

**United States Sentencing Commission Public Meeting Minutes
April 13, 2012**

Chair Patti B. Saris called the meeting to order at 2:00 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

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

The following Commissioner was present via telephone:

- Judge Ricardo H. Hinojosa, Commissioner

The following Commissioner was not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Kenneth Cohen, General Counsel

The Chair called for a motion to adopt the January 10, 2012, public meeting minutes. Commissioner Howell made a motion to adopt the minutes, with Vice Chair Carr seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

The Chair called on Mr. Cohen to inform the Commission on possible votes to amend the sentencing guidelines.

Mr. Cohen stated that the first proposed amendment, attached hereto as Exhibit A, was a multi-part amendment responding to miscellaneous issues arising from recently enacted legislation. First, the proposed amendment responds to the Cell Phone Contraband Act of 2010, Pub. L. 111-225 (August 10, 2010), which amended 18 U.S.C. § 1791 (Providing or possessing contraband in prison) to make it a class A misdemeanor to provide a mobile phone or similar device to an inmate, or for an inmate to possess such a device. The proposed amendment amends Appendix A (Statutory Index) to reference section 1791 to §2P1.2 (Providing or Possessing Contraband in Prison) and amends §2P1.2 to assign mobile phones and similar devices a base offense level of 6.

Second, the proposed amendment responds to the Prevent All Cigarette Trafficking Act of 2009

(PACT Act), Pub. L. 111–154 (March 31, 2010). The PACT Act raised the criminal penalty at 15 U.S.C. § 377 for a knowing violation of the Jenkins Act, which governs the sale, shipment, and taxation of cigarettes and smokeless tobacco, from a misdemeanor to a felony with a statutory maximum term of imprisonment of 3 years. The proposed amendment amends Appendix A to reference section 377 offenses to §2T2.1 (Non-Payment of Taxes) and §2T2.2 (Regulatory Offenses). The PACT Act also created a new Class A misdemeanor at 18 U.S.C. § 1716E, prohibiting the knowing shipment of cigarettes and smokeless tobacco through the United States mail. The proposed amendment amends Appendix A to reference section 1716E offenses to §2T2.2.

Third, the proposed amendment responds to the Animal Crush Video Prohibition Act of 2010, Pub. L. 111–294 (December 9, 2010), which makes substantial revisions to the offense at 18 U.S.C. § 48 (Animal crush videos). The offense as amended prohibits the creation or distribution of an animal crush video that is "obscene". The proposed amendment amends Appendix A to reference section 48 offenses to §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names).

Fourth, the proposed amendment responds to the Indian Arts and Crafts Amendments Act of 2010, Pub. L. 111–211 (July 29, 2010), which amended the criminal offense at 18 U.S.C. § 1159 (Misrepresentation of Indian produced goods and services) to reduce penalties for certain first-time offenders. The proposed amendment amends Appendix A to reference section 1159 offenses to §2B1.1 (Theft, Property Destruction, and Fraud). The proposed amendment also addresses an existing offense, 18 U.S.C. § 1158 (Counterfeiting Indian Arts and Crafts Board trade mark), by referencing section 1158 offenses to both §2B1.1 and §2B5.3 (Criminal Infringement of Copyright or Trademark).

Finally, the proposed amendment responds to Public Law 111–350 (January 4, 2011), which enacted certain laws relating to public contracts as a new positive-law title of the Code — title 41, "Public Contracts". As part of this codification, two criminal offenses, 41 U.S.C. §§ 53 and 423(a)–(b), and their respective penalty provisions, 41 U.S.C. §§ 54 and 423(e), were given new title 41 section numbers: sections 8702 and 8707 for sections 53 and 54, and sections 2102 and 2105 for sections 423(a)–(b) and 423(e). The substantive offenses and their related penalties did not change. The proposed amendment makes clerical changes to Appendix A to reflect the renumbering and includes a reference for the new section 2102, whose predecessor section 423(a)–(b) was not referenced in Appendix A.

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2012 effective date, and with staff being authorized to make technical and conforming changes if needed.

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

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit B, responds to an application issue regarding the applicable guideline range in a case in which the defendant is sentenced on multiple counts of conviction, at least one of which involves a mandatory minimum sentence that is greater than the minimum of the otherwise applicable guideline range. There are differences among the circuits on this issue. First, the proposed amendment amends subsection (b) of §5G1.2 (Sentencing on Multiple Counts of Conviction) to clarify that the court is to determine the total punishment and impose that total punishment on each count, except to the extent otherwise required by law.

Second, the proposed amendment amends the Commentary at §5G1.2 to clarify that the defendant's guideline range in a multiple-count case may be restricted by a mandatory minimum penalty or statutory maximum penalty in a manner similar to how the guideline range in a single-count case may be restricted by a minimum or maximum penalty under §5G1.1 (Sentencing on a Single Count of Conviction).

Third, the proposed amendment amends the commentary at §5G1.2 to clarify that in a case in which a defendant's guideline range was affected or restricted by a mandatory minimum penalty, the court is resentencing the defendant, and the mandatory minimum sentence no longer applies, the court shall redetermine the defendant's guideline range for purposes of the remaining counts without regard to the mandatory minimum penalty.

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2012 effective date, and with staff being authorized to make technical and conforming changes if needed.

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

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit C, responds to an application issue arising under subsection (c) of §4A1.2 (Definitions and Instructions for Computing Criminal History) when a defendant's prior sentence for driving while intoxicated or driving under the influence (and similar offenses by whatever name they are known) is counted toward the defendant's criminal history score. There appear to be differences among the circuits when the prior sentence is a misdemeanor or petty offense. The proposed amendment responds to the application issue by amending Application Note 5 at §4A1.2 to clarify that such a sentence is always counted, without regard to how the offense is classified.

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2012 effective date, and with staff being authorized to make technical and conforming changes if needed.

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

motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the motion. Hearing none, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit D, responds to a circuit conflict over application of the term "sentenced imposed" in §2L1.2 (Unlawfully Entering or Remaining in the United States) when the defendant's original "sentence imposed" was lengthened after the defendant was deported after a conviction for a felony drug trafficking offense. The conflict arises when the defendant was sentenced on two or more different occasions for the same drug trafficking conviction (*e.g.*, because of a revocation of supervision), such that there was a sentence imposed before the defendant's deportation and an additional sentence imposed thereafter (*e.g.*, after revocation of supervision). The proposed amendment resolves the conflict by amending the definition of "sentence imposed" in Application Note 1(B)(vii) to specify that a post-revocation additional sentence is included, "but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States".

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2012 effective date, and with staff being authorized to make technical and conforming changes if needed.

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

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit E, responds to *Pepper v. United States*, 131 S. Ct. 1229 (2011), which held, among other things, that a defendant's post-sentencing rehabilitative efforts may be considered when the defendant is resentenced after appeal. The policy statement in the guidelines on post-sentencing rehabilitation is §5K2.19 (Post-Sentencing Rehabilitative Efforts (Policy Statement)). The proposed amendment repeals §5K2.19.

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2012 effective date, and with staff being authorized to make technical and conforming changes if needed.

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

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit F, creates a "safety valve" provision in the guideline for chemical precursors, §2D1.11 (Unlawfully

Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), that parallels the safety valve provision in the drug guideline, §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The proposed amendment adds a new specific offense characteristic at §2D1.11(b)(6) and a corresponding new application note. Under the proposed amendment, certain first-time, nonviolent offenders sentenced under §2D1.11 would be eligible to receive the same 2-level safety valve reduction (and using the same five safety valve criteria at §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases)) as such offenders are eligible to receive under §2D1.1.

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2012 effective date, and with staff being authorized to make technical and conforming changes if needed.

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

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit G, provides a specific reference for N-Benzylpiperazine (BZP), a Schedule I stimulant, in the Drug Equivalency Table in Application Note 10(D) in §2D1.1. The proposed amendment establishes a marijuana equivalency of 1 gram of BZP equals 100 grams of marijuana.

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2012 effective date, and with staff being authorized to make technical and conforming changes if needed.

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

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit H, results from the Commission's multi-year review to ensure that the guidelines provide appropriate guidelines penalties for cases involving human rights violations. First, the proposed amendment addresses cases in which the defendant is convicted of an offense that Congress has indicated is a "serious human rights offense," *i.e.*, an offense under 18 U.S.C. §§ 1091 (Genocide), 2340A (Torture), 2441 (War crimes), and 2442 (Recruitment or use of child soldiers). *See* 28 U.S.C. § 509B(e). Such offenses are currently accounted for in the guidelines through various Chapter Two guidelines.

