Cocaine Base;
● At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
● At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than

500 G of "Ice";

- At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD;
- At least 1.2 KG but less than 4 KG of Fentanyl;
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

- (4) ● At least 1 KG but less than 3 KG of Heroin; **Level 32**
- At least 5 KG but less than 15 KG of Cocaine;
 - At least ~~150~~280 G but less than ~~500~~840 G of Cocaine Base;
 - At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
 - At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
 - At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
 - At least 10 G but less than 30 G of LSD;
 - At least 400 G but less than 1.2 KG of Fentanyl;
 - At least 100 G but less than 300 G of a Fentanyl Analogue;
 - At least 1,000 KG but less than 3,000 KG of Marihuana;
 - At least 200 KG but less than 600 KG of Hashish;
 - At least 20 KG but less than 60 KG of Hashish Oil;
 - At least 1,000,000 but less than 3,000,000 units of Ketamine;
 - At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
 - At least 62,500 but less than 187,500 units of Flunitrazepam.

- (5) ● At least 700 G but less than 1 KG of Heroin; **Level 30**
- At least 3.5 KG but less than 5 KG of Cocaine;
 - At least ~~50~~196 G but less than ~~150~~280 G of Cocaine Base;
 - At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
 - At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
 - At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
 - At least 7 G but less than 10 G of LSD;
 - At least 280 G but less than 400 G of Fentanyl;
 - At least 70 G but less than 100 G of a Fentanyl Analogue;
 - At least 700 KG but less than 1,000 KG of Marihuana;
 - At least 140 KG but less than 200 KG of Hashish;

- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- 700,000 or more units of Schedule III Hydrocodone;
- At least 43,750 but less than 62,500 units of Flunitrazepam.

- (6)
- At least 400 G but less than 700 G of Heroin;
 - At least 2 KG but less than 3.5 KG of Cocaine;
 - At least ~~35~~112 G but less than ~~50~~196 G of Cocaine Base;
 - At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
 - At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
 - At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
 - At least 4 G but less than 7 G of LSD;
 - At least 160 G but less than 280 G of Fentanyl;
 - At least 40 G but less than 70 G of a Fentanyl Analogue;
 - At least 400 KG but less than 700 KG of Marihuana;
 - At least 80 KG but less than 140 KG of Hashish;
 - At least 8 KG but less than 14 KG of Hashish Oil;
 - At least 400,000 but less than 700,000 units of Ketamine;
 - At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
 - At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;
 - At least 25,000 but less than 43,750 units of Flunitrazepam.

Level 28

- (7)
- At least 100 G but less than 400 G of Heroin;
 - At least 500 G but less than 2 KG of Cocaine;
 - At least ~~20~~28 G but less than ~~35~~112 G of Cocaine Base;
 - At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
 - At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
 - At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
 - At least 1 G but less than 4 G of LSD;
 - At least 40 G but less than 160 G of Fentanyl;
 - At least 10 G but less than 40 G of a Fentanyl Analogue;
 - At least 100 KG but less than 400 KG of Marihuana;
 - At least 20 KG but less than 80 KG of Hashish;
 - At least 2 KG but less than 8 KG of Hashish Oil;
 - At least 100,000 but less than 400,000 units of Ketamine;
 - At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
 - At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;
 - At least 6,250 but less than 25,000 units of Flunitrazepam.

Level 26

- (8)
- At least 80 G but less than 100 G of Heroin;
 - At least 400 G but less than 500 G of Cocaine;

- At least ~~20~~22.4 G but less than ~~20~~28 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
- At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD;
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marijuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- At least 80,000 but less than 100,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 6,250 units of Flunitrazepam.

Level 24

- (9)
- At least 60 G but less than 80 G of Heroin;
 - At least 300 G but less than 400 G of Cocaine;
 - At least ~~4~~16.8 G but less than ~~5~~22.4 G of Cocaine Base;
 - At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
 - At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
 - At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
 - At least 600 MG but less than 800 MG of LSD;
 - At least 24 G but less than 32 G of Fentanyl;
 - At least 6 G but less than 8 G of a Fentanyl Analogue;
 - At least 60 KG but less than 80 KG of Marijuana;
 - At least 12 KG but less than 16 KG of Hashish;
 - At least 1.2 KG but less than 1.6 KG of Hashish Oil;
 - At least 60,000 but less than 80,000 units of Ketamine;
 - At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
 - At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;
 - At least 3,750 but less than 5,000 units of Flunitrazepam.

Level 22

- (10)
- At least 40 G but less than 60 G of Heroin;
 - At least 200 G but less than 300 G of Cocaine;
 - At least ~~3~~11.2 G but less than ~~4~~16.8 G of Cocaine Base;
 - At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
 - At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
 - At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);

Level 20

- At least 400 MG but less than 600 MG of LSD;
- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;
- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;
- 40,000 or more units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 2,500 but less than 3,750 units of Flunitrazepam.

