UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth a number of issues for comment, some of which are set forth together with the proposed amendments; one of which is set forth independent of any proposed amendment; and one of which (regarding retroactive application of proposed amendments) is set forth in the Supplementary Information portion of this notice.

The proposed amendments and issues for comment in this notice are as follows:

(1) a proposed amendment to make certain technical changes to the Guidelines Manual, including (A) technical changes to reflect the editorial reclassification of certain sections of the United States Code, (B) stylistic and technical changes to the Commentary following §3D1.5 (Determining the Total Punishment) captioned "Illustrations of the Operation of the Multiple-Count Rules" to better reflect its purpose as a concluding commentary to Part D of Chapter Three, and (C) clerical changes to §2D1.11 (Unlawful Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) and to the commentary of other guidelines;

(2) a proposed amendment to §4A1.2 (Definitions and Instructions for Computing Criminal History) to respond to a circuit conflict regarding the meaning of the "single sentence" rule and its implications for the career offender guideline and other guidelines that use predicate offenses, and related issues for comment;

(3) a proposed amendment to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) to provide more guidance on the use of "jointly undertaken criminal activity" in determining relevant conduct under the guidelines, and a related issue for comment on whether the Commission should make changes for policy reasons to the operation of "jointly undertaken criminal activity";

(4) a proposed amendment to revise the monetary tables throughout the Guidelines Manual, including options for amending the monetary tables in the guidelines to adjust for inflation, conforming changes to other guidelines that refer to monetary tables, and related issues

for comment;

(5) a proposed amendment to §3B1.2 (Mitigating Role) to respond to a circuit conflict regarding what determining the "average participant" requires, to revise the Commentary to state that certain individuals who perform limited functions in criminal activity may receive a mitigating role adjustment, and to provide a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and the amount of the adjustment, and a related issue for comment on the application of the mitigating role adjustment;

(6) a detailed request for comment on offenses in which controlled substances are colored, packaged, or flavored in ways to appear to be designed to attract use by children;

(7) a proposed amendment to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to address the new statutory penalty structure for offenses involving hydrocodone and hydrocodone combination products in light of recent administrative actions by the Food and Drug Administration and the Drug Enforcement Administration, and a related issue for comment; and

(8) a proposed amendment to §2B1.1 (Theft, Property, Destruction, and Fraud), including (A) options to revise the definition of "intended loss" at §2B1.1, comment. (n.3(A)(ii)), (B) options to address the impact of the victims table in §2B1.1(b)(2), (C) a proposed amendment to revise the specific offense characteristic for sophisticated means in subsection (b)(10)(C), and (D) a proposed amendment to address offenses involving fraud on the market and related offenses, and

related issues for comment.

DATES: (1) Written Public Comment.—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than **March 18, 2015**.

(2) Public Hearing.—The Commission plans to hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice on **March 12, 2015**. Further information regarding the public hearing, including requirements for testifying and providing written testimony, as well as the location, time, and scope of the hearing, will be provided by the Commission on its website at www.ussc.gov.

ADDRESS: Public comment should be sent to the Commission by electronic mail or regular mail. The email address for public comment is Public_Comment@ussc.gov. The regular mail address for public comment is United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Jeanne Doherty, Public Affairs Officer, (202) 502-4502, jdoherty@ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission

promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

The Commission requests public comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), any proposed amendment published in this notice 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. The Commission lists in §1B1.10(c) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The background commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the

change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(c). To the extent practicable, public comment should address each of these factors.

Publication of a proposed amendment requires the affirmative vote of at least three voting members and is deemed to be a request for public comment on the proposed amendment. See Rules 2.2 and 4.4 of the Commission's Rules of Practice and Procedure. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. See Rule 2.2; 28 U.S.C. § 994(p).

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's website at www.ussc.gov.

AUTHORITY: 28 U.S.C. § 994(a), (o), (p), (x); USSC Rules of Practice and Procedure, Rule 4.4.

Patti B. Saris,

Chair

1. Technical Amendment

Synopsis of Proposed Amendment: This proposed amendment makes certain technical changes to the Guidelines Manual.

The proposed amendment contains three parts, as follows.

Part A sets forth technical changes to reflect the editorial reclassification of certain sections in the United States Code. Effective February 2014, the Office of the Law Revision Counsel transferred provisions relating to voting and elections from titles 2 and 42 to a new title 52. It also transferred provisions of the National Security Act of 1947 from one place to another in title 50. To reflect the new section numbers of the reclassified provisions, changes are made to—

(1) the Commentary to §2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property);

(2) the Commentary to §2H2.1 (Obstructing an Election or Registration);

(3) the Commentary to §2M3.9 (Disclosure of Information Identifying a Covert Agent);

(4) Application Note 5 to §5E1.2 (Fines for Individual Defendants); and

(5) Appendix A (Statutory Index).

Part B makes stylistic and technical changes to the Commentary following §3D1.5 (Determining the Total Punishment) captioned "Illustrations of the Operation of the Multiple-Count Rules" to better reflect its purpose as a concluding commentary to Part D of Chapter Three.

Part C makes clerical changes to—

(1) the Background Commentary to §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)), to correct a typographical error in a U.S. Reports citation;

(2) the Commentary to §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), to correct certain United States Code citations to correspond with their respective references in Appendix A that were revised by Amendment 769 (effective November 1, 2012);

(3) subsection (e)(7) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), to add a missing measurement unit to the line referencing Norpseudoephedrine; and

(4) Application Note 2 to §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), to correct a typographical error in an abbreviation.

(A) Reclassification of sections of United States Code

Proposed Amendment:

The Commentary to §2C1.8 captioned "Statutory Provisions" is amended by striking "2 U.S.C." and all that follows through "441k;" and after "18 U.S.C. § 607" inserting "; 52 U.S.C. §§ 30109(d), 30114, 30116, 30117, 30118, 30119, 30120, 30121, 30122, 30123, 30124(a), 30125, 30126"; and by striking "Statutory Index (Appendix A)" and inserting "Appendix A (Statutory Index)".

The Commentary to §2C1.8 captioned "Application Notes" is amended in Note 1 by striking "2 U.S.C. § 441e(b)" and inserting "52 U.S.C. § 30121(b)"; by striking "2 U.S.C. § 431 et seq" and inserting "52 U.S.C. § 30101 et seq."; and by striking "(2 U.S.C. § 431(8) and (9))" and inserting "(52 U.S.C. § 30101(8) and (9))".

The Commentary to §2H2.1 captioned "Statutory Provisions" is amended by striking "42 U.S.C. §§ 1973i, 1973j(a), (b)" and inserting "52 U.S.C. §§ 10307, 10308(a), (b)".

The Commentary to §2M3.9 is amended by striking "§ 421" each place such term appears and inserting "§ 3121"; and by striking "§ 421(d)" and inserting "§ 3121(d)".

The Commentary to §5E1.2 captioned "Application Notes" is amended in Note 5 by striking "2

U.S.C. § 437g(d)(1)(D)" and inserting "52 U.S.C. § 30109(d)(1)(D)"; and by striking "2 U.S.C. § 441f" and inserting "52 U.S.C. § 30122".

Appendix A (Statutory Index) is amended by striking the following line references:

"2 U.S.C. § 437g(d)	2C1.8
2 U.S.C. § 439a	2C1.8
2 U.S.C. § 441a	2C1.8
2 U.S.C. § 441a-1	2C1.8
2 U.S.C. § 441b	2C1.8
2 U.S.C. § 441c	2C1.8
2 U.S.C. § 441d	2C1.8
2 U.S.C. § 441e	2C1.8
2 U.S.C. § 441f	2C1.8
2 U.S.C. § 441g	2C1.8
2 U.S.C. § 441h(a)	2C1.8
2 U.S.C. § 441i	2C1.8
2 U.S.C. § 441k	2C1.8",

and inserting at the end the following new line references:

"52 U.S.C. § 30109	2C1.8
52 U.S.C. § 30114	2C1.8

52 U.S.C. § 30116	2C1.8
52 U.S.C. § 30117	2C1.8
52 U.S.C. § 30118	2C1.8
52 U.S.C. § 30119	2C1.8
52 U.S.C. § 30120	2C1.8
52 U.S.C. § 30121	2C1.8
52 U.S.C. § 30122	2C1.8
52 U.S.C. § 30123	2C1.8
52 U.S.C. § 30124(a)	2C1.8
52 U.S.C. § 30125	2C1.8
52 U.S.C. § 30126	2C1.8”;

by striking the following line references:

“42 U.S.C. § 1973i(c)	2H2.1
42 U.S.C. § 1973i(d)	2H2.1
42 U.S.C. § 1973i(e)	2H2.1
42 U.S.C. § 1973j(a)	2H2.1
42 U.S.C. § 1973j(b)	2H2.1
42 U.S.C. § 1973j(c)	2X1.1
42 U.S.C. § 1973aa	2H2.1
42 U.S.C. § 1973aa-1	2H2.1
42 U.S.C. § 1973aa-1a	2H2.1

42 U.S.C. § 1973aa-3 2H2.1

42 U.S.C. § 1973bb 2H2.1

42 U.S.C. § 1973gg-10 2H2.1”,

and inserting after the line referenced to 50 U.S.C. App. § 2410 the following new line references:

“52 U.S.C. § 10307(c) 2H2.1

52 U.S.C. § 10307(d) 2H2.1

52 U.S.C. § 10307(e) 2H2.1

52 U.S.C. § 10308(a) 2H2.1

52 U.S.C. § 10308(b) 2H2.1

52 U.S.C. § 10308(c) 2X1.1

52 U.S.C. § 10501 2H2.1

52 U.S.C. § 10502 2H2.1

52 U.S.C. § 10503 2H2.1

52 U.S.C. § 10505 2H2.1

52 U.S.C. § 10701 2H2.1

52 U.S.C. § 20511 2H2.1”;

and by striking the line referenced to 50 U.S.C. § 421 and inserting after the line referenced to 50 U.S.C. § 1705 the following new line reference:

“50 U.S.C. § 3121 2M3.9”.

(B) Stylistic changes to the Illustrations of the Operation of the Multiple-Count Rules

Proposed Amendment:

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended by striking the heading as follows:

" Illustrations of the Operation of the Multiple-Count Rules",

and inserting the following new heading:

" Concluding Commentary to Part D of Chapter Three
Illustrations of the Operation of the Multiple-Count Rules";

in Examples 1 and 2 by striking "convicted on" both places such term appears and inserting "convicted of";

in Example 2 by striking "Defendant C" and inserting "Defendant B";

and in Example 3 by striking "Defendant D" and inserting "Defendant C"; by striking "$27,000", "$12,000", "$15,000", and "$20,000" and inserting "$1,000" in each place such terms appear; by striking "$74,000" and inserting "$4,000"; and by striking "16" both places such term appears and

inserting “9”.

(C) Clerical Changes

Proposed Amendment:

The Commentary to §1B1.11 captioned “Background” is amended by striking “144 S. Ct.” and inserting “133 S. Ct.”.

The Commentary to §2B4.1 captioned “Statutory Provisions” is amended by striking “41 U.S.C. §§ 53, 54” and inserting “41 U.S.C. §§ 8702, 8707”.