The proposed amendment establishes a new Chapter Three adjustment, at §3A1.5 (Serious Human Rights Offense), that applies if the defendant was convicted of a serious human rights

offense. The new guideline provides two tiers of adjustments. If the defendant was convicted of an offense under 18 U.S.C. § 1091(c), it provides an increase of 2 levels. However, if the defendant was convicted of any other serious human rights offense, it provides an increase of 4 levels, and in such a case it further provides a minimum offense level of 37 if death resulted. The proposed amendment also amends Appendix A to reference war crimes (*i.e.*, offenses under 18 U.S.C. § 2441) to §2X5.1 (Other Felony Offenses).

Second, the proposed amendment addresses cases in which the offense of conviction is for immigration or naturalization fraud but the defendant committed any part of the instant offense to conceal the defendant's involvement, or possible involvement, in a serious human rights offense. The proposed amendment adds a new two-prong specific offense characteristic to §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). Prong (A) provides a 2-level enhancement and a minimum offense level of 13 if the defendant committed any part of the instant offense to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense. Prong (B) provides an enhancement of 6 levels if the offense was incitement to genocide or 10 levels and a minimum offense level of 25 if the offense was any other serious human rights offense.

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2012 effective date, and with staff being authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to promulgate the proposed amendment, with Vice Chair Carr seconding. The Chair called for discussion on the motion.

Commissioner Howell recounted how in April 2009, Senators Richard J. Durbin and Tom Coburn recommended to the Commission that it consider developing a new human rights guideline addressing certain laws criminalizing serious human right violations. She stated that, prompted by the Senators' recommendation and other public comment, the Commission made the issue a priority and for the past few years examined the various options for a human rights guideline, while also waiting to see how cases applying these laws could inform the Commission's work.

Commissioner Howell observed that the proposed amendment is the culmination of a lot of focused work that the Commission has given to this issue over the last couple of amendment cycles, with testimony at hearings and input from a number of stakeholders, including importantly, the Department of Justice.

Commissioner Howell stated that she recognized, as the Senators and the Department of Justice acknowledge, that the human rights laws are relatively new and encompass a wide range of

serious criminal conduct with varying penalties. However, she believes the proposed human rights adjustment at §3A1.5 will differentiate the unique and heinous nature of serious human rights crimes while maintaining the current proportionality in the guidelines for the underlying core criminal offenses.

Commissioner Wroblewski thanked the Commission, Commission staff, and stakeholders who participated in the Commission's most recent amendment cycle, noting that the public comment and the testimony the Commission received at its February and March hearings were especially helpful.

Commissioner Wroblewski recalled how the Obama administration made promoting human rights and addressing human rights violations one of its priorities. He added that it is also a priority to ensure the United States is not a safe haven for human rights violators. Commissioner Wroblewski recounted how the Department of Justice has worked with Congress over the last several years to strengthen federal law and that it created a Human Rights and Special Prosecution Section within its Criminal Division. He believes the proposed amendment will help ensure that the United States is indeed not a safe haven for human rights violators and will help make sure that such violators are held accountable. Commissioner Wroblewski closed by stating that the Department of Justice appreciates the Commission's work and fully supports the proposed amendment.

Hearing no further discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit I, responds to the two directives to the Commission in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (the "Act"). The first directive relates to securities fraud and similar offenses, and the second directive relates to mortgage fraud and financial institution fraud.

Mr. Cohen explained that the proposed amendment responds to the securities fraud directive in two ways. First, it amends §2B1.1 by adding a new Application Note 3(F)(ix) that provides a special rule for determining loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. Under the special rule, the court is to (I) "calculat[e] the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market," and (II) "multiply[] the difference in average price by the number of shares outstanding." Application Note 3(F)(ix) provides for a rebuttable presumption that the amount so determined is the actual loss and that, in determining whether the amount so determined is a reasonable estimate of the actual loss, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense.

Second, the proposed amendment amends the insider trading guideline, §2B1.4 (Insider Trading), in two ways. It creates a new specific offense characteristic if the offense involved an

organized scheme to engage in insider trading that provides a minimum offense level of 14. It also amends the commentary to §2B1.4 to provide more guidance on the applicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in insider trading cases in which the defendant's employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense.

Mr. Cohen stated that the proposed amendment responds to the mortgage fraud directive in two ways. First, the proposed amendment amends §2B1.1 to change how the fair market value of the collateral is determined in the case of a fraud involving a mortgage loan. A new Application Note 3(E)(iii) provides that, notwithstanding Note 3(E)(ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, the court is to use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by plea or by trial.

Second, the proposed amendment broadens the applicability of §2B1.1(b)(15)(B), which provides an enhancement of 4 levels if the offense involved specific types of financial harms (*e.g.*, jeopardizing a financial institution or organization). Application Note 12 to §2B1.1 lists factors to be considered in determining whether to apply the enhancement in subsection (b)(15)(B) for jeopardizing a financial institution or organization. The proposed amendment amends Application Note 12 to direct the court to consider whether one of the listed harms was likely to result from the offense, but did not result from the offense because of federal government intervention, such as a "bailout".

Finally, the proposed amendment expands the departure provisions in §2B1.1 by providing two examples of cases in which a departure may be warranted. First, the proposed amendment amends Application Note 19(A)(iv), which provides that an upward departure may be warranted if the offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1). To provide an example of such a risk, the proposed amendment adds "such as a risk of a significant disruption of a national financial market."

Second, the proposed amendment amends Application Note 19(C), which provides that a downward departure may be warranted if the offense level substantially overstates the seriousness of the offense. To provide an example of such a case, the proposed amendment adds the following: "For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted."

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2012 effective date, and with staff being authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to

promulgate the proposed amendment, with Commissioner Howell seconding.

Chair Saris stated that the proposed amendment increases penalties in insider trading cases and provides that no defendant will receive a reduced penalty due to federal intervention, such as a bailout. She added that the proposed amendment also addresses certain complex, practical problems that arise in fraud cases. For example, Chair Saris explained, the proposed amendment includes presumptive rules governing the calculation of the loss in mortgage fraud and securities trading cases.

Chair Saris added that the Commission is not finished with its review of the fraud guidelines. She recounted that the Commission received public comment from a number of stakeholders that a broader review of the operation of the fraud guidelines should be undertaken. For example, comments from the courts, defense attorneys, and prosecutors suggest that the interaction of the loss table at §2B1.1(b)(1) and the victims table at §2B1.1(b)(2) may result in disproportionate and/or disparate sentences in certain high-loss fraud cases. To address these concerns, Chair Saris noted that proposed amendments provides a departure provision for cases where interaction of the loss and victims tables result in a guideline sentence that is disproportionate to the seriousness of the offense.

Chair Saris asserted that it is important to understand that more than 30 guidelines, such as the money laundering guideline at §2S1.1, the public corruption guidelines at USSG, Ch. 2, Pt.C, and the identify theft guideline at §2B1.6, either reference §2B1.1 or have a proportional relationship with it. Therefore, she stressed, any change to §2B1.1, such as amending the loss or victims tables, must be undertaken comprehensively. Thus, Chair Saris concluded, the Commission will continue its multi-year review of the fraud guideline and the proposed amendment is the first step of that process.

The Chair called for further discussion on the motion and hearing none, called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Mr. Cohen stated that the amendments to §2D1.11 and §2L1.2 may reduce the guideline range applicable to certain offenders. Therefore, he advised, a motion pursuant to Rule 2.2 of the Commission's Rules of Practice and Procedure directing staff to prepare a retroactivity impact analysis of those amendments would be in order if the Commission so desired.

Chair Saris called for a motion as suggested by Mr. Cohen. No commissioner made such motion. The Chair stated that the matter failed for lack of a motion and asked if the commissioners had any comments.

Commissioner Howell thanked Chair Saris for her leadership during the amendment cycle, during which, she observed, the Commission also issued its report to Congress on statutory mandatory minimum sentencing and continued its work on two additional reports concerning child pornography offenses and the impact of *Booker* on federal sentencing.