- (11) ● At least 20 G but less than 40 G of Heroin;
- At least 100 G but less than 200 G of Cocaine;
 - At least ~~25.6~~ 11.2 G but less than ~~311.2~~ G of Cocaine Base;
 - At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
 - At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
 - At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
 - At least 200 MG but less than 400 MG of LSD;
 - At least 8 G but less than 16 G of Fentanyl;
 - At least 2 G but less than 4 G of a Fentanyl Analogue;
 - At least 20 KG but less than 40 KG of Marihuana;
 - At least 5 KG but less than 8 KG of Hashish;
 - At least 500 G but less than 800 G of Hashish Oil;
 - At least 20,000 but less than 40,000 units of Ketamine;
 - At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
 - At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;
 - At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine or Hydrocodone);
 - At least 1,250 but less than 2,500 units of Flunitrazepam.

Level 18

- (12) ● At least 10 G but less than 20 G of Heroin;
- At least 50 G but less than 100 G of Cocaine;
 - At least ~~±2.8~~ 25.6 G but less than ~~±25.6~~ G of Cocaine Base;
 - At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
 - At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
 - At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
 - At least 100 MG but less than 200 MG of LSD;
 - At least 4 G but less than 8 G of Fentanyl;
 - At least 1 G but less than 2 G of a Fentanyl Analogue;
 - At least 10 KG but less than 20 KG of Marihuana;

Level 16

- At least 2 KG but less than 5 KG of Hashish;
- At least 200 G but less than 500 G of Hashish Oil;
- At least 10,000 but less than 20,000 units of Ketamine;
- At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III Hydrocodone;
- At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 625 but less than 1,250 units of Flunitrazepam.

- (13) ● At least 5 G but less than 10 G of Heroin; **Level 14**
- At least 25 G but less than 50 G of Cocaine;
 - At least ~~500 MG~~ **1.4 G** but less than ~~±2.8~~ G of Cocaine Base;
 - At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
 - At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
 - At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
 - At least 50 MG but less than 100 MG of LSD;
 - At least 2 G but less than 4 G of Fentanyl;
 - At least 500 MG but less than 1 G of a Fentanyl Analogue;
 - At least 5 KG but less than 10 KG of Marihuana;
 - At least 1 KG but less than 2 KG of Hashish;
 - At least 100 G but less than 200 G of Hashish Oil;
 - At least 5,000 but less than 10,000 units of Ketamine;
 - At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
 - At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;
 - At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine or Hydrocodone);
 - At least 312 but less than 625 units of Flunitrazepam.

- (14) ● Less than 5 G of Heroin; **Level 12**
- Less than 25 G of Cocaine;
 - Less than ~~500 MG~~ **1.4 G** of Cocaine Base;
 - Less than 5 G of PCP, or less than 500 MG of PCP (actual);
 - Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
 - Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
 - Less than 50 MG of LSD;
 - Less than 2 G of Fentanyl;
 - Less than 500 MG of a Fentanyl Analogue;
 - At least 2.5 KG but less than 5 KG of Marihuana;
 - At least 500 G but less than 1 KG of Hashish;
 - At least 50 G but less than 100 G of Hashish Oil;
 - At least 2,500 but less than 5,000 units of Ketamine;
 - At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
 - At least 2,500 but less than 5,000 units of Schedule III Hydrocodone;
 - At least 2,500 but less than 5,000 units of Schedule III substances (except

- Ketamine or Hydrocodone);
- At least 156 but less than 312 units of Flunitrazepam;
 - 40,000 or more units of Schedule IV substances (except Flunitrazepam).
- (15) ● At least 1 KG but less than 2.5 KG of Marihuana; **Level 10**
- At least 200 G but less than 500 G of Hashish;
 - At least 20 G but less than 50 G of Hashish Oil;
 - At least 1,000 but less than 2,500 units of Ketamine;
 - At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
 - At least 1,000 but less than 2,500 units of Schedule III Hydrocodone;
 - At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine or Hydrocodone);
 - At least 62 but less than 156 units of Flunitrazepam;
 - At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).
- (16) ● At least 250 G but less than 1 KG of Marihuana; **Level 8**
- At least 50 G but less than 200 G of Hashish;
 - At least 5 G but less than 20 G of Hashish Oil;
 - At least 250 but less than 1,000 units of Ketamine;
 - At least 250 but less than 1,000 units of Schedule I or II Depressants;
 - At least 250 but less than 1,000 units of Schedule III Hydrocodone;
 - At least 250 but less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);
 - Less than 62 units of Flunitrazepam;
 - At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
 - 40,000 or more units of Schedule V substances.
- (17) ● Less than 250 G of Marihuana; **Level 6**
- Less than 50 G of Hashish;
 - Less than 5 G of Hashish Oil;
 - Less than 250 units of Ketamine;
 - Less than 250 units of Schedule I or II Depressants;
 - Less than 250 units of Schedule III Hydrocodone;
 - Less than 250 units of Schedule III substances (except Ketamine or Hydrocodone);
 - Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
 - Less than 40,000 units of Schedule V substances.

*Notes to Drug Quantity Table:

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.
- (B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a

mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

- (C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marijuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marijuana. *Provided*, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.*, patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one "unit".
- (G) In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.
- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(30)), (ii) at least two of the following: cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(30)), (ii) at least two of the following: cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (*e.g.*, plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

Commentary

Statutory Provisions: 21 U.S.C. §§ 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:

1. *"Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.*

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

2. *The statute and guideline also apply to "counterfeit" substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.*
3. *Application of Subsections (b)(1) and (b)(2).*—

(A) Application of Subsection (b)(1).—Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession *in subsection (b)(1)* reflects the increased danger of violence when drug traffickers possess weapons. The *adjustment enhancement* should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at ~~his~~ *the defendant's* residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(c)(1), and 2D2.1(b)(1).