The Commentary to §2B4.1 captioned “Background” is amended by striking “41 U.S.C. §§ 51, 53-54” and inserting “41 U.S.C. §§ 8702, 8707”.

Section 2D1.11(e)(7) is amended in the line referenced to Norpseudoephedrine by striking “400” and inserting “400 G”.

The Commentary to §2H4.2 captioned “Application Notes” is amended in Note 2 by striking “et. seq.” and inserting “et seq.”.

2. “Single Sentence” Rule

Synopsis of Proposed Amendment: This proposed amendment responds to a circuit conflict regarding the meaning of the "single sentence" rule and its implications for the career offender guideline and other guidelines that use predicate offenses.

When the defendant's criminal history includes two or more prior sentences that meet certain criteria specified in §4A1.2(a)(2), those prior sentences are counted as a "single sentence" rather than separately. This operates to reduce the cumulative impact of the prior sentences on the criminal history score. Courts are now divided over whether this "single sentence" rule also causes certain prior sentences that ordinarily would qualify as predicates under the career offender guideline to be disqualified from serving as predicates. See §4B1.2, comment. (n.3).

The "single sentence" rule in subsection (a)(2) to §4A1.2 (Definitions and Instructions for Computing Criminal History) provides:

> If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also §4A1.1(e).

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

See §4A1.2(a)(2).

In 2010, in King v. United States, the Eighth Circuit held that when two or more prior sentences are counted as a single sentence, all the criminal history points attributable to the single sentence are assigned to only one of the prior sentences — specifically, the one that was the longest. King, 595 F.3d 844, 852 (8th Cir. 2010). Accordingly, only that prior sentence may be considered a predicate for purposes of the career offender guideline. Id. at 849, 852.

In King, there were two different sets of prior sentences that each qualified as a single sentence. Each set of prior sentences included a sentence that ordinarily would qualify as a career offender predicate and several other sentences that were not career offender predicates, imposed to run concurrently. The panel indicated that, within a "single sentence," only one sentence receives the criminal history points. For the first set of sentences, one of the non-predicate sentences "should receive the criminal history point for this group because it was the longest." Id. at 849. Accordingly, the sentence that ordinarily would qualify as a career offender predicate did not receive criminal history points and therefore did not qualify as a career offender predicate. Id. For the second set of sentences, the sentence that ordinarily would qualify as a career offender

predicate was the same length as the one of the non-predicate sentences, and longer than any of the other sentences; it was unclear which of the two should be treated as the "longest". Given the uncertainty, the panel applied the rule of lenity and attributed the criminal history points to the sentence that was not a career offender predicate. Id. As a result, the sentence that ordinarily would qualify as a career offender predicate did not receive criminal history points and did not qualify as a career offender predicate.

In June 2014, in United States v. Williams, a panel of the Sixth Circuit considered and rejected King as "nonsensical," because it permitted the defendant to "evade career offender status because he committed more crimes". Williams, 753 F.3d 626, 639 (6th Cir. 2014) (emphasis in original). The facts in Williams were similar to the second set of sentences in King: the single sentence included one sentence that ordinarily would qualify as a career offender predicate and one sentence that was not a career offender predicate. The two sentences were equally long. Because each of the sentences ordinarily would receive criminal history points, the panel held, the sentence that ordinarily would qualify as a career offender predicate was not disqualified by the single sentence rule; it remained eligible to serve as a career offender predicate. Id.

On August 26, 2014, a different panel of the Eighth Circuit agreed with the Sixth Circuit's analysis in Williams but was not in a position to overrule the earlier panel's decision in King. See Donnell v. United States, 765 F.3d 817, 820 (8th Cir. 2014) ("we are bound by this court's prior decision in King even though a majority of the panel believe it should now be overruled to eliminate a conflict with the Sixth Circuit"). Before then, other panels of the Eighth Circuit had followed King, applying it to a case involving the firearms guideline rather than the career offender guideline and

to a case in which the prior sentences were consecutive rather than concurrent. See, e.g., Pierce v. United States, 686 F.3d 529, 533 n.3 (8th Cir. 2012) (indicating that the reasoning of King would also apply to predicate offenses under the firearms guideline); United States v. Parker, 762 F.3d 801, 808 (8th Cir. 2014) ("King's logic is equally applicable to consecutive sentences").

The Eleventh Circuit anticipated this issue in dicta in United States v. Cornog, a 1991 decision not cited by either King or Williams. See 945 F.2d 1504 (11th Cir. 1991). The defendant in Cornog had two prior sentences, one that ordinarily would qualify as a career offender predicate and another that was not a career offender predicate but was the longer of the two. He argued under the "related cases" rule (predecessor to the "single sentence" rule) that only the longer sentence should receive criminal history points and therefore the shorter sentence should be disqualified from serving as a career offender predicate. The Eleventh Circuit found this unpersuasive: "It would be illogical . . . to ignore a conviction for a violent felony just because it happened to be coupled with a nonviolent felony conviction having a longer sentence." See 945 F.2d at 1506 n.3.

Of the other cases discussing this issue, some have been consistent with the Sixth Circuit's approach in Williams. See, e.g., United States v. Carr, 2013 WL 4855341 (N.D. Ga. 2013); United States v. Augurs, 2014 WL 3735584 (W.D. Pa., July 28, 2014). Others have been consistent with the Eighth Circuit's approach in King. See, e.g., United States v. Santiago, 387 F. App'x 223 (3d Cir. 2010); United States v. McQueen, 2014 WL 3749215 (E.D. Wash., July 29, 2014).

The proposed amendment generally follows the Sixth Circuit's approach in Williams. It amends the commentary to §4A1.2 to provide that, when multiple prior sentences are counted as a single

sentence, the court should treat each of the multiple prior sentences as if it received criminal history points for purposes of determining predicate offenses. As a result, it also states that a prior sentence included in a single sentence may serve as a predicate under the career offender guideline (or other guidelines that involve predicates) if it independently would have received criminal history points.

In addition, the proposed amendment provides two issues for comment. The first issue for comment is on whether the Commission should use a different approach to respond to the King/Williams conflict over the "single sentence" rule. The second issue for comment is on whether the application issues presented by the "single sentence" rule are also presented by other provisions involved in calculating the criminal history score, such as the provision in §4A1.1(c) (adding 1 point for certain prior offenses up to a total of 4 points).

Proposed Amendment:

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 3 by redesignating Note 3 as Note 3(B), and by inserting at the beginning the following:

"Counting Multiple Prior Sentences Separately or as a Single Sentence (Subsection (a)(2)).—

(A) In General.—In some cases, multiple prior sentences are counted as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, each of the multiple prior sentences

included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (see §4B1.2(c)) or other guidelines with predicate offenses, such as §2K1.3(a) and §2K2.1(a), if it independently would have received criminal history points.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day and are counted as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.".

Issues for Comment:

1. The proposed amendment follows the Sixth Circuit's approach in Williams regarding the meaning of the "single sentence" rule and its implications for guidelines that use predicate offenses. The Commission seeks comment on whether a different approach should be used to respond to the King/Williams conflict over the "single sentence" rule. For example, should the Commission follow the Eighth Circuit's approach in King, and amend the commentary to §4A1.2 to provide that, if prior sentences are counted as a single

sentence, only one of the sentences included in the single sentence is counted (the sentence with the longest term of imprisonment) and any other sentences included in the single sentence cannot serve as a predicate under the career offender guideline (or other guidelines that involve predicates)?

2. The Commission seeks comment on whether the application issues presented by the King/Williams conflict over the "single sentence" rule are also presented by other provisions involved in calculating the criminal history score and, if so, whether and how they should be addressed.

In particular, there may be cases in which the defendant has more than four sentences that each could qualify for a criminal history point under §4A1.1(c), which instructs the court to add 1 point for each such sentence, "up to a total of 4 points". In a case in which the defendant has more than four such sentences, and one of the sentences would ordinarily qualify as a career offender predicate, should that sentence (A) always qualify as a career offender predicate, following the reasoning of Williams; (B) never qualify as a career offender predicate, following the reasoning of King; or (C) qualify as a career offender predicate in some circumstances but not in others? For example, some helpline callers have asked whether the sentences under §4A1.1(c) should be placed in chronological sequence, with the first four sentences each receiving a point (and being eligible to serve as a career offender predicate) and any remaining sentences not receiving a point (and being ineligible to serve as a career offender predicate). A similar issue may also be presented by the 3-point limitation in §4A1.1(e), which instructs courts to add 1 point for certain prior

sentences “up to a total of 3 points”.

Are there application issues presented by these provisions, or other provisions in the guidelines, that are similar to the issues presented by the King/Williams conflict over the “single sentence” rule? If so, how, if at all, should the Commission address them?

Finally, if the Commission were to address this circuit conflict and/or any similar application issues, what conforming or clarifying changes, if any, should be made to other provisions of the guidelines? In particular, are there places in the guidelines that refer to the “single sentence” rule (or, conversely, refer to whether prior sentences are “counted separately”) that should be revised to clarify how they operate? If so, which ones, and how should the Commission address them?

3. Jointly Undertaken Criminal Activity

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s effort to simplify the operation of the guidelines, including, among other matters, the use of relevant conduct in offenses involving multiple participants. See United States Sentencing Commission, “Notice of Final Priorities,” 79 Fed. Reg. 49378 (Aug. 20, 2014).

This proposed amendment is being published to inform the Commission’s consideration of these issues. The Commission seeks comment on revisions that would provide further guidance on the operation of the “jointly undertaken criminal activity” provision as well as on possible revisions

that would change the operation of the provision.

Proposed Additional Guidance

The proposed amendment would revise §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) to provide more guidance on the use of "jointly undertaken criminal activity" in determining relevant conduct under the guidelines. See §1B1.3(a)(1)(B). Specifically, it restructures the guideline and its commentary to set out more clearly the three-step analysis the court applies to hold the defendant accountable for acts of others in the jointly undertaken criminal activity. The three-step test requires that the court (1) identify the scope of the criminal activity the defendant agreed to jointly undertake; (2) determine whether the conduct of others in the jointly undertaken criminal activity was in furtherance of that criminal activity; and (3) determine whether the conduct of others was reasonably foreseeable in connection with that criminal activity.

Possible Policy Changes

An issue for comment is provided on whether the Commission should make changes for policy reasons to the operation of "jointly undertaken criminal activity." Several options are presented for comment.

Proposed Amendment:

Section 1B1.3(a)(1)(B) is amended by striking "all reasonably foreseeable acts and omissions of

others in furtherance of the jointly undertaken criminal activity," and inserting the following:

" all acts and omissions of others that were—

(i) within the scope of the criminal activity that the defendant agreed to jointly undertake,

(ii) in furtherance of the jointly undertaken criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;".

The Commentary to §1B1.3 captioned "Application Notes" is amended by striking Note 2 as follows:

"2. A 'jointly undertaken criminal activity' is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

(A) in furtherance of the jointly undertaken criminal activity; and

(B) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the 'jointly undertaken criminal activity') is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second

defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there

may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

Illustrations of Conduct for Which the Defendant is Accountable

(a) Acts and omissions aided or abetted by the defendant

(1) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase

regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B)(applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity (the scope of which was the importation of the shipment of marihuana). A finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.