Commissioner Howell observed that one of the Commission's priorities was whether to make available a 2-level "safety valve" reduction for first-time, nonviolent offenders sentenced under

§2D1.11. She noted such a reduction is currently available to defendants sentenced under §2D1.1, pursuant to the adjustment at §5C1.2 and the specific offense characteristics at §2D1.1(b)(16). She stated she supported the just-promulgated amendment implementing that priority.

Commissioner Howell remarked that the safety valve applicable to §2D1.1 typically applies to drug offenses carrying a mandatory minimum penalty. However, she believes that the amendment to §2D1.11 is appropriate even though the offenses under §2D1.11 do not carry mandatory minimum penalties because §2D1.11's penalties are based on the penalties in §2D1.1 and many of the same specific offense characteristics apply under both guidelines.

Commissioner Howell reported that the Commission's fiscal year 2011 data indicates that the majority of §2D1.11 offenders were sentenced below the applicable guideline range, with almost 41 percent sentenced below range pursuant to a government sponsored motion and another 39 percent sentenced below range pursuant to a non-government sponsored motion. She noted that among the reasons cited by judges for the non-government sponsored below range sentences was application of the safety valve at §5C1.2 even though §5C1.2 does not technically apply to §2D1.11 offenses. Commissioner Howell stated that the just promulgated amendment would formally make available a 2-level safety valve reduction to eligible defendants sentenced under §2D1.11 and who meet the five criteria for safety valve at §5C1.2.

Regarding retroactive application of the amendment to §2D1.11, Commissioner Howell recalled that the Commission did not make retroactive the original 2-level safety valve reduction in §2D1.1 when initially promulgated in 1995, nor the 2001 amendment that expanded the reduction to include offenders in §2D1.1 with offense levels less than level 26. Therefore, Commissioner Howell noted, the Commission's determination not to make the new §2D1.11 safety valve reduction retroactive is consistent with its past practices.

When making her own determination about the appropriateness of making the amendment to §2D1.11 retroactive, Commissioner Howell recalled her consideration of "the difficulty of applying the amendment retroactively," one of several factors identified in the policy statement governing retroactivity, §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)). As a result, in her view retroactive application of the amendment would be extremely difficult because one of the criteria for the reduction at §5C1.2 is that "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same court of conduct or of a common scheme or plan." In Commissioner Howell's opinion, making such determinations retroactively would be extraordinarily difficult and likely would give rise to substantial litigation. Based on these reasons, she did not support a motion to have staff undertake a retroactively impact analysis for the amendment to §2D1.11.

Regarding the amendment changing the definition of "sentenced imposed" at §2L1.2, Commissioner Howell observed that resolving circuit splits is an important responsibility of the Commission, and the new definition fulfills that responsibility. She noted that the Commission adopted the majority approach to count only time served by the defendant before deportation, not

afterward.

Commissioner Howell stated she based her decision not to consider making the amendment retroactive on three reasons. First, she noted that historically, when the Commission lowered penalties for illegal entry offenders under §2L1.2, it has not made the change retroactive. As an example, she cited the 2001 amendment replacing a 16-level enhancement for all aggravated felonies with a tiered enhancement scheme. While that amendment affected a large number of defendants, the Commission did not make it retroactive.

Commissioner Howell stated her second reason was that the amendment affects a relatively small number of offenders as the majority of circuits, especially the ones handling most of these cases, have already adopted the approach adopted by the amendment. She added that while more than 20,000 illegal entry defendants are sentenced annually, the Commission received no public comment indicating that the circumstance in which a defendant's sentencing enhancement depends solely upon a revocation sentence imposed after deportation is a circumstance that occurs frequently.

Commissioner Howell stated that her third reason was that she believes it would be difficult and time consuming to identify those offenders who may benefit from the amendment. To identify the affected individuals, she explained, would require the Commission or the courts to examine the offense conduct and criminal history in each presentence report to determine whether the enhancement depended upon a revocation sentence imposed after the defendant was deported. Such a project, Commissioner Howell concluded, would be enormously burdensome and time-consuming. Further, in her view, the amendment promulgated today does not raise an issue of fundamental fairness that would militate in favor of retroactive application.

Chair Saris thanked Commissioner Howell for her comments and asked whether there were any closing comments. Vice Chair Carr observed that the Commission did not address the differing approaches adopted by the courts of appeals as to when, if ever, the burglary of a non-dwelling should be considered a crime of violence under certain provisions of the sentencing guidelines. He noted that the Commission is aware that this issue is troublesome and a much litigated subject.

Vice Chair Carr explained that the Commission's inability to arrive at a resolution at this time stemmed in part from its recognition of the fact that a coherent remedy requires both statutory changes and a more ambitious modification to the sentencing guidelines than the Commission published for notice and comment. He stated that addressing the asymmetry and confusion regarding the definition and application of "crime of violence" and related terms will remain a priority for the Commission in the immediate future. Vice Chair Carr stated he did not mean to imply that the Commission will await statutory changes before working on the issue, and that the Commission may ultimately recommend some statutory changes to Congress.

Chair Saris observed that she was concluding her first full amendment cycle. She stated she was grateful for the outstanding work of staff in its presentations and data. Chair Saris also thanked other stakeholders for the data and reports they provide, noting that the Commission reads and considers such submissions.

Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Hinojosa made a motion to adjourn, with Vice Chair Carr seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 2:35 p.m.

EXHIBIT A

PROPOSED AMENDMENT: MISCELLANEOUS

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

First, the proposed amendment responds to the Cell Phone Contraband Act of 2010, Pub. L. 111–225 (August 10, 2010), which amended 18 U.S.C. § 1791 (Providing or possessing contraband in prison) to make it a class A misdemeanor to provide a mobile phone or similar device to an inmate, or for an inmate to possess a mobile phone or similar device — specifically, "a phone or other device used by a user of commercial mobile service (as defined in section 332(d) of Title 47) in connection with such service". See 18 U.S.C. § 1791(d)(1)(F). Offenses under section 1791 are referenced in Appendix A (Statutory Index) to §2P1.2 (Providing or Possessing Contraband in Prison). The other class A misdemeanors in section 1791 involve currency, alcohol, and certain controlled substances; those other types of contraband receive a base offense level of 6 in §2P1.2. The proposed amendment amends §2P1.2 to assign mobile phones and similar devices a base offense level of 6.

*Second, the proposed amendment responds to the Prevent All Cigarette Trafficking Act of 2009 (PACT Act), Pub. L. 111–154 (enacted March 31, 2010). The PACT Act made a series of revisions to the Jenkins Act, 15 U.S.C. § 375 *et seq.*, which is one of several laws governing the sale, shipment and taxation of cigarettes and smokeless tobacco. The PACT Act raised the criminal penalty at 15 U.S.C. § 377 for a knowing violation of the Jenkins Act from a misdemeanor to a felony with a statutory maximum term of imprisonment of 3 years. The proposed amendment amends Appendix A (Statutory Index) to reference section 377 offenses to §2T2.1 (Non-Payment of Taxes) and §2T2.2 (Regulatory Offenses). The proposed amendment also amends the Commentary to §§2T2.1 and 2T2.2 to add section 377 to the list of statutory provisions. These lists indicate that §2T2.1 applies if the conduct constitutes non-payment, evasion, or attempted evasion of taxes and §2T2.2 applies if the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes.*

The PACT Act also created a new Class A misdemeanor at 18 U.S.C. § 1716E, prohibiting the knowing shipment of cigarettes and smokeless tobacco through the United States mail. The proposed amendment amends Appendix A (Statutory Index) to reference section 1716E offenses to §2T2.2.

Third, the proposed amendment responds to the Animal Crush Video Prohibition Act of 2010, Pub. L. 111–294 (enacted December 9, 2010), which substantially revised the criminal offense at 18 U.S.C. § 48 (Animal crush videos). Section 48 makes it a crime to create or distribute an "animal crush video," as defined in section 48 (which requires, among other things, that the depiction be "obscene"). The maximum term of imprisonment for a section 48 offense is 7 years. Section 48 is not referenced in Appendix A (Statutory Index). The proposed amendment amends Appendix A (Statutory Index) to reference section 48 offenses to §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names).