(B) Interaction of Subsections (b)(1) and (b)(2).—The enhancements in subsections (b)(1) and (b)(2) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. See §1B1.1 (Application Instructions), Application Note 4(A). However, in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.

4. *Distribution of "a small amount of marihuana for no remuneration", 21 U.S.C. § 841(b)(4), is treated as simple possession, to which §2D2.1 applies.*
5. *Analogues and Controlled Substances Not Referenced in this Guideline.—Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline "analogue" has the meaning given the term "controlled substance analogue" in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.*

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marihuana equivalency of the most closely related controlled substance referenced in this guideline. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

- (A) *Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.*
 - (B) *Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.*
 - (C) *Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.*
6. *Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.*
 7. *Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a downward departure), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." See §5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).*
 8. *Interaction with §3B1.3.—A defendant who used special skills in the commission of the offense may be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a*

coach to influence an athlete to use an anabolic steroid. *An adjustment under §3B1.3 also applies in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. See 21 U.S.C. § 822(g).*

Note, however, that if an adjustment from subsection (b)(23)(C) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

9. *Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, or oxycodone for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.*

10. Use of Drug Equivalency Tables.—

(A) Controlled Substances Not Referenced in Drug Quantity Table.—*The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:*

- (i) *Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.*
- (ii) *Find the equivalent quantity of marihuana in the Drug Quantity Table.*
- (iii) *Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.*

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table.

(B) Combining Differing Controlled Substances (Except Cocaine Base).—*The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level. To determine a single offense level in a case involving cocaine base and other controlled substances, see subdivision (D) of this note.*

For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are "capped" at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 999 grams of marihuana). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).

Note: Because of the statutory equivalences, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.

(C) Examples for Combining Differing Controlled Substances (Except Cocaine Base).—

- (i) The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.
- (ii) The defendant is convicted of selling 500 grams of marihuana (Level 8) and five kilograms of diazepam (Level 8). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 10 in the Drug Quantity Table.
- (iii) The defendant is convicted of selling 80 grams of cocaine (Level 16) and ~~five kilograms of marihuana~~ **2 grams of cocaine base** (Level 14). The cocaine is equivalent to 16 kilograms of marihuana, **and the cocaine base is equivalent to 7.142 kilograms of marihuana**. The total is therefore equivalent to ~~23~~ **23.142** kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table.
- (iv) The defendant is convicted of selling 56,000 units of a Schedule III substance, 100,000 units of a Schedule IV substance, and 200,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms.

~~(D) Determining Base Offense Level in Offenses Involving Cocaine Base and Other Controlled Substances.~~

~~(i) In General.—Except as provided in subdivision (ii), if the offense involves cocaine base ("crack") and one or more other controlled substance, determine the combined offense level as provided by subdivision (B) of this note, and reduce the combined offense level by 2 levels.~~

~~(ii) Exceptions to 2-level Reduction.—The 2-level reduction provided in subdivision (i) shall not apply in a case in which:~~

~~(I) the offense involved 4.5 kg or more, or less than 250 mg, of cocaine base; or~~

~~(II) the 2-level reduction results in a combined offense level that is less than the combined offense level that would apply under subdivision (B) of this note if the offense involved only the other controlled substance(s) (i.e., the controlled substance(s) other than cocaine base).~~

~~(iii) Examples.—~~

~~(I) The case involves 20 gm of cocaine base, 1.5 kg of cocaine, and 10 kg of marihuana. Under the Drug Equivalency Tables in subdivision (E) of this note, 20 gm of cocaine base converts to 400 kg of marihuana (20 gm x 20 kg = 400 kg), and 1.5 kg of cocaine converts to 300 kg of marihuana (1.5 kg x 200 gm = 300 kg), which, when added to the 10 kg of marihuana results in a combined equivalent quantity of 710 kg of marihuana. Under the Drug Quantity Table, 710 kg of marihuana corresponds to a combined offense level of 30, which is reduced by two levels to level 28. For the cocaine and marihuana, their combined equivalent quantity of 310 kg of marihuana corresponds to a combined offense level of 26 under the Drug Quantity Table. Because the combined offense level for all three drug types after the 2-level reduction is not less than the combined base offense level for the cocaine and marihuana, the combined offense level for all three drug types remains level 28.~~

~~(II) The case involves 5 gm of cocaine base and 6 kg of heroin. Under the Drug Equivalency Tables in subdivision (E) of this note, 5 gm of cocaine base converts to 100 kg of marihuana (5 gm x 20 kg = 100 kg), and 6 kg of heroin converts to 6,000 kg of marihuana (6,000 gm x 1 kg = 6,000 kg), which, when added together results in a combined equivalent quantity of 6,100 kg of marihuana. Under the Drug Quantity Table, 6,100 kg of marihuana corresponds to a combined offense level of 34, which is reduced by two levels to 32. For the heroin, the 6,000 kg of marihuana corresponds to an offense level 34 under the Drug Quantity Table. Because the combined offense level for the two drug types after the 2-level reduction is less than the offense level for the heroin, the reduction does not apply and the combined offense level for the two drugs remains level 34.~~