(b) Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and

reasonably foreseeable

(1) Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

(c) Requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable; scope of the criminal activity

(1) Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant D (i.e., the forgery of the $800 check).

(2) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.

(3) Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single

shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (see the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).

(4) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those

defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

(5) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (i.e., the one delivery).

(6) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity

with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.

(7) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.

(8) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana

transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.";

by redesignating Notes 3 through 10 as Notes 5 through 12, respectively, and inserting the following new Notes 2, 3 and 4:

"2. Accountability Under More Than One Provision.—In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant's accountability for particular conduct is established under one provision of this

guideline, it is not necessary to review alternative provisions under which such accountability might be established.

3. Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).—

(A) In General.—A 'jointly undertaken criminal activity' is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:

(i) within the scope of the criminal activity that the defendant agreed to jointly undertake;

(ii) in furtherance of the jointly undertaken criminal activity; and

(iii) reasonably foreseeable in connection with that criminal activity.

The conduct of others that was within the scope of, in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others

that was not within the scope of the criminal activity that the defendant agreed to jointly undertake, was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

(B) Scope.—Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the 'jointly undertaken criminal activity') is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). In doing so, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant

for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

(C) In Furtherance.—The court must determine if the conduct (acts and omissions) of others was in furtherance of the criminal activity that the defendant agreed to jointly undertake.

(D) Reasonably Foreseeable.—The court must then determine if the conduct (acts and omissions) of others in furtherance of the jointly undertaken criminal activity was reasonably foreseeable in connection with the criminal activity that the defendant agreed to jointly undertake.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was within the scope of the criminal activity that the defendant agreed to jointly undertake (the robbery), was in furtherance of that criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all reasonably foreseeable quantities of contraband that were within the scope of, and in furtherance of, the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands,

induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

4. Illustrations of Conduct for Which the Defendant is Accountable under Subsections (a)(1)(A) and (B).—

(A) Acts and omissions aided or abetted by the defendant.—

(i) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase

regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B)(applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity that meets all three criteria of subsection (a)(1)(B). First, the criminal activity was within the scope of what the defendant agreed to jointly undertake (the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity, as described above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. See

Application Note 2.

(B) Acts and omissions aided or abetted by the defendant; acts and omissions in a jointly undertaken criminal activity.—

(i) Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

(C) Requirements that the conduct of others be within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity and reasonably foreseeable.—

(i) Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not within the scope of the criminal activity he agreed to jointly undertake with Defendant D (i.e., the forgery of the $800 check).

(ii) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the criminal activity they agreed to jointly undertake (the scheme to sell fraudulent stocks), was in

furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity.

(iii) Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions of others related to the importation of that shipment on the basis of subsection (a)(1)(B) (see the discussion in example (A)(i) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not within the scope of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).

(iv) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and

frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity (to distribute child pornography with Defendant K), in furtherance of that criminal activity, and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because he is not engaged in a jointly undertaken criminal activity with the other defendants. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

(v) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not within the scope of her jointly undertaken criminal activity (i.e., the one delivery).

(vi) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.

(vii) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those

quantities were not within the scope of his jointly undertaken criminal activity (i.e., the 500 grams).

(viii) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, the scope of the jointly undertaken criminal activity may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of

separate criminal activities. See Application Note 3(A).".

Issues for Comment:

1. Additional Guidance. The Commission seeks comment on whether additional or different guidance should be provided on the "jointly undertaken criminal activity" provision in subsection (a)(1)(B). In particular, should the Commission provide further guidance on how to determine (A) the scope of the jointly undertaken criminal activity, (B) whether the conduct of others was in furtherance of the criminal activity, and (C) whether the conduct of others was reasonably foreseeable in connection with the criminal activity? Does the proposed amendment provide adequate guidance on the operation of "jointly undertaken criminal activity"?

   Should the Commission provide additional or different examples to better explain the operation of "jointly undertaken criminal activity"? If so, what examples should be provided? Are there examples that are no longer good illustrations of present-day criminal cases? If so, should those examples be deleted or revised, or should they be replaced with more appropriate illustrations of present-day criminal cases?

2. Possible Policy Changes. The Commission seeks comment on whether changes should be made for policy reasons to the operation of "jointly undertaken criminal activity," such as to provide greater limitations on the extent to which a defendant is held accountable at sentencing for the conduct of co-participants that the defendant did not aid, abet, counsel,

command, induce, procure, or willfully cause. (Such conduct is covered by §1B1.3(a)(1)(A).) In particular, but without limitation, the Commission seeks comment on two options for possible changes that could be made to the operation of "jointly undertaken criminal activity", as follows.

(A) Option A: Requiring a Higher State of Mind Than "Reasonable Foreseeability"

This option would revise "jointly undertaken criminal activity" by changing the "reasonable foreseeability" part of the analysis. The requirement that the other participant's conduct be reasonably foreseeable has been described as a "negligence" standard, that is, the defendant should have known or should have foreseen the conduct.

The Commission seeks specific comment on whether "jointly undertaken criminal activity" should require a higher state of mind, such as recklessness or deliberate indifference; knowledge; or intent. For example, if a co-participant possessed a weapon, should the defendant be held accountable for the weapon only if he was deliberately indifferent to whether a weapon would be possessed; or only if he knew the weapon would be possessed; or only if he intended that the weapon be possessed?

(B) Option B: Requiring a Conviction for Conspiracy or At Least a "Pinkerton Conviction"

This option would hold a defendant accountable for a "jointly undertaken criminal activity" only when the defendant (1) was convicted of a conspiracy charge related to a co-conspirator's conduct in furtherance of the jointly undertaken criminal activity; or (2) was convicted by a jury that was specifically instructed on Pinkerton liability regarding a substantive offense; or (3) admitted facts sufficient to constitute Pinkerton liability.

The Commission seeks specific comment on what the practical impact of such a change would be on charging and sentencing practices.

Does the current provision on "jointly undertaken criminal activity" appropriately further the purposes of sentencing? If not, what changes, if any, should the Commission make to "jointly undertaken criminal activity" to more appropriately further the purposes of sentencing? Do any of the options described above more appropriately further the purposes of sentencing? Are there other possible changes, whether or not identified in the options described above, that should be made to "jointly undertaken criminal activity" to more appropriately further the purposes of sentencing?

4. Inflationary Adjustments

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's work in examining the overall structure of the guidelines post-Booker. See United States

Sentencing Commission, "Notice of Final Priorities," 79 Fed. Reg. 49378 (Aug. 20, 2014). As part of that work, the Commission is considering whether to adjust monetary tables in the guidelines for inflation. Congress has generally mandated that agencies in the executive branch must, every four years, adjust the civil monetary penalties they impose to account for inflation. See Section 4 of the Federal Civil Penalties Inflationary Adjustment Act of 1990 (28 U.S.C. § 2461 note). The work of the Commission does not involve civil monetary penalties. It involves establishing appropriate criminal sentences for categories of offenses and offenders, including appropriate amounts for criminal fines. See, e.g., 28 U.S.C. § 994(b)(1), (a)(1)(B). While some of the monetary values in the Chapter Two offense guidelines have been revised since they were originally established in 1987 (e.g., the loss table in §2B1.1 was substantially amended in 2001), they have never been revised specifically to account for inflation. Other monetary values in the Chapter Two offense guidelines, as well as the monetary values in the fine tables for individual defendants and for organizational defendants, have never been revised.

The proposed amendment, including the issues for comment set forth below, are intended to inform the Commission's work across all the relevant guidelines and its examination of rulemaking practices generally. The proposed amendment illustrates one possible approach for implementing an inflationary adjustment during this amendment cycle. Specifically, it sets forth options for amending the monetary tables in the guidelines to adjust for inflation, i.e., the tables in §§2B1.1 (Theft, Property, Destruction, and Fraud), 2B2.1 (Burglary), 2B3.1 (Robbery), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 2T4.1 (Tax Table), 5E1.2 (Fines for Individual Defendants), and 8C2.4 (Base Fine). The options are based on changes to the Bureau of Labor Statistics' Consumer Price Index and on different time frames

(taking into consideration the year each monetary table was last amended). For each of the seven tables, two options are presented. They are as follows.

Option 1 adjusts the amounts in the monetary tables using a specific multiplier derived from the Consumer Price Index, and then rounds the amounts using the rounding methodology applied when adjusting civil monetary penalties for inflation under section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note). In effect, this rounds—

amounts greater than $200,000 to the nearest multiple of $25,000;
amounts greater than $100,000 to the nearest multiple of $10,000;
amounts greater than $10,000 to the nearest multiple of $5,000;
amounts greater than $1,000 to the nearest multiple of $1,000;
amounts greater than $100 to the nearest multiple of $100; and
amounts less than or equal to $100 to the nearest multiple of $10.

Option 2 adjusts the amounts in the monetary tables using a specific multiplier derived from the Consumer Price Index, but then rounds the amounts using a different set of rounding rules extrapolated from the methodology used in Option 1. This "extrapolated" methodology provides rules that address a wider range of values than Option 1, such as by providing rounder numbers for amounts significantly greater than $200,000. Specifically, this methodology rounds—

amounts greater than $100,000,000 to the nearest multiple of $50,000,000;

amounts greater than $10,000,000 to the nearest multiple of $5,000,000;

amounts greater than $1,000,000 to the nearest multiple of $500,000;

amounts greater than $100,000 to the nearest multiple of $50,000;

amounts greater than $10,000 to the nearest multiple of $5,000;

amounts greater than $1,000 to the nearest multiple of $500; and

amounts of $1,000 or less to the nearest multiple of $50.

For the loss table in §2B1.1(b)(1) and the tax table in §2B4.1, the options would adjust for inflation since 2001, the year both tables were last amended. According to the Consumer Price Index, $1.00 in 2001 has the same buying power as $1.34 in 2014. For the loss tables in §§2B2.1 (Burglary) and 2B3.1 (Robbery), and the fine table for individual defendants at §5E1.2(c)(3), the options would adjust for inflation since 1989, the year these tables were last amended. The adjustments would take into account that $1.00 in 1989 has the same buying power as $1.91 in 2014, according to the Consumer Price Index. The options for the antitrust table in §2R1.1(b)(2) would adjust for inflation since 2005, the year the table was last amended. According to the Consumer Price Index, $1.00 in 2005 has the same buying power as $1.22 in 2014. And, finally, for the fine table for organizational defendants at §8C2.4(d), the options would adjust for inflation since 1991, as the table has not been substantially amended since it was promulgated. The adjustments would take into account that, according to the Consumer Price Index, $1.00 in 1991 has the same buying power as $1.74 in 2014.

Each of the tables shows the initial multiplier used to make the adjustments for inflation taken

from the Consumer Price Index. In addition, the proposed amendment includes conforming changes to other Chapter Two guidelines that refer to the monetary tables.

Finally, the proposed amendment sets forth a series of issues for comment related to additional changes to the monetary tables that could be considered instead of, or in conjunction with, the proposed amendment.