Fourth, the proposed amendment responds to the Indian Arts and Crafts Amendments Act of 2010, Pub. L. 111–211 (July 29, 2010), which amended the criminal offense at 18 U.S.C. § 1159 (Misrepresentation of Indian produced goods and services) to reduce penalties for first offenders when the value of the goods involved is less than \$1,000. The maximum term of imprisonment under section 1159 had been 5 years for a first offender and 15 years for a repeat offender. The Act retained this penalty structure, except that the statutory maximum for a first offender was reduced to 1 year in a case in which the value of the goods involved is less than \$1,000. The proposed amendment amends Appendix A (Statutory Index) to reference section 1159 offenses to §2B1.1 (Theft, Property Destruction, and Fraud).

The proposed amendment also addresses an existing offense, 18 U.S.C. § 1158 (Counterfeiting Indian Arts and Crafts Board trade mark), which makes it a crime to counterfeit or unlawfully affix a Government trade mark used or devised by the Indian Arts and Crafts Board or to make any false statement for the purpose of obtaining the use of any such mark. The maximum term of imprisonment under section 1158 is 5 years for a first offender and 15 years for a repeat offender. Offenses under section 1158 are not referenced in Appendix A (Statutory Index). The proposed amendment references section 1158 offenses to both §2B1.1 and §2B5.3 (Criminal Infringement of Copyright or Trademark).

Finally, the proposed amendment responds to Public Law 111–350 (enacted January 4, 2011), which enacted certain laws relating to public contracts as a new positive-law title of the Code — title 41, "Public Contracts". As part of this codification, two criminal offenses, 41 U.S.C. §§ 53 and 423(a)–(b), and their respective penalty provisions, 41 U.S.C. §§ 54 and 423(e), were given new title 41 section numbers: sections 8702 and 8707 for sections 53 and 54, and sections 2102 and 2105 for sections 423(a)–(b) and 423(e). The substantive offenses and their related penalties did not change. The proposed amendment makes clerical changes to Appendix A (Statutory Index) to reflect the renumbering and includes a reference for the new section 2102, whose predecessor section 423(a)–(b) was not referenced in Appendix A.

Proposed Amendment:

§2P1.2. Providing or Possessing Contraband in Prison

- (a) Base Offense Level:
 - (1) **23**, if the object was a firearm or destructive device.
 - (2) **13**, if the object was a weapon (other than a firearm or a destructive device), any object that might be used as a weapon or as a means of facilitating escape, ammunition, LSD, PCP, methamphetamine, or a narcotic drug.
 - (3) **6**, if the object was an alcoholic beverage, United States or foreign currency, a mobile phone or similar device, or a controlled substance (other than LSD, PCP, methamphetamine, or a narcotic drug).
 - (4) **4**, if the object was any other object that threatened the order, discipline, or security of the institution or the life, health, or safety of an individual.
- (b) Specific Offense Characteristic
 - (1) If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by **2** levels.
- (c) Cross Reference
 - (1) If the object of the offense was the distribution of a controlled substance, apply the offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy). *Provided*, that if the defendant is convicted under 18 U.S.C. § 1791(a)(1) and is punishable under 18 U.S.C. § 1791(b)(1), and the resulting offense level

is less than level **26**, increase to level **26**.

Commentary

Statutory Provision: 18 U.S.C. § 1791.

Application Notes:

1. *In this guideline, the term "mobile phone or similar device" means a phone or other device as described in 18 U.S.C. § 1791(d)(1)(F).*
2. *If the adjustment in §2P1.2(b)(1) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*
3. *In a case in which the defendant is convicted of the underlying offense and an offense involving providing or possessing a controlled substance in prison, group the offenses together under §3D1.2(c). (Note that 18 U.S.C. § 1791(b) does not require a sentence of imprisonment, although if a sentence of imprisonment is imposed on a count involving providing or possessing a controlled substance in prison, section 1791(c) requires that the sentence be imposed to run consecutively to any other sentence of imprisonment for the controlled substance. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b)(1), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 1791(c). For example, if the combined applicable guideline range for both counts is 30-37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the providing or possessing a controlled substance in prison count would satisfy these requirements.*

Pursuant to 18 U.S.C. § 1791(c), a sentence imposed upon an inmate for a violation of 18 U.S.C. § 1791 shall be consecutive to the sentence being served by the inmate at the time of the violation.

* * *

2. ALCOHOL AND TOBACCO TAXES

Introductory Commentary

This subpart deals with offenses contained in Parts I-IV of Subchapter J of Chapter 51 of Subtitle E of Title 26, chiefly 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, and 5762, where the essence of the conduct is tax evasion or a regulatory violation. Because these offenses are no longer a major enforcement priority, no effort has been made to provide a section-by-section set of guidelines. Rather, the conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.

§2T2.1. Non-Payment of Taxes

- (a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the amount of taxes that the taxpayer failed to pay or attempted not to pay.

Commentary

Statutory Provisions: 15 U.S.C. § 377, 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, 5762, provided the conduct constitutes non-payment, evasion or attempted evasion of taxes. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The tax loss is the total amount of unpaid taxes that were due on the alcohol and/or tobacco, or that the defendant was attempting to evade.
2. Offense conduct directed at more than tax evasion (e.g., theft or fraud) may warrant an upward departure.

Background: The most frequently prosecuted conduct violating this section is operating an illegal still. 26 U.S.C. § 5601(a)(1).

§2T2.2. Regulatory Offenses

- (a) Base Offense Level: **4**

Commentary

Statutory Provisions: 15 U.S.C. § 377, 26 U.S.C. §§ 5601, 5603-5605, 5661, 5671, 5762, provided the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes. For additional statutory provision(s), see Appendix A (Statutory Index).

Background: Prosecutions of this type are infrequent.

* * *

APPENDIX A - STATUTORY INDEX

* * *

15 U.S.C. § 158 2B1.1

15 U.S.C. § 377 2T2.1, 2T2.2

* * *

18 U.S.C. § 43 2B1.1

18 U.S.C. § 48 2G3.1

* * *

18 U.S.C. § 1153	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2B1.1, 2B1.4, 2B2.1, 2B3.1, 2K1.4
18 U.S.C. § 1158	2B1.1, 2B5.3
18 U.S.C. § 1159	2B1.1
	* * *
18 U.S.C. § 1716D	2Q2.1
18 U.S.C. § 1716E	2T2.2
	* * *
41 U.S.C. § 53	2B4.1
41 U.S.C. § 54	2B4.1
41 U.S.C. § 423(e)	2B1.1, 2C1.1
41 U.S.C. § 2102	2B1.1, 2C1.1
41 U.S.C. § 2105	2B1.1, 2C1.1
41 U.S.C. § 8702	2B4.1
41 U.S.C. § 8707	2B4.1

EXHIBIT B

PROPOSED AMENDMENT: MULTIPLE COUNTS (§5G1.2)

Synopsis of Proposed Amendment: *This proposed amendment responds to an application issue regarding the applicable guideline range in a case in which the defendant is sentenced on multiple counts of conviction, at least one of which involves a mandatory minimum sentence that is greater than the minimum of the otherwise applicable guideline range. There are differences among the circuits on this issue.*

The issue arises under §5G1.2 (Sentencing on Multiple Counts of Conviction) when at least one count in a multiple-count case involves a mandatory minimum sentence that affects the otherwise applicable guideline range. In such cases, circuits differ over whether the guideline range is affected only for the count involving the mandatory minimum or for all counts in the case. The cases indicate that there may also be an ancillary application issue over how the "total punishment" is to be determined and imposed under §5G1.1(b).

The Fifth Circuit has held that, in such a case, the effect on the guideline range applies to all counts in the case. See United States v. Salter, 241 F.3d 392, 395-96 (5th Cir. 2001). In that case, the guideline range on the Sentencing Table was 87 to 108 months, but one of the three counts carried a mandatory minimum sentence of 10 years (120 months), which resulted in a guideline sentence of 120 months. The Fifth Circuit instructed the district court that the appropriate guideline sentence was 120 months on each of the three counts.

The Ninth Circuit took a different approach in United States v. Evans-Martinez, 611 F.3d 635 (9th Cir. 2010), holding that, in such a case, "a mandatory minimum count becomes the starting point for any count that carries a mandatory minimum sentence higher than what would otherwise be the Guidelines sentencing range," but "[a]ll other counts . . . are sentenced based on the Guidelines sentencing range, regardless of the mandatory minimum sentences that apply to other counts." See id. at 637. The Ninth Circuit stated that it would be more "logical" to follow the Fifth Circuit's approach but "such logic is overcome by the precise language of the Sentencing Guidelines". See id.