(ED) Drug Equivalency Tables.—

Schedule I or II Opiates*

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/ PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM)=	3 kg of marihuana

**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylamine =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana

1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P ₂ P (in any other case) =	75 gm of marihuana
1 gm Cocaine Base ('Crack') =	20 kg 3,571 gm of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana

**Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DMT =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-methamphetamine/MDMA =	500 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA=	500 gm of marihuana
1 gm of Paramethoxymethamphetamine/PMA =	500 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) =	1 kg of marihuana

**Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.*

Schedule I Marihuana

1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm of marihuana
1 gm of Hashish Oil =	50 gm of marihuana
1 gm of Cannabis Resin or Hashish =	5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	167 gm of marihuana
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm of marihuana

Flunitrazepam **

1 unit of Flunitrazepam =	16 gm of marihuana
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***Provided*, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

Schedule I or II Depressants (except gamma-hydroxybutyric acid)

1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) =	1 gm of marihuana
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Gamma-hydroxybutyric Acid

1 ml of gamma-hydroxybutyric acid =	8.8 gm of marihuana
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Schedule III Substances (except ketamine and hydrocodone)***

1 unit of a Schedule III Substance =	1 gm of marihuana
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****Provided*, that the combined equivalent weight of all Schedule III substances (except ketamine and hydrocodone), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule III Hydrocodone****

1 unit of Schedule III hydrocodone =	1 gm of marihuana
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*****Provided*, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 999.99 kilograms of marihuana.

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

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.

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.

Date Rape Drugs (except flunitrazepam, GHB, or ketamine)

1 ml of 1,4-butanediol = 8.8 gm marihuana

1 ml of gamma butyrolactone = 8.8 gm marihuana

To facilitate conversions to drug equivalencies, the following table is provided:

MEASUREMENT CONVERSION TABLE

1 oz = 28.35 gm
1 lb = 453.6 gm
1 lb = 0.4536 kg
1 gal = 3.785 liters
1 qt = 0.946 liters
1 gm = 1 ml (liquid)
1 liter = 1,000 ml
1 kg = 1,000 gm
1 gm = 1,000 mg
1 grain = 64.8 mg.

11. *If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 mg per dose = 50 gms of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.*

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

Hallucinogens

<i>MDA</i>	250 mg
<i>MDMA</i>	250 mg
<i>Mescaline</i>	500 mg
<i>PCP*</i>	5 mg
<i>Peyote (dry)</i>	12 gm
<i>Peyote (wet)</i>	120 gm
<i>Psilocin*</i>	10 mg
<i>Psilocybe mushrooms (dry)</i>	5 gm
<i>Psilocybe mushrooms (wet)</i>	50 gm
<i>Psilocybin*</i>	10 mg
<i>2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*</i>	3 mg

Marihuana

<i>1 marihuana cigarette</i>	0.5 gm
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Stimulants

<i>Amphetamine*</i>	10 mg
<i>Methamphetamine*</i>	5 mg
<i>Phenmetrazine (Preludin)*</i>	75 mg

**For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.*

12. *Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.*

If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the

offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.

13. *Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13-15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13-15 is the appropriate classification.*
14. *If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.*
15. *LSD on a blotter paper carrier medium typically is marked so that the number of doses ("hits") per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.*

In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.
16. *In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.*
17. *For purposes of the guidelines, a "plant" is an organism having leaves and a readily observable root formation (e.g., a marijuana cutting having roots, a rootball, or root hairs is a marijuana plant).*
18. *If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(23) applies, do not apply subsection (b)(5).*
19. *Hazardous or Toxic Substances.—Subsection (b)(13)(A) applies if the conduct for which*

the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(~~13~~)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).

20. Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine.—

(A) Factors to Consider.—*In determining, for purposes of subsection (b)(~~13~~)(C)(ii) or (D), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:*

- (i) *The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.*
- (ii) *The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.*
- (iii) *The duration of the offense, and the extent of the manufacturing operation.*
- (iv) *The location of the laboratory (e.g., whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.*

(B) Definitions.—*For purposes of subsection (b)(~~13~~)(D):*

"Incompetent" means an individual who is incapable of taking care of the individual's self or property because of a mental or physical illness or disability, mental retardation, or senility.

"Minor" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

21. Applicability of Subsection (b)(~~16~~).—The applicability of subsection (b)(~~16~~) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(~~16~~) applies.
22. Imposition of Consecutive Sentence for 21 U.S.C. § 860a or § 865.—Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 860a or § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 860a or § 865. For example, if the applicable adjusted guideline range is 151-188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 860a or § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.
23. Application of Subsection (b)(~~67~~).—For purposes of subsection (b)(~~67~~), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(~~67~~) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(~~67~~) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).
24. Application of Subsection (e)(1).—
- (A) Definition.—For purposes of this guideline, "sexual offense" means a "sexual act" or "sexual contact" as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.
- (B) Upward Departure Provision.—If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.
25. Application of Subsection (b)(~~78~~).—For purposes of subsection (b)(~~78~~), "masking agent" means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual's body.
26. Application of Subsection (b)(~~89~~).—For purposes of subsection (b)(~~89~~), "athlete" means an individual who participates in an athletic activity conducted by (i) an intercollegiate athletic association or interscholastic athletic association; (ii) a professional athletic association; or (iii) an amateur athletic organization.
27. Application of Subsection (b)(11).—Subsection (b)(11) does not apply if the purpose of the

bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant. Such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice) and, if applicable, §2D1.1(b)(14)(D).