Proposed Amendment:

Section 2B1.1(b)(1) is amended—

[Option 1:

by striking $5,000 each place such term appears and inserting $7,000;

by striking $10,000 and inserting $15,000;

by striking $30,000 and inserting $40,000;

by striking $70,000 and inserting $95,000;

by striking $120,000 and inserting $160,000;

by striking $200,000 and inserting $275,000;

by striking $400,000 and inserting $525,000;

by striking $1,000,000 and inserting $1,350,000;

by striking $2,500,000 and inserting $3,350,000;

by striking $7,000,000 and inserting $9,375,000;

by striking $20,000,000 and inserting $26,800,000;

by striking $50,000,000 and inserting $67,000,000;

by striking $100,000,000 and inserting $134,000,000;

by striking $200,000,000 and inserting $268,000,000; and

by striking $400,000,000 and inserting $536,000,000.]

[Option 2:

by striking $5,000 each place such term appears and inserting $6,500;

by striking $10,000 and inserting $15,000;

by striking $30,000 and inserting $40,000;

by striking $70,000 and inserting $95,000;

by striking $120,000 and inserting $150,000;

by striking $200,000 and inserting $250,000;

by striking $400,000 and inserting $550,000;

by striking $1,000,000 and inserting $1,500,000;

by striking $2,500,000 and inserting $3,500,000;

by striking $7,000,000 and inserting $9,500,000;

by striking $20,000,000 and inserting $30,000,000;

by striking $50,000,000 and inserting $70,000,000;

by striking $100,000,000 and inserting $150,000,000;

by striking $200,000,000 and inserting $300,000,000; and

by striking $400,000,000 and inserting $550,000,000.]

Section 2B1.4(b)(1) is amended—

[Option 1:

by striking $5,000 and inserting $7,000.]

[Option 2:

by striking $5,000 and inserting $6,500.]

Section 2B1.5(b)(1) is amended—

[Option 1:

by striking $2,000 and inserting $3,000; and

by striking $5,000 both places such term appears and inserting $7,000.]

[Option 2:

by striking $2,000 and inserting $2,500; and

by striking $5,000 both places such term appears and inserting $6,500.]

Section 2B2.1(b)(2) is amended—

[Option 1:

by striking $2,500 each place such term appears and inserting $5,000;

by striking $10,000 and inserting $20,000;

by striking $50,000 and inserting $95,000;

by striking $250,000 and inserting $475,000;

by striking $800,000 and inserting $1,525,000;

by striking $1,500,000 and inserting $2,875,000;

by striking $2,500,000 and inserting $4,775,000;

by striking $5,000,000 and inserting $9,550,000.]

[Option 2:

by striking $2,500 each place such term appears and inserting $5,000;

by striking $10,000 and inserting $20,000;

by striking $50,000 and inserting $95,000;

by striking $250,000 and inserting $500,000;

by striking $800,000 and inserting $1,500,000;

by striking $1,500,000 and inserting $3,000,000;

by striking $2,500,000 and inserting $5,000,000;

by striking $5,000,000 and inserting $9,500,000.]

Section 2B2.3(b)(3) is amended—

[Option 1:

by striking $2,000 and inserting $3,000; and

by striking $5,000 both places such term appears and inserting $7,000.]

[Option 2:

by striking $2,000 and inserting $2,500; and

by striking $5,000 both places such term appears and inserting $6,500.]

Section 2B3.1(b)(7) is amended—

[Option 1:

by striking $10,000 each place such term appears and inserting $20,000;

by striking $50,000 and inserting $95,000;

by striking $250,000 and inserting $475,000;

by striking $800,000 and inserting $1,525,000;

by striking $1,500,000 and inserting $2,875,000;

by striking $2,500,000 and inserting $4,775,000;

by striking $5,000,000 and inserting $9,550,000.]

[Option 2:

by striking $10,000 each place such term appears and inserting $20,000;

by striking $50,000 and inserting $95,000;

by striking $250,000 and inserting $500,000;

by striking $800,000 and inserting $1,500,000;

by striking $1,500,000 and inserting $3,000,000;

by striking $2,500,000 and inserting $5,000,000;

by striking $5,000,000 and inserting $9,500,000.]

Section 2B3.2(b)(2) is amended by striking $10,000 and inserting $20,000.

Sections 2B3.3(b)(1), 2B4.1(b)(1), 2B5.1(b)(1), 2B5.3(b)(1), and 2B6.1(b)(1) are each amended—

[Option 1:

by striking $2,000 and inserting $3,000; and

by striking $5,000 both places such term appears and inserting $7,000.]

[Option 2:

by striking $2,000 and inserting $2,500; and

by striking $5,000 both places such term appears and inserting $6,500.]

Sections 2C1.1(b)(2), 2C1.2(b)(2), and 2C1.8(b)(1) are each amended—

[Option 1:

by striking $5,000 and inserting $7,000.]

[Option 2:

by striking $5,000 and inserting $6,500.]

Sections 2E5.1(b)(2) and 2Q2.1(b)(3) are each amended—

[Option 1:

by striking $2,000 and inserting $3,000; and

by striking $5,000 both places such term appears and inserting $7,000.]

[Option 2:

by striking $2,000 and inserting $2,500; and

by striking $5,000 both places such term appears and inserting $6,500.]

Section 2R1.1(b)(2) is amended—

[Option 1:

by striking $1,000,000 each place such term appears and inserting $1,225,000;

by striking $10,000,000 and inserting $12,200,000;

by striking $40,000,000 and inserting $48,800,000;

by striking $100,000,000 and inserting $122,000,000;

by striking $250,000,000 and inserting $305,000,000;

by striking $500,000,000 and inserting $610,000,000;

by striking $1,000,000,000 and inserting $1,220,000,000;

by striking $1,500,000,000 and inserting $1,830,000,000.]

[Option 2:

by striking $1,000,000 each place such term appears and inserting $1,000,000;

by striking $10,000,000 and inserting $10,000,000;

by striking $40,000,000 and inserting $50,000,000;

by striking $100,000,000 and inserting $100,000,000;

by striking $250,000,000 and inserting $300,000,000;

by striking $500,000,000 and inserting $600,000,000;

by striking $1,000,000,000 and inserting $1,200,000,000;

by striking $1,500,000,000 and inserting $1,850,000,000.]

Section 2T3.1(a) is amended—

[Option 1:

by striking $1,000 both places such term appears and inserting $2,000;

by striking $100 both places such term appears and inserting $200.]

[Option 2:

by striking $1,000 both places such term appears and inserting $1,500;

by striking $100 both places such term appears and inserting $200.]

Section 2T4.1 is amended—

[Option 1:

by striking $2,000 both places such term appears and inserting $3,000;

by striking $5,000 and inserting $7,000;

by striking $12,500 and inserting $15,000;

by striking $30,000 and inserting $40,000;

by striking $80,000 and inserting $110,000;

by striking $200,000 and inserting $275,000;

by striking $400,000 and inserting $525,000;

by striking $1,000,000 and inserting $1,350,000;

by striking $2,500,000 and inserting $3,350,000;

by striking $7,000,000 and inserting $9,375,000;

by striking $20,000,000 and inserting $26,800,000;

by striking $50,000,000 and inserting $67,000,000;

by striking $100,000,000 and inserting $134,000,000;

by striking $200,000,000 and inserting $268,000,000; and

by striking $400,000,000 and inserting $536,000,000.]

[Option 2:

by striking $2,000 both places such term appears and inserting $2,500;

by striking $5,000 and inserting $6,500;

by striking $12,500 and inserting $15,000;

by striking $30,000 and inserting $40,000;

by striking $80,000 and inserting $100,000;

by striking $200,000 and inserting $250,000;

by striking $400,000 and inserting $550,000;

by striking $1,000,000 and inserting $1,500,000;

by striking $2,500,000 and inserting $3,500,000;

by striking $7,000,000 and inserting $9,500,000;

by striking $20,000,000 and inserting $25,000,000;

by striking $50,000,000 and inserting $65,000,000;

by striking $100,000,000 and inserting $150,000,000;

by striking $200,000,000 and inserting $250,000,000; and

by striking $400,000,000 and inserting $550,000,000.]

Section 5E1.2(c)(3) is amended—

[Option 1:

in Column A—

by striking $100 and inserting $200;

by striking $250 and inserting $500;

by striking $500 and inserting $1,000;

by striking $1,000 and inserting $2,000;

by striking $2,000 and inserting $4,000;

by striking $3,000 and inserting $6,000;

by striking $4,000 and inserting $8,000;

by striking $5,000 and inserting $10,000;

by striking $6,000 and inserting $10,000;

by striking $7,500 and inserting $15,000;

by striking $10,000 and inserting $20,000;

by striking $12,500 and inserting $25,000;

by striking $15,000 and inserting $30,000;

by striking $17,500 and inserting $35,000;

by striking $20,000 and inserting $40,000;

by striking $25,000 and inserting $50,000;

and in Column B—

by striking $5,000 each place such term appears and inserting $10,000;

by striking $10,000 and inserting $20,000;

by striking $20,000 and inserting $40,000;

by striking $30,000 and inserting $55,000;

by striking $40,000 and inserting $75,000;

by striking $50,000 and inserting $95,000;

by striking $60,000 and inserting $110,000;

by striking $75,000 and inserting $140,000;

by striking $100,000 and inserting $190,000;

by striking $125,000 and inserting $250,000;

by striking $150,000 and inserting $275,000;

by striking $175,000 and inserting $325,000;

by striking $200,000 and inserting $375,000; and

by striking $250,000 and inserting $475,000.]

[Option 2:

in Column A—

by striking $100 and inserting $200;

by striking $250 and inserting $500;

by striking $500 and inserting $1,000;

by striking $1,000 and inserting $2,000;

by striking $2,000 and inserting $4,000;

by striking $3,000 and inserting $5,500;

by striking $4,000 and inserting $7,500;

by striking $5,000 and inserting $10,000;

by striking $6,000 and inserting $10,000;

by striking $7,500 and inserting $15,000;

by striking $10,000 and inserting $20,000;

by striking $12,500 and inserting $25,000;

by striking $15,000 and inserting $30,000;

by striking $17,500 and inserting $35,000;

by striking $20,000 and inserting $40,000;

by striking $25,000 and inserting $50,000;

and in Column B—

by striking $5,000 each place such term appears and inserting $9,500;

by striking $10,000 and inserting $20,000;

by striking $20,000 and inserting $40,000;

by striking $30,000 and inserting $55,000;

by striking $40,000 and inserting $75,000;

by striking $50,000 and inserting $95,000;

by striking $60,000 and inserting $100,000;

by striking $75,000 and inserting $150,000;

by striking $100,000 and inserting $200,000;

by striking $125,000 and inserting $250,000;

by striking $150,000 and inserting $300,000;

by striking $175,000 and inserting $350,000;

by striking $200,000 and inserting $400,000; and

by striking $250,000 and inserting $500,000.]