The District of Columbia Circuit appears to follow an approach similar to the Ninth Circuit. See United States v. Kennedy, 133 F.3d 53, 60-61 (D.C. Cir. 1998) (one of two counts carried a mandatory sentence of life imprisonment; district court treated life imprisonment as the guidelines sentence for both counts; Court of Appeals reversed, holding that the appropriate guidelines range for the other count was 262 to 327 months).

The proposed amendment adopts the approach followed by the Fifth Circuit and makes three changes to §5G1.2.

First, it amends §5G1.2(b) to clarify that the court is to determine the total punishment (i.e., the combined length of the sentences to be imposed) and impose that total punishment on each count, except to the extent otherwise required by law.

Second, it amends the Commentary to clarify that the defendant's guideline range in a multiple-count case may be restricted by a mandatory minimum penalty or statutory maximum penalty in a manner similar to how the guideline range in a single-count case may be restricted by a minimum or maximum penalty under §5G1.1 (Sentencing on a Single Count of Conviction). Specifically, it clarifies that when any count involves a mandatory minimum that restricts the defendant's guideline range, the guideline range is restricted as to all counts. It also provides examples of how these restrictions operate.

Third, it amends the commentary to clarify that in a case in which a defendant's guideline range was affected or restricted by a mandatory minimum penalty, the court is resentencing the defendant, and the mandatory minimum sentence no longer applies, the court shall redetermine the defendant's guideline range for purposes of the remaining counts without regard to the mandatory minimum penalty.

[Note that the proposed amendment includes the text of both §5G1.1 and §5G1.2. The proposed amendment affects §5G1.2 only, but it presents §5G1.1 as well for ease of reference.]

Proposed Amendment:

§5G1.1. Sentencing on a Single Count of Conviction

- (a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.
- (b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.
- (c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence --
 - (1) is not greater than the statutorily authorized maximum sentence, and
 - (2) is not less than any statutorily required minimum sentence.

Commentary

This section describes how the statutorily authorized maximum sentence, or a statutorily required minimum sentence, may affect the determination of a sentence under the guidelines. For example, if the applicable guideline range is 51-63 months and the maximum sentence authorized by statute for the offense of conviction is 48 months, the sentence required by the guidelines under subsection (a) is 48 months; a sentence of less than 48 months would be a guideline departure. If the applicable guideline range is 41-51 months and there is a statutorily required minimum sentence of 60 months, the sentence required by the guidelines under subsection (b) is 60 months; a sentence of more than 60 months would be a guideline departure. If the applicable guideline range is 51-63 months and the maximum sentence authorized by statute for the offense of conviction is 60 months, the guideline range is restricted to 51-60 months under subsection (c).

§5G1.2. Sentencing on Multiple Counts of Conviction

- (a) Except as provided in subsection (e), the sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.
- (b) ~~Except as otherwise required by law (see §5G1.1(a), (b)), the sentence imposed~~

~~on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.~~ For all counts not covered by subsection (a), the court shall determine the total punishment (i.e., the combined length of the sentences to be imposed) and shall impose that total punishment on each such count, except to the extent otherwise required by law.

- (c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.
- (d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.
- (e) In a case in which subsection (c) of §4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the sentence to be imposed on the 18 U.S.C. § 924(c) or § 929(a) count shall be imposed to run consecutively to any other count.

Commentary

Application Notes:

1. *In General.*—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ("total punishment") is determined by the court after determining the adjusted combined offense level and the Criminal History Category; and determining the defendant's guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table).

Note that the defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, see §5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. See Note 3, below.

Except as otherwise required by subsection (e) or any other law, the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.

This section applies to multiple counts of conviction (A) contained in the same indictment or information, or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts

will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence. If no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment.

2. Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Subsection (e)).—

- (A) In General.—Subsection (a) applies if a statute (i) specifies a term of imprisonment to be imposed; and (ii) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.,* 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment) and 18 U.S.C. § 1028A (requiring a mandatory term of imprisonment of either two or five years, based on the conduct involved, and also requiring, except in the circumstances described in subdivision (B), the sentence imposed to run consecutively to any other term of imprisonment). Except for certain career offender situations in which subsection (c) of §4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is the minimum required by the statute of conviction and is independent of the guideline sentence on any other count. *See, e.g.,* the Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding the determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. *See, e.g.,* Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.
- (B) Multiple Convictions Under 18 U.S.C. § 1028A.—Section 1028A of title 18, United States Code, generally requires that the mandatory term of imprisonment for a violation of such section be imposed consecutively to any other term of imprisonment. However, 18 U.S.C. § 1028A(b)(4) permits the court, in its discretion, to impose the mandatory term of imprisonment on a defendant for a violation of such section "concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission. . .".

In determining whether multiple counts of 18 U.S.C. § 1028A should run concurrently with, or consecutively to, each other, the court should consider the following non-exhaustive list of factors:

- (i) *The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S.C. § 1028A in a case in which an underlying offense for one of the 18 U.S.C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. § 2332b(g)(5)(B).*
- (ii) *Whether the underlying offenses are groupable under §3D1.2 (Groups of Closely Related Counts). Generally, multiple counts of 18 U.S.C. § 1028A should run concurrently with one another in cases in which the underlying offenses are*

groupable under §3D1.2.

(iii) Whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by imposing a concurrent or a consecutive sentence for multiple counts of 18 U.S.C. § 1028A.

(C) Imposition of Supervised Release.—In the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e).

3. Application of Subsection (b).—

(A) In General.—Subsection (b) provides that, for all counts not covered by subsection (a), the court shall determine the total punishment (i.e., the combined length of the sentences to be imposed) and shall impose that total punishment on each such count, except to the extent otherwise required by law (such as where a statutorily required minimum sentence or a statutorily authorized maximum sentence otherwise requires).

(B) Effect on Guidelines Range of Mandatory Minimum or Statutory Maximum.—The defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, see §5G1.1, but also in a multiple-count case.

In particular, where a statutorily required minimum sentence on any count is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence on that count shall be the guideline sentence on all counts. See §5G1.1(b). Similarly, where a statutorily required minimum sentence on any count is greater than the minimum of the applicable guideline range, the guideline range for all counts is restricted by that statutorily required minimum sentence. See §5G1.1(c)(2) and accompanying Commentary.

However, where a statutorily authorized maximum sentence on a particular count is less than the minimum of the applicable guideline range, the sentence imposed on that count shall not be greater than the statutorily authorized maximum sentence on that count. See §5G1.1(a).

(C) Examples.—The following examples illustrate how subsection (b) applies, and how the restrictions in subparagraph (B) operate, when a statutorily required minimum sentence is involved.

Defendant A and Defendant B are each convicted of the same four counts. Counts 1, 3, and 4 have statutory maximums of 10 years, 20 years, and 2 years, respectively. Count 2 has a statutory maximum of 30 years and a mandatory minimum of 10 years.

For Defendant A, the court determines that the final offense level is 19 and the defendant is in Criminal History Category I, which yields a guideline range on the Sentencing Table of 30 to 37 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant A's guideline sentence is 120 months. See subparagraph (B), above. After considering that guideline sentence, the court determines that the appropriate "total punishment" to be imposed on Defendant A is 120 months. Therefore, subsection (b)

requires that the total punishment of 120 months be imposed on each of Counts 1, 2, and 3. The sentence imposed on Count 4 is limited to 24 months, because a statutory maximum of 2 years applies to that particular count.

For Defendant B, in contrast, the court determines that the final offense level is 30 and the defendant is in Criminal History Category II, which yields a guideline range on the Sentencing Table of 108 to 135 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant B's guideline range is restricted to 120 to 135 months. See subparagraph (B), above. After considering that restricted guideline range, the court determines that the appropriate "total punishment" to be imposed on Defendant B is 130 months. Therefore, subsection (b) requires that the total punishment of 130 months be imposed on each of Counts 2 and 3. The sentences imposed on Counts 1 and 4 are limited to 120 months (10 years) and 24 months (2 years), respectively, because of the applicable statutory maximums.