28. Application of Subsection (b)(12).—Subsection (b)(12) applies to a defendant who knowingly maintains a premises (i.e., a "building, room, or enclosure," see §2D1.8, comment. (backg'd.)) for the purpose of manufacturing or distributing a controlled substance.

Among the factors the court should consider in determining whether the defendant "maintained" the premises are (A) whether the defendant held a possessory interest in (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.

Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

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

(A) Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(14)(B)).—If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(14)(B), the individual is not a "vulnerable victim" for purposes of §3A1.1(b).

(B) Directly Involved in the Importation of a Controlled Substance (Subsection (b)(14)(C)).—Subsection (b)(14)(C) applies if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), i.e., the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.

If subsection (b)(3) or (b)(5) applies, do not apply subsection (b)(14)(C).

(C) Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(14)(E)).—For purposes of subsection (b)(14)(E), "pattern of criminal conduct" and "engaged in as a livelihood" have the meaning given such terms in §4B1.3 (Criminal Livelihood).

Background: Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense.

The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 32 and 26 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse

Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.

For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.

The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

~~Specific Offense Characteristic~~ *Subsection (b)(23) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.*

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration's standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in Chapman v. United States, 111 S.Ct. 1919 (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per

dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable offense level. Nonetheless, this approach does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (see Chapman; §5G1.1(b)).

Subsection (b)(11) implements the directive to the Commission in section 6(1) of Public Law 111–220.

Subsection (b)(12) implements the directive to the Commission in section 6(2) of Public Law 111–220.

Subsection (b)(~~13~~)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections (b)(~~13~~)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

Subsection (b)(14) implements the directive to the Commission in section 6(3) of Public Law 111–220.

Subsection (b)(15) implements the directive to the Commission in section 7(2) of Public Law 111–220.

* * *

§2D1.14. Narco-Terrorism

(a) Base Offense Level:

- (1) The offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying offense, except that §2D1.1(a)(5)(A), (a)(5)(B), and (b)(~~16~~) shall not apply.

(b) Specific Offense Characteristic

- (1) If §3A1.4 (Terrorism) does not apply, increase by 6 levels.

Commentary

Statutory Provision: 21 U.S.C. § 960a.

* * *

§2D2.1. Unlawful Possession; Attempt or Conspiracy

(a) Base Offense Level:

- (1) **8**, if the substance is heroin or any Schedule I or II opiate, an analogue of these, or cocaine base; or
- (2) **6**, if the substance is cocaine, flunitrazepam, LSD, or PCP; or
- (3) **4**, if the substance is any other controlled substance or a list I chemical.

(b) Cross References

- ~~(1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute.~~
- (21) If the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility, apply §2P1.2 (Providing or Possessing Contraband in Prison).

Commentary

Statutory Provision: 21 U.S.C. § 844(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant's own consumption. Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.

Background: Mandatory (statutory) minimum penalties for several categories of cases, ranging from fifteen days' to ~~five~~**three** years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. See §5G1.1(b). Note, however, that 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five

~~grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under 21 U.S.C. § 844(a). Other cases for which enhanced penalties are provided under 21 U.S.C. § 844(a) (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b).~~

* * *

§2K2.4. Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes

- (a) If the defendant, whether or not convicted of another crime, was convicted of violating section 844(h) of title 18, United States Code, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.
- (b) Except as provided in subsection (c), if the defendant, whether or not convicted of another crime, was convicted of violating section 924(c) or section 929(a) of title 18, United States Code, the guideline sentence is the minimum term of imprisonment required by statute. Chapters Three and Four shall not apply to that count of conviction.
- (c) If the defendant (1) was convicted of violating section 924(c) or section 929(a) of title 18, United States Code; and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). Except for §§3E1.1 (Acceptance of Responsibility), 4B1.1, and 4B1.2 (Definitions of Terms Used in Section 4B1.1), Chapters Three and Four shall not apply to that count of conviction.
- (d) Special Instructions for Fines
 - (1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section.

Commentary

Statutory Provisions: 18 U.S.C. §§ 844(h), 924(c), 929(a).

Application Notes:

1. Application of Subsection (a).—Section 844(h) of title 18, United State Code, provides a mandatory term of imprisonment of 10 years (or 20 years for the second or subsequent offense). Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 844(h) is the term required by that statute. Section 844(h) of title 18, United State Code, also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
2. Application of Subsection (b).—
 - (A) In General.—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (*e.g.*, not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. § 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. §§ 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.
 - (B) Upward Departure Provision.—In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant’s criminal history in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense but is not determined to be a career offender under §4B1.1.
3. Application of Subsection (c).—In a case in which the defendant (A) was convicted of violating 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a); and (B) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1 (Career Offender), the guideline sentence shall be determined under §4B1.1(c). In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).
4. Weapon Enhancement.— If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under §2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(6) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(6) would not apply.

In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. § 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) (i.e., the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a).