Section 8C2.4(d) is amended—

[Option 1:

by striking $5,000 and inserting $9,000;

by striking $7,500 and inserting $15,000;

by striking $10,000 and inserting $15,000;

by striking $15,000 and inserting $25,000;

by striking $20,000 and inserting $35,000;

by striking $30,000 and inserting $50,000;

by striking $40,000 and inserting $70,000;

by striking $60,000 and inserting $100,000;

by striking $85,000 and inserting $150,000;

by striking $125,000 and inserting $225,000;

by striking $175,000 and inserting $300,000;

by striking $250,000 and inserting $425,000;

by striking $350,000 and inserting $600,000;

by striking $500,000 and inserting $875,000;

by striking $650,000 and inserting $1,125,000;

by striking $910,000 and inserting $1,575,000;

by striking $1,200,000 and inserting $2,100,000;

by striking $1,600,000 and inserting $2,775,000;

by striking $2,100,000 and inserting $3,650,000;

by striking $2,800,000 and inserting $4,875,000;

by striking $3,700,000 and inserting $6,450,000;

by striking $4,800,000 and inserting $8,350,000;

by striking $6,300,000 and inserting $10,950,000;

by striking $8,100,000 and inserting $14,100,000;

by striking $10,500,000 and inserting $18,275,000;

by striking $13,500,000 and inserting $23,500,000;

by striking $17,500,000 and inserting $30,450,000;

by striking $22,000,000 and inserting $38,275,000;

by striking $28,500,000 and inserting $49,600,000;

by striking $36,000,000 and inserting $62,650,000;

by striking $45,500,000 and inserting $79,175,000;

by striking $57,500,000 and inserting $100,050,000;

by striking $72,500,000 and inserting $126,150,000.]

[Option 2:

by striking $5,000 and inserting $8,500;

by striking $7,500 and inserting $15,000;

by striking $10,000 and inserting $15,000;

by striking $15,000 and inserting $25,000;

by striking $20,000 and inserting $35,000;

by striking $30,000 and inserting $50,000;

by striking $40,000 and inserting $70,000;

by striking $60,000 and inserting $100,000;

by striking $85,000 and inserting $150,000;

by striking $125,000 and inserting $200,000;

by striking $175,000 and inserting $300,000;

by striking $250,000 and inserting $450,000;

by striking $350,000 and inserting $600,000;

by striking $500,000 and inserting $850,000;

by striking $650,000 and inserting $1,000,000;

by striking $910,000 and inserting $1,500,000;

by striking $1,200,000 and inserting $2,000,000;

by striking $1,600,000 and inserting $3,000,000;

by striking $2,100,000 and inserting $3,500,000;

by striking $2,800,000 and inserting $5,000,000;

by striking $3,700,000 and inserting $6,500,000;

by striking $4,800,000 and inserting $8,500,000;

by striking $6,300,000 and inserting $10,000,000;

by striking $8,100,000 and inserting $15,000,000;

by striking $10,500,000 and inserting $20,000,000;

by striking $13,500,000 and inserting $25,000,000;

by striking $17,500,000 and inserting $30,000,000;

by striking $22,000,000 and inserting $40,000,000;

by striking $28,500,000 and inserting $50,000,000;

by striking $36,000,000 and inserting $65,000,000;

by striking $45,500,000 and inserting $80,000,000;

by striking $57,500,000 and inserting $100,000,000;

by striking $72,500,000 and inserting $150,000,000.]

Issues for Comment:

1. The Commission seeks comment on whether the monetary tables in the guidelines should be adjusted for inflation. The monetary tables set forth in the proposed amendment relate to a variety of different offenses and apply to a number of different criminal statutes.

Given the difference between the types of offenses, should all monetary tables be adjusted for inflation in the same way? Does the type of offenses or statutory provisions related to any of the monetary tables suggest that it should not be adjusted for inflation?

2. As set forth in the proposed amendment, should an adjustment for inflation be made during the 2014-2015 amendment cycle? Should the Commission make it a practice to make, or consider making, an inflationary adjustment at periodic intervals, such as every four or ten years, or at particular inflationary measures, such as when $1.00 in the year the table was last adjusted has the same buying power as $1.25 or $1.33 or $1.50 in the current year? Should the Commission incorporate directly into the guidelines a mechanism for automatically adjusting for inflation?

3. In each of the options presented above, the amounts associated with the offense level increases in the monetary tables would be adjusted for inflation. The Commission seeks comment on whether the changes, if any, to account for inflation should be made using a different methodology than the options presented above. Should the changes be based on a different indicator than the changes to the Consumer Price Index? Should the changes be based on different time frames than the ones provided? Should the changes be rounded using a different method than presented in the options above?

4. The Commission seeks comment on whether, in addition to or instead of any of the options above, the Commission should consider any other changes to the monetary tables, such as to promote proportionality or to reduce complexity.

5. There are 18 other Chapter Two guidelines that refer to the loss table at §2B1.1(b)(1) (see §§2B1.4, 2B1.5, 2B2.3, 2B3.3, 2B4.1, 2B5.1, 2B5.3, 2B6.1, 2C1.1, 2C1.2, 2C1.8, 2E5.1, 2G2.2, 2G3.1, 2G3.2, 2Q2.1, 2S1.1, 2S1.3); 1 other Chapter Two guideline that refers to the loss table at §2B3.1(b)(7) (see §2B3.2); and 8 other Chapter Two guidelines that refer to the tax table at §2T4.1 (see §§2E4.1, 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1). If the Commission were to adjust the monetary tables in the guidelines, should the revised tables apply to these other guidelines as well? In the alternative, should the Commission provide separate, alternative monetary tables specifically for these other guidelines? If so, which ones?

6. Are there other places in the guidelines that refer to monetary values that should be adjusted, if the Commission were to adjust the tables in the guidelines?

5. Mitigating Role

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's study of the operation of §3B1.2 (Mitigating Role) and related provisions in the Guidelines Manual. See United States Sentencing Commission, "Notice of Final Priorities," 79 Fed. Reg. 49378 (Aug. 20, 2014).

First, there are differences among the circuits about what determining the "average participant" requires. The Seventh and Ninth Circuits have concluded that the "average participant" means

only those persons who actually participated in the criminal activity at issue in the defendant's case, so that the defendant's relative culpability is determined only by reference to his or her co-participants. See, e.g., United States v. Benitez, 34 F.3d 1489, 1498 (9th Cir. 1994) (explaining that "the relevant comparison . . . is to the conduct of co-participants in the case at hand."); United States v. Cantrell, 433 F.3d 1269, 1283 (9th Cir. 2006) ("While a comparison to the conduct of a hypothetical average participant may be appropriate in determining whether a downward adjustment is warranted at all, the relevant comparison in determining which of the §3B1.2 adjustments to grant a given defendant is to the conduct of co-participants in the case at hand.") (internal quotations omitted); United States v. DePriest, 6 F.3d 1201, 1214 (7th Cir. 1993) ("The controlling standard for an offense level reduction under [§3B1.2] is whether the defendant was substantially less culpable than the conspiracy's other participants."). The First and Second Circuits have concluded that the "average participant" also includes typical offenders who commit similar crimes. See, e.g., United States v. Santos, 357 F.3d 136, 142 (1st Cir. 2004) ("[A] defendant must prove that he is both less culpable than his cohorts in the particular criminal endeavor and less culpable than the majority of those within the universe of persons participating in similar crimes."); United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999) ("A reduction will not be available simply because the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant's conduct must be 'minor' or 'minimal' as compared to the average participant in such a crime."). Under this latter approach, courts will ordinarily consider the defendant's culpability relative both to his co-participants and to the typical offender. The proposed amendment would generally adopt the approach of the Seventh and Ninth Circuits.

Second, the Commentary to §3B1.2 provides that certain individuals who perform limited

functions in criminal activity are not precluded from consideration for a mitigating role adjustment. The proposed amendment would revise this language to state that such an individual may receive a mitigating role adjustment.

Third, the proposed amendment provides a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment.

An issue for comment is also included.

Proposed Amendment:

The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 3(A) by inserting after "that makes him substantially less culpable than the average participant" the following: "in the criminal activity", by striking "concerted" and inserting "the", by striking "is not precluded from consideration for" each place such term appears and inserting "may receive", by striking "role" both places such term appears and inserting "participation", and by striking "personal gain from a fraud offense and who had limited knowledge" and inserting "personal gain from a fraud offense or who had limited knowledge";

in Note 3(C) by inserting at the end the following new paragraph:

" In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the

court should consider the following non-exhaustive list of factors:

(i) the degree to which the defendant understood the scope and structure of the criminal activity;

(ii) the degree to which the defendant participated in planning or organizing the criminal activity; and

(iii) the degree to which the defendant stood to benefit from the criminal activity.";

in Note 4 by striking "concerted" and inserting "the criminal";

and in Note 5 by inserting after "than most participants" the following: "in the criminal activity".

Issue for Comment:

1. The Commission seeks comment on the application of the mitigating role adjustment. Are there application issues relating to this adjustment that the Commission should address and, if so, how should the Commission address them?

   The proposed amendment would provide additional guidance on applying the mitigating role adjustment. Is the additional guidance in the proposed amendment appropriate? What additional or different guidance should the Commission provide on applying

mitigating role adjustments?

6. Flavored Drugs

Issue for Comment:

1. The Commission seeks comment on offenses in which controlled substances are colored, packaged, or flavored in ways that appear to be designed to attract use by children. How prevalent are these offenses, and do the guidelines adequately address these offenses?

The Commission has received comment, for example, that drugs are being flavored with additives to make them taste like candy, with flavors such as strawberry, lemon, coconut, cinnamon and chocolate, and are being marketed in smaller amounts, making them cheaper and more accessible to children. The Commission has also received comment about incidents in which candy and soft drinks were laced with marijuana and packaged to look like well-known, brand-name products.

Under the Controlled Substances Act, a person who distributes a controlled substance to a person under 21 years of age is generally subject to twice the statutory maximum term of imprisonment that would otherwise apply, and a statutory minimum term of imprisonment of one year, unless a higher statutory minimum applies. See 21 U.S.C. § 859(a). If such a person already has a prior conviction under section 859, he or she is generally subject to three times the statutory maximum term of imprisonment that would otherwise apply. See

21 U.S.C. § 859(b). Notably, these provisions apply only to the distribution of the controlled substance, not to the manufacture of the controlled substance.

The Commission seeks comment on whether the guidelines provide appropriate penalties for offenders who manufacture or create drugs that are packaged or modified by coloring or flavoring with the intent of appealing to children, or who combine drugs with candy or soft drinks with the intent of appealing to children. If not, how should the Commission revise the guidelines to provide appropriate penalties in such cases? Should the Commission provide new departure provisions, enhancements, adjustments, or minimum offense levels to account for such offenses? If so, what provision or provisions should the Commission provide, and what penalty increase should be provided?

If the Commission were to provide such a provision, what specific offense conduct, harm, or other factor should be the basis for applying the provision? For example, should the provision apply to any type of manufacturing conduct as long as the defendant had the specific intent to appeal to children? Or should the provision apply without regard to specific intent, as long as a specific type of offense conduct was involved, such as (1) combining with soft drinks or candy, (2) marketing or packaging to look like soft drinks or candy, or (3) flavoring or coloring?