- (D) Special Rule on Resentencing.—In a case in which (i) the defendant's guideline range on the Sentencing Table was affected or restricted by a statutorily required minimum sentence (as described in subparagraph (B)), (ii) the court is resentencing the defendant, and (iii) the statutorily required minimum sentence no longer applies, the defendant's guideline range for purposes of the remaining counts shall be redetermined without regard to the previous effect or restriction of the statutorily required minimum sentence.

34. Career Offenders Covered under Subsection (e).—

- (A) Imposing Sentence.—The sentence imposed for a conviction under 18 U.S.C. § 924(c) or § 929(a) shall, under that statute, consist of a minimum term of imprisonment imposed to run consecutively to the sentence on any other count. Subsection (e) requires that the total punishment determined under §4B1.1(c) be apportioned among all the counts of conviction. In most cases this can be achieved by imposing the statutory minimum term of imprisonment on the 18 U.S.C. § 924(c) or § 929(a) count, subtracting that minimum term of imprisonment from the total punishment determined under §4B1.1(c), and then imposing the balance of the total punishment on the other counts of conviction. In some cases covered by subsection (e), a consecutive term of imprisonment longer than the minimum required by 18 U.S.C. § 924(c) or § 929(a) will be necessary in order both to achieve the total punishment determined by the court and to comply with the applicable statutory requirements.
- (B) Examples.—The following examples illustrate the application of subsection (e) in a multiple count situation:
- (i) The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 300 months is appropriate (applicable guideline range of 262-327). The court then imposes a sentence of 60 months on the 18 U.S.C. § 924(c) count, subtracts that 60 months from the total punishment of 300 months and imposes the remainder of 240 months on the 21 U.S.C. § 841 count. As required by statute, the sentence on the 18 U.S.C. § 924(c) count is imposed to run consecutively.

- (ii) *The defendant is convicted of one count of 18 U.S.C. § 924(c) (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 327 months is appropriate (applicable guideline range of 262-327). The court then imposes a sentence of 240 months on the 21 U.S.C. § 841 count and a sentence of 87 months on the 18 U.S.C. § 924(c) count to run consecutively to the sentence on the 21 U.S.C. § 841 count.*
- (iii) *The defendant is convicted of two counts of 18 U.S.C. § 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. § 113(a)(3) (10 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 460 months is appropriate (applicable guideline range of 460-485 months). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of 100 months on the 18 U.S.C. § 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.*

EXHIBIT C

PROPOSED AMENDMENT: DRIVING WHILE INTOXICATED

Synopsis of Proposed Amendment: *This proposed amendment responds to an application issue regarding when a defendant's prior sentence for driving while intoxicated or driving under the influence (and similar offenses by whatever name they are known) is counted toward the defendant's criminal history score. There appear to be differences among the circuits on this issue.*

The issue does not occur when the prior sentence is a felony, because "[s]entences for all felony offenses are counted." See subsection (c) of §4A1.2 (Definitions and Instructions for Computing Criminal History). However, when the prior sentence is a misdemeanor or petty offense, circuits have taken different approaches.

When the prior sentence is a misdemeanor or petty offense, §4A1.2(c) specifies that the offense is counted, but with two exceptions, which are limited to cases in which the prior offense is on (or similar to an offense that is on) either of two lists. On the first list are offenses from "careless or reckless driving" to "trespassing," and the exception applies if the prior offense is on (or similar to an offense that is on) the list. In such a case, the sentence is counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense. See §4A1.2(c)(1). On the second list are offenses from "fish and game violations" to "vagrancy," and the exception applies to any offense that is on (or similar to an offense that is on) the list. In such a case, the sentence is never counted. See §4A1.2(c)(2).

Several circuits have held that a sentence for driving while intoxicated — whether a felony, misdemeanor, or petty offense — is always counted toward the criminal history score, without exception, even if the offense met the criteria for either of the two lists. These circuits rely on Application Note 5 to §4A1.2, which provides:

Sentences for Driving While Intoxicated or Under the Influence.—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are counted. Such offenses are not minor traffic infractions within the meaning of §4A1.2(c).

*The Seventh Circuit has read Application Note 5 as "reflect[ing] the Sentencing Commission's conclusion 'that driving while intoxicated offenses are of sufficient gravity to merit inclusion in the defendant's criminal history, however they might be classified under state law.'" United States v. LeBlanc, 45 F.3d 192, 195 (7th Cir. 1995) (quoting United States v. Jakobetz, 955 F.2d 786, 806 (2d Cir. 1992)). Thus, the Seventh Circuit has held, a sentence for driving while intoxicated is always counted, without exception. For example, such a sentence is counted even though it may otherwise qualify for a second-list exception, see LeBlanc, *supra*, 45 F.3d at 194-95 (sentence counts even though it was a local ordinance violation that was not also a violation under state criminal law).*

The Eighth Circuit has also relied on Application Note 5 to hold that a sentence for driving while intoxicated is always counted, without exception. See United States v. Pando, 545 F.3d 682 (8th Cir. 2008) (Colorado misdemeanor for driving a vehicle when a person has consumed alcohol or one or more other drugs which "affects the person to the slightest degree so that the person is less able than the person ordinarily would have been" to operate a vehicle was "similar" to driving while intoxicated or under the influence, and therefore automatically counted, without regard to the exceptions in §4A1.2(c)(1) and (2)).

The Second Circuit took a different approach in *United States v. Potes-Castillo*, 638 F.3d 106 (2d Cir. 2011). In that case, the Second Circuit held Application Note 5 to be ambiguous and could be read either (1) to "mean that, like felonies, driving while ability impaired sentences are always counted, without possibility of exception" or (2) "as setting forth the direction that driving while ability impaired sentences must not be treated as minor traffic infractions or local ordinance violations and excluded under section 4A1.2(c)(2)." *Id.* at 110-11. The Second Circuit adopted the second reading and, accordingly, held that a prior sentence for driving while ability impaired "should be treated like any other misdemeanor or petty offense, except that they cannot be exempted under section 4A1.2(c)(2)." *Id.* at 113. Accordingly, such a sentence can qualify for an exception under the first list (e.g., if it was similar to "careless or reckless driving" and the other criteria for a first-list exception were met).

The proposed amendment responds to the application issue by amending Application Note 5 consistent with the approaches of the Seventh and Eighth Circuits. Specifically, it amends Application Note 5 to clarify that such a sentence is always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply.

Proposed Amendment:

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

(a) Prior Sentence

- (1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.
- (2) 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.

- (3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).
- (4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense

set forth in §4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.

"Convicted of an offense," for the purposes of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

(b) Sentence of Imprisonment Defined

- (1) The term "sentence of imprisonment" means a sentence of incarceration and refers to the maximum sentence imposed.
- (2) If part of a sentence of imprisonment was suspended, "sentence of imprisonment" refers only to the portion that was not suspended.

(c) Sentences Counted and Excluded

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

- (1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

- Careless or reckless driving
- Contempt of court
- Disorderly conduct or disturbing the peace
- Driving without a license or with a revoked or suspended license
- False information to a police officer
- Gambling
- Hindering or failure to obey a police officer
- Insufficient funds check
- Leaving the scene of an accident
- Non-support
- Prostitution
- Resisting arrest
- Trespassing.

- (2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

- Fish and game violations
- Hitchhiking
- Juvenile status offenses and truancy
- Local ordinance violations (except those violations that are also violations under state criminal law)
- Loitering
- Minor traffic infractions (e.g., speeding)
- Public intoxication

Vagrancy.

(d) **Offenses Committed Prior to Age Eighteen**

- (1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add **3** points under §4A1.1(a) for each such sentence.
- (2) In any other case,
 - (A) add **2** points under §4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;
 - (B) add **1** point under §4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).

(e) **Applicable Time Period**

- (1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.
- (2) Any other prior sentence that was imposed within ten years of the defendant's commencement of the instant offense is counted.
- (3) Any prior sentence not within the time periods specified above is not counted.
- (4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by §4A1.2(d)(2).

(f) **Diversions Dispositions**

Diversion from the judicial process without a finding of guilt (*e.g.*, deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

(g) **Military Sentences**

Sentences resulting from military offenses are counted if imposed by a general or special court martial. Sentences imposed by a summary court martial or Article 15 proceeding are not counted.

(h) Foreign Sentences

Sentences resulting from foreign convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

(i) Tribal Court Sentences

Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

(j) Expunged Convictions

Sentences for expunged convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

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

(1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.