5. Chapters Three and Four.—Except for those cases covered by subsection (c), do not apply Chapter Three (Adjustments) and Chapter Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2. In determining the guideline sentence for those cases covered by subsection (c): (A) the adjustment in §3E1.1 (Acceptance of Responsibility) may apply, as provided in §4B1.1(c); and (B) no other adjustments in Chapter Three and no provisions of Chapter Four, other than §§4B1.1 and 4B1.2, shall apply.
6. Terms of Supervised Release.— Imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release).
7. Fines.— Subsection (d) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a). This is required because the

offense level for the underlying offense may be reduced when there is also a conviction under 18 U.S.C. § 844(h), § 924(c), or § 929(a) in that any specific offense characteristic for possession, brandishing, use, or discharge of a firearm is not applied (see Application Note 4). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571.

Background: Section 844(h) of title 18, United States Code, provides a mandatory term of imprisonment. Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment. A sentence imposed pursuant to any of these statutes must be imposed to run consecutively to any other term of imprisonment. To avoid double counting, when a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for explosive or firearm discharge, use, brandishing, or possession is not applied in respect to such underlying offense.

* * *

§3B1.4. Using a Minor To Commit a Crime

If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by **2** levels.

Commentary

Application Notes:

1. "Used or attempted to use" includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting.
2. Do not apply this adjustment if the Chapter Two offense guideline incorporates this factor. *For example, if the defendant receives an enhancement under §2D1.1(b)(14)(B) for involving an individual less than 18 years of age in the offense, do not apply this adjustment.*
3. If the defendant used or attempted to use more than one person less than eighteen years of age, an upward departure may be warranted.

* * *

§3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by **2** levels.

Commentary

Application Notes:

1. In General.—This adjustment applies if the defendant’s obstructive conduct (A) occurred with respect to the investigation, prosecution, or sentencing of the defendant’s instant offense of conviction, and (B) related to (i) the defendant’s offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.

Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction.

2. Limitations on Applicability of Adjustment.—This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant’s denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

3. Covered Conduct Generally.—Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth examples of the types of conduct to which this adjustment is intended to apply. Application Note 5 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this adjustment applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this adjustment is warranted in a particular case.

4. Examples of Covered Conduct.—The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:

- (A) *threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;*
- (B) *committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;*
- (C) *producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;*
- (D) *destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official*

investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

- (E) *escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;*
- (F) *providing materially false information to a judge or magistrate judge;*
- (G) *providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;*
- (H) *providing materially false information to a probation officer in respect to a presentence or other investigation for the court;*
- (I) *other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511);*
- (J) *failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p);*
- (K) *threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.*

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

5. *Examples of Conduct Ordinarily Not Covered.*—*Some types of conduct ordinarily do not warrant application of this adjustment but may warrant a greater sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (e.g., §3E1.1 (Acceptance of Responsibility)). However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 8, below.*

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

- (A) *providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;*
- (B) *making false statements, not under oath, to law enforcement officers, unless*

Application Note 4(G) above applies;

- (C) *providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;*
 - (D) *avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight));*
 - (E) *lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility).*
6. *"Material" Evidence Defined.—"Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.*
7. *Inapplicability of Adjustment in Certain Circumstances.—If the defendant is convicted of an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense).*
- Similarly, if the defendant receives an enhancement under §2D1.1(b)(14)(D), do not apply this adjustment.*
8. *Grouping Under §3D1.2(c).—If the defendant is convicted both of an obstruction offense (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.*
9. *Accountability for §1B1.3(a)(1)(A) Conduct.—Under this section, the defendant is accountable for the defendant's own conduct and for conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.*

Issues for Comment:

1. *Re-Promulgation of the Fair Sentencing Act.* The Fair Sentencing Act of 2010 reduced statutory penalties for cocaine base ("crack" cocaine) offenses, eliminated the mandatory minimum sentence for simple possession of crack cocaine, and directed the Commission to review and amend the sentencing guidelines to account for specified aggravating and mitigating circumstances in certain drug cases.

Section 8 of the Act required the Commission to promulgate, under emergency authority, the amendments provided for in the Act and such conforming amendments as the Commission determined necessary to achieve consistency with other guideline provisions and applicable law. The Commission was required to promulgate the amendment as soon as practicable, and in any event not later than 90 days after enactment of the Act. The Commission promulgated the temporary, emergency amendment required by the Act and established an effective date of November 1, 2010, for the amendment. See Appendix C, Amendment 748 (effective November 1, 2010). The temporary, emergency amendment will expire not later than November 1, 2011. See section 21(a) of the Sentencing Act of 1987 (28 U.S.C. § 994 note); 28 U.S.C. § 994(p).

The Commission is continuing work on the issues raised by the Act during the regular amendment cycle ending May 1, 2011, with a view to re-promulgating the temporary amendment as a permanent amendment (in its original form, or with revisions) under 28 U.S.C. § 994(p). The Commission seeks comment on whether the Commission should make any changes to the emergency amendment in re-promulgating it as a permanent amendment. If so, what changes should the Commission make?