Should the provision take the form of a specific instruction to apply a vulnerable victim adjustment under subsection (b) of §3A1.1 (Hate Crime Motivation or Vulnerable Victim)? For example, should the Commission provide a specific instruction at

§2D1.1(d)(2) stating that, if a specific objective of the offense was to manufacture a controlled substance product for marketing to, or use by, minors, an adjustment under §3A1.1(b) would apply?

7. Hydrocodone

Synopsis of Proposed Amendment: This proposed amendment addresses the new statutory penalty structure for offenses involving hydrocodone and hydrocodone combination products in light of two recent administrative actions. As a result of those actions, all hydrocodone products are now schedule II controlled substances rather than schedule III controlled substances.

A. Until Recently, the Scheduling of Hydrocodone Has Depended on Whether It Is a Single-Entity Product (Schedule II) or A Combination Product (Schedule III)

Products featuring hydrocodone in combination with one or more unscheduled active pharmaceutical ingredients have been schedule III controlled substances, until recently. Such "hydrodocone combination" products are the most frequently prescribed opioids in the United States, with nearly 137 million prescriptions for such products dispensed in 2013, according to the Drug Enforcement Administration. See Drug Enforcement Administration, "Schedules of Controlled Substances: Rescheduling of Hydrocodone Combination Products From Schedule III to Schedule II," 79 FR 49661 (August 22, 2014). There are several hundred hydrocodone combination products on the market. The hydrocodone combination products that were most frequently prescribed in 2013 were combinations of hydrocodone and acetaminophen, with brand

names such as Vicodin and Lortab as well as generics. Id.

In contrast, single-entity, or "standalone," hydrocodone products have been, and continue to be, schedule II controlled substances. However, there have been no single-entity hydrocodone products on the United States market, until recently.

B. All Hydrocodone Products Are Now Schedule II Controlled Substances

Two recent administrative actions have had the effect of moving all offenses involving hydrocodone (whether in combination or standing alone) to schedule II.

First, in October 2013 the Food and Drug Administration approved a single-entity hydrocodone product (brand name Zohydro), the first such product to be approved for the United States market. According to the Food and Drug Administration, Zohydro is "an opioid analgesic medication for the management of moderate to severe chronic pain when a continuous, around-the-clock opioid analgesic is needed for an extended period of time." It is marketed in extended-release capsules and formulated in dose strengths up to 50 milligrams. See Food and Drug Administration, "Anesthetic and Analgesic Drug Products Advisory Committee: Notice of Meeting," 77 FR 67380 (November 9, 2012). As mentioned above, such a product is a schedule II controlled substance. Other single-entity hydrocodone products are also being considered for the U.S. market.

Second, the Drug Enforcement Administration published a final rule that moved all hydrocodone combination products from schedule III to schedule II. See Drug Enforcement Administration,

"Schedules of Controlled Substances: Rescheduling of Hydrocodone Combination Products From Schedule III to Schedule II," 79 FR 49661 (August 22, 2014). This action imposes stronger regulatory controls and administrative and civil sanctions on persons who handle hydrocodone combination products. As discussed in more detail below, it also changes the statutory and guideline penalty structure for offenses involving hydrocodone combination products.

C. The Statutory and Guideline Penalty Structures

By statute, an offense involving a schedule III controlled substance has a statutory maximum term of imprisonment of 10 years, unless certain aggravating factors are present (such as a prior conviction for a felony drug offense or the use of the substance resulting in death or bodily injury). See 21 U.S.C. § 841(b)(1)(E). An offense involving a schedule II controlled substance, in contrast, has a statutory maximum term of imprisonment of 20 years, unless such an aggravating factor is present. See 21 U.S.C. § 841(b)(1)(C).

Under the guidelines, an offense involving "schedule III hydrocodone" generally has a base offense level determined by the number of pills, tablets, or capsules, without regard to the weight of the pills, tablets, or capsules or the quantity of hydrocodone in them. The base offense levels for schedule III hydrocodone range from a minimum of level 6 to a maximum of level 30, and quantity is determined by a marijuana equivalency under which 1 "unit" (i.e., 1 pill, tablet, or capsule) equals 1 gram of marijuana.

An offense involving schedule II hydrocodone generally has a base offense level determined by

the weight of the entire pill, tablet, or capsule involved. The base offense levels for schedule II hydrocodone range from a minimum of level 12 to a maximum of level 38, and quantity is determined by a marijuana equivalency under which 1 gram of the pills, tablets, or capsules equals 500 grams of marijuana.

D. The Proposed Amendment Deletes the Reference to "Schedule III Hydrocodone" and Proposes a Marijuana Equivalency Using "Hydrocodone (Actual)"

The proposed amendment responds to the administrative actions in two ways. First, the proposed amendment deletes references in the guidelines to "Schedule III Hydrocodone." In light of the rescheduling of hydrocodone combination products from schedule III to schedule II, the references to schedule III hydrocodone are obsolete.

Second, the proposed amendment provides a single marijuana equivalency for hydrocodone offenses, whether single-entity or in combination, that is based on the actual weight of the hydrocodone involved rather than the number of pills involved or the weight of an entire pill. Specifically, a marijuana equivalency under which 1 gram of "hydrocodone (actual)" equates to [4,467]/[6,700] grams of marijuana is proposed.

The use of an "actual" approach for hydrocodone in the proposed amendment is informed by the Commission's decision in 2003 to use an "actual" approach for oxycodone. See USSG App. C, amend. 657 (effective November 1, 2003). Oxycodone is an opium alkaloid found in certain prescription pain relievers such as Percocet and OxyContin, generally sold in pill form. The

Commission determined that a penalty structure based on the weight of the entire pill resulted in proportionality issues because (1) products come in different pill sizes and formulations and (2) products of the same size and formulation come in different dosages, containing different amounts of oxycodone. The Commission remedied these proportionality issues by adopting a penalty structure for oxycodone offenses using the weight of the actual oxycodone instead of the weight of the entire pill. See USSG App. C, amend. 657 (Reason for Amendment).

Such proportionality issues may also arise with offenses involving hydrocodone products, to the extent those products come in different pill sizes, formulations, or dosages. The proposed use of an "actual" approach for hydrocodone would address these proportionality issues by providing sentences for hydrocodone offenses using the weight of the actual hydrocodone instead of the number of pills or the weight of an entire pill.

The rescheduling of hydrocodone combination products also raises severity issues, and the proposed amendment addresses the severity issues by bracketing two possible severity levels, one that assigns hydrocodone (actual) the same marijuana equivalency as oxycodone (actual), and one that assigns a lower marijuana equivalency. The higher severity level (6,700 gm) is based on a 1:1 ratio of hydrocodone to oxycodone in marijuana equivalency, which would reflect a view that equivalent amounts of hydrocodone and oxycodone cause the same pharmacological effects on the body. The lower severity level (4,467 gm) is based on a 3:2 ratio of hydrocodone to oxycodone in marijuana equivalency, which would reflect a view that it takes more hydrocodone than oxycodone to achieve the same pharmacological effects on the body. Compare "Dosing Data for Clinically Employed Opioid Analgesics" in Goodman and Gilman's The Pharmacological Basis

of Therapeutics, 12th edition (2011), p. 496 (recommending equivalent amounts of hydrocodone and oxycodone) with University of Chicago Department of Palliative Care, Opioid Analgesic Chart, available at http://champ.bsd.uchicago.edu/documents/Pallpaincard2009update.pdf (recommending 15 milligrams of hydrocodone as equivalent to 10 milligrams of oxycodone).

A multi-part issue for comment is also provided, seeking comment on hydrocodone offenses and offenders and how the proportionality and severity issues raised by the administrative actions should be addressed, either by the approach taken in the proposed amendment or some other manner.

Proposed Amendment:

Sections 2D1.1(c) is amended in subdivisions (5), (6), (7), (8) and (9) by striking the lines referenced to Schedule III Hydrocodone;

and in subdivisions (10), (11), (12), (13), (14), (15), (16) and (17) by striking the lines referenced to Schedule III Hydrocodone, and in the lines referenced to Schedule III substances (except Ketamine or Hydrocodone) by striking "or Hydrocodone".

The annotation to §2D1.1(c) captioned "Notes to Drug Quantity Table" is amended in Note (B) in the last paragraph by striking "The term 'Oxycodone (actual)' refers" and inserting "The terms 'Hydrocodone (actual)' and 'Oxycodone (actual)' refer".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 8(D), under the heading relating to Schedule I or II Opiates, by striking the line referenced to Hydrocodone/Dihydrocodeinone and inserting the following:

" 1 gm of Hydrocodone (actual) = [4467]/[6700] gm of marihuana";

in the heading relating to Schedule III Substances (except ketamine and hydrocodone) by striking "and hydrocodone" both places such term appears;

and in the heading relating to Schedule III Hydrocodone by striking the heading and subsequent paragraphs as follows:

" Schedule III Hydrocodone****

1 unit of Schedule III hydrocodone = 1 gm of marihuana

****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 2,999.99 kilograms of marihuana.";

and in Note 27(C) by inserting after "methamphetamine," the following "hydrocodone,".

Issue for Comment:

1. The Commission seeks comment on how, if at all, the guidelines for hydrocodone trafficking should be changed, such as to address the administrative actions described in the synopsis above, and the severity and proportionality issues that may result from those actions.

A. Proportionality

The proposed amendment would provide a marijuana equivalency for hydrocodone based on the actual weight of the controlled substance rather than on the number of pills or the weight of an entire pill. As discussed in the synopsis above, the Commission has used such an "actual" approach for offenses involving oxycodone. Is the use of an "actual" approach for hydrocodone offenses appropriate to address the proportionality issues that arise from differing pill sizes, formulations, and dosages?

In the alternative, should the Commission continue to provide a marijuana equivalency for hydrocodone based on the entire weight of the pill? If so, how, if at all, should the Commission address the proportionality issues that arise to the extent there are differing pill sizes, formulations, or dosages? For example, should the guidelines continue to distinguish between single-entity hydrocodone products and hydrocodone combination products? What distinctions, if any, should be made?

B. Severity

Whether the Commission continues to provide a marijuana equivalency for hydrocodone based on the entire weight of the pill or provides a marijuana equivalency using an "actual" approach (as proposed by the proposed amendment), the Commission seeks comment on what marijuana equivalency or equivalencies should be provided for hydrocodone trafficking, in light of the first-ever approval of a hydrocodone single-entity product and the rescheduling of hydrocodone combination products from schedule III to schedule II.

Under the current guidelines, a schedule III hydrocodone product has a marijuana equivalency based on the number of pills, at 1 unit = 1 gram marijuana, and a schedule II hydrocodone product has a marijuana equivalency based on the weight of the entire pill, at 1 gram = 500 grams marijuana. In light of the rescheduling, the entry for schedule III hydrocodone products is obsolete, and all hydrocodone combination products are schedule II controlled substances, with a marijuana equivalency based on the weight of the entire pill, at 1 gram = 500 grams marijuana.

If the Commission were to continue to use the entire weight of the pill for all hydrocodone offenses, is this severity level (1 gram = 500 grams marijuana) appropriate? Should the Commission establish a different equivalency for all hydrocodone offenses, or several equivalencies, such as one equivalency for single-entity products and another for combination products? If so, what equivalency or equivalencies should the Commission provide?