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

(l) Sentences on Appeal

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and (e) shall apply as if the execution of such sentence had not been stayed.

(m) Effect of a Violation Warrant

For the purposes of §4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) **Failure to Report for Service of Sentence of Imprisonment**

For the purposes of §4A1.1(d), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

(o) **Felony Offense**

For the purposes of §4A1.2(c), a "felony offense" means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed.

(p) **Crime of Violence Defined**

For the purposes of §4A1.1(e), the definition of "crime of violence" is that set forth in §4B1.2(a).

Commentary

Application Notes:

1. *Prior Sentence.—"Prior sentence" means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. See §4A1.2(a). A sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense. Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct).*

Under §4A1.2(a)(4), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.1(c) if a sentence resulting from such conviction otherwise would have been counted. In the case of an offense set forth in §4A1.2(c)(1) (which lists certain misdemeanor and petty offenses), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.2(a)(4) only where the offense is similar to the instant offense (because sentences for other offenses set forth in §4A1.2(c)(1) are counted only if they are of a specified type and length).

2. *Sentence of Imprisonment.—To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time). See §4A1.2(a)(3) and (b)(2). For the purposes of applying §4A1.1(a), (b), or (c), the length of a sentence of imprisonment is the stated maximum (e.g., in the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant's twenty-first birthday, the stated maximum is the amount of time in pre-trial detention plus the amount of time between the date of sentence and the defendant's twenty-first birthday). That is, criminal history points are based on the sentence pronounced, not the length of time actually served. See §4A1.2(b)(1) and (2). A sentence of probation is to be treated as a sentence under §4A1.1(c) unless a condition of probation requiring imprisonment of at least sixty days was imposed.*

3. *Upward Departure Provision.—Counting multiple prior sentences as a single sentence may result*

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

4. *Sentences Imposed in the Alternative.*—A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (e.g., \$1,000 fine or ninety days' imprisonment) is treated as a non-imprisonment sentence.
5. *Sentences for Driving While Intoxicated or Under the Influence.*—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply. Such offenses are not minor traffic infractions within the meaning of §4A1.2(c).
6. *Reversed, Vacated, or Invalidated Convictions.*—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (e.g., 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions). Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Adequacy of Criminal History Category).
7. *Offenses Committed Prior to Age Eighteen.*—Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a "juvenile," this provision applies to all offenses committed prior to age eighteen.
8. *Applicable Time Period.*—Section 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term "commencement of the instant offense" includes any relevant conduct. See §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category).
9. *Diversionary Dispositions.*—Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.

10. Convictions Set Aside or Defendant Pardoned.—A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).
11. Revocations to be Considered.—Section 4A1.2(k) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

Where a revocation applies to multiple sentences, and such sentences are counted separately under §4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. *Example:* A defendant was serving two probationary sentences, each counted separately under §4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a "straight" probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under §4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under §4A1.1(c) (for the other probationary sentence).

12. Application of Subsection (c).—

- (A) In General.—In determining whether an unlisted offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.
- (B) Local Ordinance Violations.— A number of local jurisdictions have enacted ordinances covering certain offenses (*e.g.*, larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (*e.g.*, a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.
- (C) Insufficient Funds Check.—"Insufficient funds check," as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.

Background: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

EXHIBIT D

PROPOSED AMENDMENT: "SENTENCE IMPOSED" IN §2L1.2

Synopsis of Proposed Amendment: *This proposed amendment responds to a circuit conflict over application of the term "sentenced imposed" in §2L1.2 (Unlawfully Entering or Remaining in the United States) when the defendant's original "sentence imposed" was lengthened after the defendant was deported.*

Section 2L1.2(b)(1) provides an enhancement if the defendant previously was deported, or unlawfully remained in the United States, after a conviction for a felony drug trafficking offense. The level of the enhancement depends on the "sentence imposed" for the felony drug trafficking offense. Specifically:

- (1) if the "sentence imposed" exceeded 13 months, the enhancement is 16 or 12 levels, depending on whether the conviction receives criminal history points. See §2L1.2(b)(1)(A); and*
- (2) if the "sentence imposed" was 13 months or less, the enhancement is 12 or 8 levels, depending on whether the conviction receives criminal history points. See §2L1.2(b)(1)(B).*

The term "sentence imposed" is defined in Application Note 1(B)(vii) as follows:

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

The conflict arises when the defendant was sentenced on two or more different occasions for the same drug trafficking conviction (e.g., because of a revocation of supervision), such that there was a sentence imposed before the defendant's deportation and an additional sentence imposed thereafter (e.g., after revocation of supervision).

The Fifth, Seventh, Tenth, and Eleventh Circuits have held that, in such a case, the later, additional sentence is not included for purposes of the enhancement in §2L1.2(b)(1). See United States v. Bustillos-Pena, 612 F.3d 863 (5th Cir. 2010); United States v. Lopez, 634 F.3d 948 (7th Cir. 2011); United States v. Rosales-Garcia, 667 F.3d 1348 (10th Cir. 2012); United States v. Guzman-Bera, 216 F.3d 1019 (11th Cir. 2000). These cases generally reason that there is a "temporal restriction" inherent in the enhancement and conclude that the "sentence imposed" is determined as of when the defendant was deported or unlawfully remained in the United States. See, e.g., Lopez, 634 F.3d at 950.

The Second Circuit has held otherwise, concluding that the later, additional sentence is included. See United States v. Compres-Paulino, 393 F.3d 116 (2d Cir. 2004). According to the Second Circuit, the enhancement requires only that the conviction have occurred, not that the sentence also be imposed, as of when the defendant was deported or unlawfully remained in the United States. For the Second Circuit, any "amended sentence, whenever imposed, relates back to this conviction" and is covered by the enhancement. See id. at 118.

The proposed amendment resolves the conflict by generally following the approach taken by the Fifth,

Seventh, and Eleventh Circuits. It amends the definition of "sentence imposed" in Application Note I(B)(vii) to specify that a post-revocation additional sentence is included, "but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States".

Proposed Amendment:

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristic

(1) Apply the Greatest:

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

- (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels if the conviction receives criminal history points under Chapter Four or by **12** levels if the conviction does not receive criminal history points;
- (B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels if the conviction receives criminal history points under Chapter Four or by **8** levels if the conviction does not receive criminal history points;
- (C) a conviction for an aggravated felony, increase by **8** levels;
- (D) a conviction for any other felony, increase by **4** levels; or
- (E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

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

Application Notes:

1. Application of Subsection (b)(1).—

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

- (i) *A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.*
 - (ii) *A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.*
 - (iii) *A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.*
 - (iv) *Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*
- (B) Definitions.—*For purposes of subsection (b)(1):*
- (i) *"Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).*
 - (ii) *"Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
 - (iii) *"Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.*
 - (iv) *"Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.*
 - (v) *"Firearms offense" means any of the following:*
 - (I) *An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).*

- (II) *An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).*
 - (III) *A violation of 18 U.S.C. § 844(h).*
 - (IV) *A violation of 18 U.S.C. § 924(c).*
 - (V) *A violation of 18 U.S.C. § 929(a).*
 - (VI) *An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
- (vi) *"Human trafficking offense" means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*
 - (vii) *"Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.*
 - (viii) *"Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).*
- (C) *Prior Convictions.—In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.*
2. *Definition of "Felony".—For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.*
3. *Application of Subsection (b)(1)(C).—*
- (A) *Definitions.—For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.*
 - (B) *In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).*

4. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):
 - (A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.
 - (B) "Three or more convictions" means at least three convictions for offenses that are not counted as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).
5. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.
6. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).
7. Departure Based on Seriousness of a Prior Conviction.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which the 12-level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.
8. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

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

EXHIBIT E

PROPOSED AMENDMENT: REHABILITATION

Synopsis of Proposed Amendment: *This proposed amendment responds to Pepper v. United States, 131 S.Ct. 1229 (2011), which held, among other things, that a defendant's post-sentencing rehabilitative efforts may be considered when the defendant is resentenced after appeal. See id. at 1236 (holding that "when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation and that such evidence may, in appropriate cases, support a downward variance from the now-advisory Federal Sentencing Guidelines.").*

The policy statement in the guidelines on post-sentencing rehabilitation is §5K2.19 (Post-Sentencing Rehabilitative Efforts). The proposed amendment repeals §5K2.19.