In particular, the Commission seeks comment on whether the penalty structure in the Drug Quantity Table for crack cocaine should continue to be set so that the statutory mandatory minimum penalties correspond to base offense levels 26 and 32. When the Commission re-promulgates the temporary amendment as a permanent amendment, should the Commission amend the Drug Quantity Table for crack cocaine so that base offense levels 24 and 30, rather than 26 and 32, correspond to the Act's new mandatory minimum penalties?

2. Possible Retroactivity of Permanent Amendment or Any Part Thereof. *The proposed permanent amendment would reduce the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses. See 28 U.S.C. § 994(u) ("If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."). The Commission seeks comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), the proposed permanent amendment or any part thereof should be included in subsection (c) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants.*

In particular, the proposed permanent amendment would change the Drug Quantity Table in §2D1.1 and also make additional mitigating changes (e.g., a "minimal role cap" in §2D1.1(a)(5), a downward adjustment for certain defendants with "minimal" role in §2D1.1(b)(15), and a deletion of the cross reference in §2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1) as well as certain proposed enhancements (e.g., enhancements for violence in §2D1.1(b)(2), for bribery in §2D1.1(b)(11), for maintaining a drug premises in §2D1.1(b)(12), and for certain defendants with an aggravating role in §2D1.1(b)(14)). Should the Commission provide that only parts of the proposed permanent amendment may be applied retroactively? For example, should the Commission provide that only the changes to the Drug Quantity Table may be applied retroactively, or that those changes and the other mitigating changes may be applied retroactively? Alternatively, should the Commission provide that the entire proposed permanent amendment may be applied retroactively, including the proposed enhancements (provided that the amended guideline range resulting from the proposed permanent amendment is not greater than the original term of imprisonment imposed)?

If the Commission does provide that the proposed permanent amendment or any part thereof may be applied retroactively to previously sentenced defendants, should the Commission provide further guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced? For example, should the Commission limit retroactivity only to a particular category or categories of defendants, such as (A) defendants who were sentenced within the guideline range, (B) defendants who were sentenced within the guideline range or who received a departure under Chapter Five, Part K, (C) defendants in a particular criminal history category or categories (e.g., defendants in Criminal History Category I), (D) defendants sentenced before United States v. Booker, 543 U.S. 220 (2005), (E) defendants sentenced before Kimbrough v. United States, 552 U.S. 85, 110 (2007) ("it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case"), or (F) defendants sentenced before Spears v. United States, 555 U.S. 261, 129 S.Ct. 840, 844 (2009) ("we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines")?

If the Commission were to provide that the proposed amendment or any part thereof may be applied retroactively to previously sentenced defendants, what conforming changes, if any, should the Commission make to §1B1.10?

3. Whether Additional Revisions to the Drug Trafficking Guidelines May Be Appropriate. The Commission requests comment on whether any additional revisions should be made to the guidelines applicable to drug trafficking cases. The complexity and scope of such an undertaking is such that it may not be completed this year (i.e., during the amendment cycle ending May 1, 2011), but the Commission is requesting comment regarding what revisions, if any, to §2D1.1 and related guidelines may be appropriate this year.

Drug Quantity Table. The penalty structure of the Drug Quantity Table is based on the penalty structure of federal drug laws, which generally establish three tiers of penalties for manufacturing and trafficking in controlled substances, each based on the amount of controlled substances involved. See 21 U.S.C. §§ 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3). For smaller quantities, the statutory maximum term of imprisonment is 20 years, and there is no statutory minimum term of imprisonment. If the amount of the controlled substance reaches a statutorily specified quantity, however, the statutory maximum term increases to 40 years, and a statutory minimum term of 5 years applies. If the amount of the controlled substance reaches ten times that specified quantity, the statutory maximum term is life, and a statutory minimum term of 10 years applies.

The Commission has generally incorporated these statutory mandatory minimum sentences into the Drug Quantity Table and extrapolated upward and downward to set guideline sentencing ranges for all drug quantities. See §2D1.1, comment. (backg'd.) ("The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking."). The drug quantity thresholds in the Drug Quantity Table have generally been set so as to provide base offense levels corresponding to guideline ranges that are slightly above the statutory mandatory minimum penalties. Thus, the quantity that triggers a statutory 5-year mandatory minimum term of imprisonment is the quantity that triggers a base offense level of 26, and the quantity that triggers a statutory 10-year mandatory minimum term of imprisonment is the quantity that triggers a base offense level of 32. See §2D1.1, comment. (backg'd.) ("The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months."). The Commission has stated that "[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities." See United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy (February 1995) at 148.

The "Safety Valve". In 1994 Congress enacted the "safety valve," which applies to certain first-time, non-violent drug defendants and allows the court, without any government motion, to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that the defendant "has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan". See 18 U.S.C. § 3553(f). This statutory provision is incorporated into the guidelines at USSG §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases). In addition, §2D1.1(b)(16) provides a 2-level reduction if the defendant meets the "safety valve" criteria, regardless of whether a mandatory minimum penalty applies in the case.

The Commission seeks comment on what changes, if any, should be made to the guidelines applicable to drug trafficking cases. In particular, the Commission seeks comment on whether the Commission should consider changing how the base offense levels in the Drug Quantity Table incorporate the

statutory mandatory minimum penalties and, if so, how? For example, should the Commission amend the Drug Quantity Table so that base offense levels 24 and 30, rather than 26 and 32, correspond with the statutory mandatory minimum penalties? As mentioned above, such an undertaking may not be completed this year (i.e., during the amendment cycle ending May 1, 2011).