In the alternative, if the Commission were to use the "actual" approach in the proposed amendment, what marijuana equivalency should be used? Should 1 gram of hydrocodone (actual) equate to [4,467] grams of marijuana, or to [6,700] grams of marijuana? Or should the Commission establish a different equivalency than either of these? If so, what equivalency should the Commission provide?

C. General Comment on Hydrocodone Offenses and Offenders

In determining the marijuana equivalencies for controlled substances, the Commission has considered, among other things, the chemical structure, the pharmacological effects, the potential for addiction and abuse, the patterns of abuse and harms associated with abuse, and the patterns of trafficking and harms associated with trafficking.

The Commission invites general comment on hydrocodone offenses and hydrocodone offenders and how these offenses and offenders compare with other drug offenses and drug offenders. For example, how is hydrocodone manufactured, distributed, and marketed? How is it diverted? Once diverted, how is it distributed, possessed, and used? What are the characteristics of the offenders involved in these various activities? What harms are posed by these activities?

Is the chemical structure of hydrocodone substantially similar to the chemical structure of a any other controlled substance referenced in §2D1.1? If so, to what substance?

Is the effect on the central nervous system of hydrocodone substantially similar to the effect of any other controlled substance referenced in §2D1.1? If so, to what substance? Is the quantity of hydrocodone needed to produce that effect lesser or greater than the quantity needed of the other such substance? If so, what is the difference in relative potency?

The Commission specifically invites comment on whether hydrocodone is similar to oxycodone. If so, should the Commission provide a marijuana equivalency for hydrocodone on this basis, e.g., by specifying a marijuana equivalency for hydrocodone (actual) equal to the marijuana equivalency for oxycodone (actual), which is 1 gram oxycodone (actual) = 6700 grams of marijuana?

8. Economic Crime

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's multi-year study of §2B1.1 (Theft, Property, Destruction, and Fraud), and related guidelines, including examination of the loss table, the definition of loss, role in the offense, and offenses involving fraud on the market. See United States Sentencing Commission, "Notice of Final Priorities," 79 Fed. Reg. 49378 (Aug. 20, 2014).

The proposed amendment contains four parts. The Commission is considering whether to promulgate any one or more of these parts, as they are not necessarily mutually exclusive. They are as follows:

Part A revises the definition of "intended loss" at §2B1.1, comment. (n.3(A)(ii)). Two options are presented, one of which would reflect certain principles discussed in the Tenth Circuit's decision in United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011). Issues for comment on intended loss are also provided.

Part B addresses the impact of the victims table in §2B1.1(b)(2). It proposes to establish a new enhancement for cases where one or more victims suffered substantial [financial] hardship and to reduce the levels of enhancement that apply based solely on the number of victims. Two options are provided. It includes issues for comment on the victims table and other provisions relating to victims.

Part C revises the specific offense characteristic for sophisticated means in subsection (b)(10)(C) in several ways. An issue for comment is also included.

Part D addresses offenses involving fraud on the market and related offenses. Issues for comment are also included.

(A) Intended Loss

Synopsis of Proposed Amendment: This part of the proposed amendment revises the definition of "intended loss" at §2B1.1, comment. (n.3(A)(ii)). While the current definition for intended loss was added as part of the Economic Crime Package in 2001, see USSG App. C, amend. 617

(eff. Nov. 1, 2001), the concept of intended loss has been included in the fraud and theft guidelines since the inception of the guidelines, see USSG §2F1.1, comment. (n.7) (1987). Note 3(A)(ii) states that "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).

The Commission has received comment expressing concern regarding the operation of intended loss, including suggestions that the Commission consider certain revisions to better reflect a defendant's culpability. In addition to these comments, the Commission has observed some disagreement in the case law regarding whether intended loss requires a subjective or objective inquiry. In United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011), the Tenth Circuit held that a subjective inquiry is required, which is similar to holdings in the Second, Third and Fifth Circuits. See United States v. Confredo, 528 F.3d 143, 152 (2d Cir. 2008) (remanding for consideration of whether defendant had "proven a subjective intent to cause a loss of less than the aggregate amount" of fraudulent loans); United States v. Kopp, 951 F.2d 521 (3d Cir. 1991) (holding that intended loss is the loss the defendant subjectively intended to inflict on the victim); United States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013) ("To make this determination, we look to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims."); United States v. Sanders, 343 F.3d 511, 527 (5th Cir. 2003) ("our case law requires the

government prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level"). On the other hand, the First and the Seventh Circuits have issued decisions that support a more objective inquiry. See United States v. Innarelli, 524 F.3d 286, 291 (1st Cir. 2008) ("we focus our loss inquiry for purposes of determining a defendant's offense level on the objectively reasonable expectation of a person in his position at the time he perpetrated the fraud, not on his subjective intentions or hopes"); United States v. Lane, 323 F.3d 568, 590 (7th Cir. 2003) ("The determination of intended loss under the Sentencing Guidelines therefore focuses on the conduct of the defendant and the objective financial risk to victims caused by that conduct").

The Commission is publishing this proposed amendment and issues for comment to inform the Commission's consideration of these issues. Two options are bracketed for comment. They are as follows:

Option 1 would state that intended loss means the pecuniary harm "that the defendant purposely sought to inflict" and that the defendant's purpose may be inferred from all available facts. This would reflect certain principles discussed in the Tenth Circuit's decision in United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011). In Manatau, the defendant was convicted of bank fraud and aggravated identity theft. The district court determined that the intended loss should be determined by adding up the credit limits of the stolen convenience checks, because a loss up to those credit limits was "both possible and potentially contemplated by the defendant's scheme." 647 F.3d at 1049-1050. On appeal, the Tenth Circuit reversed, holding that "intended loss" contemplates "a loss the

defendant purposely sought to inflict," and that the appropriate standard was one of "subjective intent to cause the loss." 647 F.3d at 1055. Such an intent, the court held, may be based on making "reasonable inferences about the defendant's mental state from the available facts." 647 F.3d at 1056.

Option 2 is similar to Option 1, but would also encompass the pecuniary harm that any other participant purposely sought to inflict, if the defendant was accountable under §1B1.3(a)(1)(A) for the other participant.

Issues for comment on intended loss are also provided.

Proposed Amendment:

[Option 1:

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3(A)(ii) by striking "(I) means the pecuniary harm that was intended to result from the offense; and" and inserting "(I) means the pecuniary harm that the defendant purposely sought to inflict; and"; and by adding at the end the following new paragraph:

"The defendant's purpose may be inferred from all available facts, including the defendant's actions, the actions and intentions of other participants, and the natural and probable consequences of those actions.".]

[Option 2:

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3(A)(ii) by striking "(I) means the pecuniary harm that was intended to result from the offense; and" and inserting "(I) means (a) the pecuniary harm that the defendant purposely sought to inflict and (b) the pecuniary harm that any other participant purposely sought to inflict, if the defendant was accountable under §1B1.3(a)(1)(A) for the other participant; and"; and by adding at the end the following new paragraph:

"An individual's purpose may be inferred from all available facts, including the individual's actions, the actions and intentions of other participants, and the natural and probable consequences of those actions.".]

Issues for Comment:

1. The Commission seeks comment on whether the definition of "intended loss" should be revised or refined, in the manner contemplated by the proposed amendment or in some other manner, to clarify or simplify guideline operation or for other reasons consistent with the purposes of sentencing. What changes, if any, should the Commission make to the definition of "intended loss"?

   How should the definition of "intended loss" interact with other parts of the guidelines?

For example:

(A) Should intended loss be limited to the amount the defendant personally intended, or should it also include amounts intended by other participants, such as participants (i) that the defendant aided and abetted, and/or (ii) that were in a jointly undertaken criminal activity with the defendant?

(B) How should intended loss interact with the commentary relating to partially completed offenses in §2B1.1, Application Note 18 (providing that, in the case of a partially completed offense, the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy))?

2. Section 2B1.1 provides that for the determination of loss under subsection (b)(1), the court shall use the greater of "actual loss" or "intended loss." Should intended loss be limited in some manner?

(B) Victims Table

Synopsis of Proposed Amendment: This part of the proposed amendment addresses issues relating to the impact of the victims table in §2B1.1(b)(2) as well as other provisions relating to victims in §2B1.1.

The victims table provides a tiered enhancement based on the number of victims. It provides an

enhancement of 2 levels if the offense involved 10 or more victims or was committed through mass-marketing; 4 levels if the offense involved 50 or more victims; and 6 levels if the offense involved 250 or more victims.

First, the proposed amendment provides a new enhancement at subsection (b)(3)(A) that applies if the offense resulted in substantial [financial] hardship to one or more victims. Two options are presented. Under **Option 1**, the enhancement applies if there are one or more such victims and the amount of the enhancement is bracketed at [2][3][4] levels. **Option 2** provides a tiered enhancement based on the number of such victims. Specifically, if there is at least [one] such victim, the enhancement is [1][2] levels; if there are at least [five] such victims, the enhancement is [2][4] levels; and if there are at least [25] such victims, the enhancement is [3][6] levels. The proposed amendment also provides factors for the court to consider in determining whether substantial [financial] hardship resulted. Several of those factors, bracketed in the proposed amendment, are non-monetary and are derived from the upward departure provision at Application Note 20(A)(vi). The proposed amendment also brackets the possibility of deleting Application Note 20(A)(vi).

Both options also bracket the possibility of a "cap" that limits the cumulative impact of subsection (b)(2) and the new (b)(3)(A) to [6] levels.

Second, the proposed amendment revises the impact of the victims table by reducing the enhancements in the table from 2, 4, and 6 levels to 1, 2, and 3 levels, respectively.

Third, the proposed amendment deletes prong (iii) of subsection (b)(16)(B), relating to an offense that substantially endangered the solvency or financial security of 100 or more victims.

Finally, the proposed amendment includes issues for comment on other possible changes to the operation and impact of the victims table and other provisions relating to victims in §2B1.1.

Proposed Amendment:

Section 2B1.1 is amended in subsection (b)(2) by striking "2 levels", "4 levels", and "6 levels" and inserting "1 level", "2 levels", and "3 levels", respectively;

by redesignating subsections (b)(3) through (b)(16) as (b)(4) through (b)(17), respectively (and conforming references to those subsections accordingly);

by inserting after subsection (b)(2) the following new subsection (b)(3):

[Option 1:

"(3) (A) If the offense resulted in substantial [financial] hardship to one or more victims, increase by [2][3][4] levels.

[(B) The cumulative adjustments from application of both subsections (b)(2) and (b)(3)(A) shall not exceed [6] levels."]];

[Option 2:

"(3) (A) (Apply the greatest) If the offense resulted in substantial [financial] hardship to—

(i) [one] or more victims, increase by [1][2] levels;

(ii) [five] or more victims, increase by [2][4] levels; or

(iii) [25] or more victims, increase by [3][6] levels.