The Commission is also requesting comment regarding what revisions, if any, to §2D1.1 and related guidelines may be appropriate this year. For example, should the Commission consider—

- A. a 2-level downward adjustment in drug trafficking cases if there are no aggravating circumstances involved in the case, e.g., none of the alternative base offense levels for death or serious bodily injury in §2D1.1(a)(1)-(4) apply, none of the enhancements in §2D1.1(b) apply, and none of the upward adjustments in Chapter Three apply?*
- B. expanding the 2-level downward adjustment in subsection (b)(16) — which applies to defendants who meet the "safety valve" criteria — so that it applies to defendants who have more than 1 criminal history point but otherwise meet all other "safety valve" criteria, or providing a similar downward adjustment to drug trafficking defendants who truthfully provide to the Government all information and evidence the defendant has concerning the offense?*

If the Commission were to make changes to the guidelines applicable to drug trafficking cases, what conforming changes, if any, should the Commission make to other provisions of the Guidelines Manual?

4. Role Adjustments. The Fair Sentencing Act of 2010 contained several directives to the Commission to amend the guidelines to provide increased emphasis on the defendant's role in the offense. See Fair Sentencing Act of 2010 §§ 6 ("Increased Emphasis on Defendant's Role and Certain Aggravating Factors"), 7 ("Increased Emphasis on Defendant's Role and Certain Mitigating Factors"). The proposed permanent amendment implements these directives by adding several provisions to §2D1.1, including a new sentence in subsection (a)(5) (a maximum base offense level for certain defendants with a minimal role) and new specific offense characteristics at subsections (b)(14) (an enhancement for certain defendants with an aggravating role) and (15) (a downward adjustment for certain defendants with a minimal role).

In light of these directives and the Commission's continued work on the guidelines applicable to drug trafficking, the Commission requests comment on what changes, if any, should be made to §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role) as they apply to drug trafficking cases.

Mitigating Role

The text of §3B1.2 has remained unchanged from the original Guidelines Manual in 1987; the guideline continues to provide a downward adjustment based on the defendant's role in the offense: 4 levels if the defendant was a "minimal" participant in any criminal activity, 2 levels if the defendant was a "minor" participant in such activity, and 3 levels in cases falling in between.

The Commentary to §3B1.2 clarifies when and to whom the guideline applies. While the Commission has amended and reorganized the Commentary several times since 1987 with regard to certain types of cases, many elements of the commentary remain the same, including the following:

To be eligible for an adjustment, the defendant must "play[] a part in committing the offense that makes him substantially less culpable than the average participant." See §3B1.2, Application Note 3(A).

The 4-level "minimal" role adjustment applies if the defendant is "plainly among the least culpable of those involved in the conduct of a group." See §3B1.2, Application Note 4.

The 2-level "minor" role adjustment applies if the defendant "is less culpable than most other participants" but his or her conduct "could not be described as minimal." See §3B1.2, Application Note 5.

The determination whether to apply a 4-, 3-, or 2-level adjustment is "heavily dependent upon the facts of the particular case." See §3B1.2, Application Note 3(C).

In 2001, the Commission amended the Commentary to clarify that a defendant who is held accountable under §1B1.3 (Relevant Conduct) only for the amount of drugs the defendant personally handled is not automatically precluded from receiving an adjustment under §3B1.2. See USSG App. C, Amendment 635 (effective November 1, 2001). The Commission also made a number of other revisions to the commentary to clarify guideline application. *Id.* In making these changes, the Commission deleted a portion of the Commentary that had stated that a "downward adjustment for a minimal participant ... would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a

small amount of drugs." Id.

The Commission has received public comment stating that there are differences from district to district with regard to the application of §3B1.2 in drug trafficking cases. In addition, the Commission has observed that, in drug trafficking cases, there are differences from district to district both on the rates of application of §3B1.2 and the relative rates of application of the 4-, 3-, and 2-level adjustments.

Aggravating Role

As with the mitigating role guideline, the text of the aggravating role guideline, §3B1.1, has remained unchanged from the original Guidelines Manual in 1987. The guideline continues to provide an upward adjustment based on the defendant's role in the offense: 4 levels if the defendant was an "organizer or leader" in a criminal activity that involved five or more participants or was otherwise extensive, 3 levels if the defendant was a "manager or supervisor (but not an organizer or leader)" of such a criminal activity, and 2 levels if the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described above.

The Commentary to §3B1.1 defines the term "participant", see §3B1.1, Application Note 1; provides guidance on assessing whether the criminal history is "otherwise extensive", see §3B1.1, Application Note 3; and provides guidance on distinguishing a leadership role from one of mere supervision, see §3B1.1, Application Note 4.

Among other things, the Commission is seeking to determine whether there are application issues regarding §3B1.1 warranting a Commission response.

Request for Comment

What changes, if any, should the Commission make to §§3B1.1 and 3B1.2 as they apply to drug trafficking cases? For example, should the Commission provide more specific guidance on when a defendant in a drug trafficking case should receive an upward adjustment for aggravating role or a downward adjustment for mitigating role and on which level of adjustment should apply? If so, what should that specific guidance be?