[(B) The cumulative adjustments from application of both subsections (b)(2) and (b)(3)(A) shall not exceed [6] levels."]]; and

in subsection (b)(17) (as so redesignated) by inserting "or" at the end of subdivision (B)(i); by striking "; or (iii) substantially endangered the solvency or financial security of 100 or more victims"; and by striking "(b)(16)(B)" and inserting "(b)(17)(B)".

The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 5 through 20 as Notes 6 through 21, respectively; by inserting after Note 4 the following new Note 5:

"5. Enhancement for Substantial [Financial] Hardship (Subsection (b)(3)).—In determining

whether the offense resulted in substantial [financial] hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—

(A) becoming insolvent;

(B) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);

(C) suffering substantial loss of a retirement, education, or other savings or investment fund;

(D) making substantial changes to his or her employment, such as postponing his or her retirement plans;

(E) making substantial changes to his or her living arrangements, such as relocating to a less expensive home;

[(F) suffering substantial harm to his or her reputation or credit record, or a substantial inconvenience related to repairing his or her reputation or a damaged credit record;]

[(G) being erroneously arrested or denied a job because an arrest record has been made in his or her name;]

[(H) having his or her identity assumed by someone else.]"; and

in Note 21 (as so redesignated) [by striking subdivision (A)(vi)].

Issues for Comment:

1. The Commission seeks comment on whether the victims table and other parts of §2B1.1 adequately address the harms to victims. If not, what if any additional enhancements or other provisions should the Commission provide to address those harms?

   Alternatively, should the Commission amend §2B1.1 to limit the impact of the victims table if no victims were substantially harmed by the offense? For example, should the Commission provide that the 4-level and 6-level prongs of the victim table apply only if the offense substantially endangered the solvency or financial security of at least one victim?

2. The proposed amendment would establish a new enhancement if the offense resulted in substantial [financial] hardship to one or more victims, and provides factors for the court to consider in determining whether the enhancement applies.

   The Commission seeks comment on the scope of the enhancement and the factors provided. Should the new enhancement encompass non-monetary harms? If so, what non-monetary harms should it encompass? Should any factors be deleted or changed? Should any additional factors be added? If so, what factors?

How should this new enhancement interact with other provisions in §2B1.1 that account for harm to victims? For example, how should this new enhancement interact with the victims table in subsection (b)(2), the enhancement for theft from the person of another in subsection (b)(3), the enhancement for means of identification in subsection (b)(11), and the enhancement for unauthorized public dissemination of personal information in subsection (b)(17)(B)? Should this new enhancement be fully cumulative with the victims table and the other enhancements, or should the Commission reduce the cumulative impact of these various provisions?

3. Section 2B1.1(b)(16)(B)(iii) provides a 4-level enhancement if the offense "substantially endangered the solvency or financial security of 100 or more victims." The Commission seeks comment on whether subsection (b)(16)(B)(iii) should be eliminated (as reflected in the proposed amendment) or, in the alternative, whether the number of victims required by subsection (b)(16)(B)(iii) should be reduced. If the number of victims should be reduced, what number of victims should be required?

(C) Sophisticated Means

Synopsis of the Proposed Amendment: As part of its overall examination of §2B1.1, the Commission is considering issues relating to the application of the sophisticated means enhancement set forth in subsection (b)(10)(C). In doing so, the Commission identified two issues that are the subject of this part of the proposed amendment.

First, the existing enhancement applies if "the offense otherwise involved sophisticated means." Applying this language, courts have applied this enhancement without a determination of whether the defendant's own conduct was "sophisticated." See, e.g., United States v. Bishop-Oyedepo, 480 Fed. App'x 431, 433-34 (7th Cir. 2012) (affirming enhancement for mortgage loan officer who submitted three fraudulent applications because the other schemer's actions were "reasonably foreseeable"; stating that "because [the defendant] knew of the scheme and the scheme as a whole was sophisticated, the adjustment was appropriate regardless of the sophistication of her individual actions"). Relatedly, courts have varied in their analysis as to whether a scheme must be "sophisticated" in comparison to any fraud that could be sentenced under §2B1.1 or if, instead, the scheme must be sophisticated in comparison to a scheme of the type at issue. Compare United States v. Jones, 530 F.3d 1292, 1307 (10th Cir. 2008) (affirming application of enhancement because scheme at issue was "readily distinguishable from less sophisticated means by which the myriad crimes within the ambit of §2B1.1 may be committed"), with United States v. Wayland, 549 F.3d 526, 529 (7th Cir. 2008) (affirming application of enhancement because the "scheme required a greater level of planning or concealment than the typical health care fraud case") and United States v. Hance, 501 F.3d 900, 909 (8th Cir. 2007) (stating that the sophisticated means enhancement is appropriate when the "mail fraud, viewed as a whole, was notably more intricate than that of the garden-variety mail fraud scheme").

The Commission is publishing this part of the proposed amendment to inform its consideration of whether the enhancement should be revised such that it applies based only on the defendant's conduct rather than offense as a whole, and whether the conduct should be compared only to similar frauds or to all frauds that could fall within the scope of §2B1.1.

The proposed amendment revises the specific offense characteristic for sophisticated means in subsection (b)(10)(C) in several ways.

Specifically, it specifies that sophisticated means is determined relative to offenses of the same kind, and it narrows the scope of the specific offense characteristic to cases in which the defendant used (rather than the offense involved) sophisticated means.

An issue for comment is also included.

Proposed Amendment:

Section 2B1.1(b)(10)(C) is amended by inserting after "otherwise involved sophisticated means" the following: "and the defendant engaged in or caused the conduct constituting sophisticated means".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 9 by striking "Sophisticated Means Enhancement under" in the heading and inserting "Application of"; and by striking subdivision (B) as follows:

"(B) Sophisticated Means Enhancement under Subsection (b)(10)(C).—For purposes of subsection (b)(10)(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.";

and inserting the following new subdivision (B):

"(B) Sophisticated Means Enhancement under Subsection (b)(10)(C).—For purposes of subsection (b)(10)(C), 'sophisticated means' means especially complex or especially intricate offense conduct that displays a significantly greater level of planning or employs significantly more advanced methods in executing or concealing the offense than a typical offense of the same kind. Conduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means.

In addition, application of subsection (b)(10)(C) requires not only that the offense involve conduct constituting sophisticated means but also that the defendant engaged in or caused such conduct, i.e., the defendant committed such conduct or the defendant aided, abetted, counseled, commanded, induced, procured, or willfully caused such conduct. See §1B1.3(a)(1)(A).".

Issue for Comment:

1. The proposed amendment would specify that "sophisticated means" is determined relative to other offenses of the same kind. What guidance, if any, should the Commission provide for determining what offenses are of the same kind, for purposes of determining sophisticated means? For example, are all telemarketing fraud offenses of the same kind, or should distinctions be made among different kinds of telemarketing fraud offenses, or — conversely — are all telemarketing fraud offenses in fact a subset of a broader category? Similarly, are all theft offenses of the same kind, or are there broader or narrower distinctions that should be made?

(D) Fraud on the Market and Related Offenses

Synopsis of Proposed Amendment: This part of the proposed amendment addresses offenses involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. The proposed new guideline is a result of the Commission's continued work on fraud offenses and, in particular, in the area of securities fraud and "fraud on the market" offenses. See 79 FR 49379 (August 20, 2014) (identifying as a Commission priority for the current amendment cycle the continuation of its work on economic crimes, including among other things a study of offenses involving fraud on the market).

The proposed amendment also involves the Commission's past work in implementing the directive in section 1079A(a)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203.

Specifically, section 1079A(a)(1)(A) directed 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."

In addition, section 1079A(a)(1)(B) provided 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.

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 (Theft, Property Destruction, and Fraud).

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.

Under the proposed amendment, the court is directed to use gain, rather than loss, for purposes of subsection (b)(1) if the offense involved (i) the fraudulent inflation or deflation in the value of a publicly traded security or commodity and (ii) the submission of false information in a public filing with the Securities and Exchange Commission or similar regulator. However, the enhancement under subsection (b)(1) shall be not less than [14]-[22] levels. While cases involving this conduct occur infrequently (the Commission identified seven such cases in fiscal years 2012 and 2013), the Commission has received comment that these cases are complex, resulting in courts applying a variety of methods to determine the appropriate enhancement under subsection (b)(1). In such cases in fiscal years 2012 and 2013, the median enhancement under subsection (b)(1) was 14 levels and the average sentence was 48 months.

As a conforming change, the special rule at Application Note 3(F)(ix), relating to the calculation of loss in cases involving the fraudulent inflation in the value of a publicly traded security or commodity, is deleted.

Issues for comment are also included.

Proposed Amendment:

Section 2B1.1 is amended in subsection (b)(1) by adding after subparagraph (P) the following proviso to subsection (b)(1):

"*Provided*, that if the offense involved (i) the fraudulent inflation or deflation in the value of a

publicly traded security or commodity and (ii) the submission of false information in a public filing with the Securities and Exchange Commission or similar regulator, the enhancement determined above shall be based on the gain that resulted from the offense rather than the loss. However, the enhancement under subsection (b)(1) shall be not less than [14]-[22] levels.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3(F) by deleting subdivision (ix).

Issues for Comment:

1. In 2012, the Commission responded to directives in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, by providing, among other things, a special rule for determining actual loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, see §2B1.1, comment. (n.3(F)(ix)), and departure provisions for cases in which there was risk of a significant disruption of a national financial market, see §2B1.1, comment. (n.20(A)(iv)), and cases in which there was a securities fraud involving a fraudulent statement made publicly to the market, see §2B1.1, comment. (n.20(C)).

   The Commission seeks comment on the operation of these provisions and whether they adequately address "fraud on the market" cases and similar types of cases involving the financial markets. Should the Commission revise these provisions to better address these types of cases? If so, how? Should the Commission make any other changes to the

guidelines to address these types of cases? If so, what changes should the Commission make? For example, should the Commission provide a separate guideline for these cases? In the alternative, should these cases be sentenced under §2B1.4 (Insider Trading) instead of §2B1.1, and if so, what if any changes should be made to §2B1.4 to address these cases?

2. The Commission seeks comment on whether gain, rather than loss, is a more appropriate method for determining the harm accountable to the defendant in "fraud on the market" cases. What are the advantages and disadvantages of using gain to measure harm in such cases? Are there application issues that would arise in determining gain in such cases? If so, what are the issues and how, if at all, should the Commission address them?

3. The Commission has heard concerns that gain and loss are difficult to measure in "fraud on the market" cases and may not effectively address the role of market forces and other factors. Accordingly, it has been argued, the use of gain or loss may over-punish some defendants and under-punish others. How, if at all, should the Commission address this issue?

In particular, the Commission seeks comment on whether "fraud on the market" offenses should be structured to include a minimum level of enhancement of [14]-[22] levels (as bracketed in the proposed amendment) under subsection (b)(1). Would such an approach be consistent with the purposes of sentencing and the directives to the Commission in the Dodd-Frank Wall Street Reform and Consumer Protection Act? Should the Commission consider such an approach? If so, what minimum level of enhancement should be

provided?

If the Commission were to provide such a minimum enhancement for such cases, should the Commission also specify that certain other specific offense characteristics in the guideline should not apply in such cases?