Proposed Amendment:

~~§5K2.19. — Post-Sentencing Rehabilitative Efforts (Policy Statement)~~

~~————— Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. § 3583(e)(1).)~~

~~————— Commentary~~

~~Background: *The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resentenced de novo.*~~

EXHIBIT F

PROPOSED AMENDMENT: SAFETY VALVE IN §2D1.11

Synopsis of Proposed Amendment: *This proposed amendment creates a "safety valve" provision in the guideline for chemical precursors, §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), that parallels the "safety valve" provision in the drug guideline, §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).*

The proposed amendment adds a new specific offense characteristic at §2D1.11(b)(6) and a corresponding new application note. Under the proposed amendment, certain first-time, nonviolent offenders sentenced under the chemical precursor guideline, §2D1.11, would be eligible to receive the same 2-level "safety valve" reduction (and using the same five "safety valve" criteria) as such offenders are eligible to receive under §2D1.1.

Proposed Amendment:

§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy

- (a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate, except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (d) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.
- (b) Specific Offense Characteristics
 - (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
 - (2) If the defendant is convicted of violating 21 U.S.C. § 841(c)(2) or (f)(1), or § 960(d)(2), (d)(3), or (d)(4), decrease by **3** levels, unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.
 - (3) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.
 - (4) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a listed chemical through mass-marketing by means of an interactive computer service, increase by **2** levels.
 - (5) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
 - (6) If the defendant meets the criteria set forth in subdivisions (1)-(5) of

subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

(c) Cross Reference

- (1) If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(c)(1), (2), (f)(1), 865, 960(d)(1), (2), (3), (4).

Application Notes:

* * *

8. Imposition of Consecutive Sentence for 21 U.S.C. § 865.—Section 865 of title 21, United States Code, requires the imposition of a mandatory consecutive term of imprisonment of not more than 15 years. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and, on the judgment form, divide the sentence between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 865. For example, if the applicable adjusted guideline range is 151-188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.
9. Applicability of Subsection (b)(6).—The applicability of subsection (b)(6) shall be determined without regard to the offense of conviction. If subsection (b)(6) applies, §5C1.2(b) does not apply. See §5C1.2(b)(2)(requiring a minimum offense level of level 17 if the "statutorily required minimum sentence is at least five years").

Background: Offenses covered by this guideline involve list I chemicals (including ephedrine, pseudoephedrine, and phenylpropanolamine) and list II chemicals. List I chemicals are important to the manufacture of a controlled substance and usually become part of the final product. For example, ephedrine reacts with other chemicals to form methamphetamine. The amount of ephedrine directly affects the amount of methamphetamine produced. List II chemicals are generally used as solvents, catalysts, and reagents.

EXHIBIT G

PROPOSED AMENDMENT: BZP

Synopsis of Proposed Amendment: *This proposed amendment provides a specific reference for N-Benzylpiperazine (BZP) in the Drug Equivalency Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).*

Specifically, it provides a marijuana equivalency for BZP equal to one-twentieth of the marijuana equivalency for amphetamine, i.e., 1 gm BZP = 100 gm marijuana.

Proposed Amendment:

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

* * *

Commentary

* * *

Application Notes:

* * *

10. Use of Drug Equivalency Tables.—

* * *

(D) Drug Equivalency Tables.—

* * *

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

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylamine =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana
1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P ₂ P (in any other case) =	75 gm of marihuana
1 gm Cocaine Base ('Crack') =	3,571 gm of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana

1 gm of N-Benzylpiperazine =

100 gm of marihuana

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

EXHIBIT H

PROPOSED AMENDMENT: HUMAN RIGHTS

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission's multi-year review to ensure that the guidelines provide appropriate guidelines penalties for cases involving human rights violations.*

Convictions for Serious Human Rights Offenses

First, the proposed amendment addresses cases in which the defendant is convicted of an offense that Congress has indicated is a "serious human rights offense," *i.e.*, an offense under 18 U.S.C. §§ 1091 (Genocide), 2340A (Torture), 2441 (War crimes), and 2442 (Recruitment or use of child soldiers). *See* 28 U.S.C. § 509B(e). Such offenses are currently accounted for in the guidelines as follows:

- (1) Genocide. Section 1091 offenses apply to a range of conduct committed "with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group". *See* 18 U.S.C. § 1091(a). The range of conduct includes (i) killing members of the group; (ii) causing serious bodily injury to members of the group; (iii) causing permanent impairment of the mental faculties of members of the group (*e.g.*, by drugs or torture); (iv) subjecting the group to conditions of life that are intended to cause the physical destruction of the group; (v) imposing measures intended to prevent births within the group; and (vi) transferring by force children of the group to another group. *Id.* The statutory maximum term of imprisonment is 20 years, or life imprisonment if the conduct involved killing and death resulted. *See* 18 U.S.C. § 1091(b).

Incitement to Genocide. In addition, section 1091(c) makes it a crime to "directly and publicly incite[] another" to violate section 1091(a); the statutory maximum term of imprisonment for this offense is 5 years. *See* 18 U.S.C. § 1091(c). Section 1091 offenses are referenced in Appendix A (Statutory Index) to §2H1.1 (Civil Rights).

- (2) Torture. Section 2340A offenses apply to whoever commits or attempts to commit torture (as defined in 18 U.S.C. § 2340). The statutory maximum term of imprisonment is 20 years, or any term of years or life if death resulted. *See* 18 U.S.C. § 2340A(a). Section 2340A offenses are referenced in Appendix A to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault), and 2A4.1 (Kidnapping, Abduction, Unlawful Restraint).
- (3) War Crimes. Section 2441 offenses apply to a range of conduct that constitute a war crime (as defined in 18 U.S.C. § 2441(c)). The range of conduct includes (i) torture; (ii) cruel or inhuman treatment; (iii) performing biological experiments; (iv) murder; (v) mutilation or maiming; (vi) intentionally causing serious bodily injury; (vii) rape; (viii) sexual assault or abuse; and (ix) taking hostages. The statutory maximum term of imprisonment is any term of years or life. *See* 18 U.S.C. § 2441(a). Section 2441 offenses are not referenced in Appendix A.
- (4) Child Soldiers. Section 2442 offenses apply to whoever knowingly (1) recruits, enlists, or conscripts a child (*i.e.*, a person under 15 years of age) to serve in an armed force or group or (2) uses a child to participate actively in hostilities. *See* 18 U.S.C. § 2442(a). The statutory maximum term of imprisonment is 20 years, or any term of years or life if death resulted. *See* 18 U.S.C. § 2442(b). Section 2442 offenses are referenced in Appendix A to §2H4.1 (Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers).

The proposed amendment establishes a new Chapter Three adjustment, at §3A1.5 (Serious Human Rights Offense), that applies if the defendant was convicted of a serious human rights offense. The new guideline provides two tiers of adjustments. If the defendant was convicted of an offense under 18 U.S.C. § 1091(c), it provides an increase of 2 levels. However, if the defendant was convicted of any other serious human rights offense, it provides an increase of 4 levels, and in such a case it further provides a minimum offense level of 37 if death resulted.

The proposed amendment also amends Appendix A (Statutory Index) to reference war crimes (*i.e.*, offenses under 18 U.S.C. § 2441) to §2X5.1 (Other Felony Offenses).

Immigration and Naturalization Offenses Involving Serious Human Rights Offenses

Second, the proposed amendment addresses cases in which the offense of conviction is for immigration or naturalization fraud but the defendant committed any part of the instant offense to conceal the defendant's involvement, or possible involvement, in a serious human rights offense.

The proposed amendment adds a new specific offense characteristic to §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). The new specific offense characteristic contains two prongs. Prong (A) applies if the defendant committed any part of the instant offense to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense during the period in which the defendant was such a member or had such authority, and provides an enhancement of 2 levels and a minimum offense level of 13. Prong (B) applies if the defendant committed any part of the instant offense to conceal the defendant's participation in a serious human rights offense, and provides an enhancement of 6 levels (if the offense was incitement to genocide) or 10 levels (if the offense was any other serious human rights offense). Prong (B) also provides a minimum offense level of 25 if the 10-level enhancement applies.

Proposed Amendment:

(A) Human Rights Offenses

§3A1.5. Serious Human Rights Offense

If the defendant was convicted of a serious human rights offense, increase the offense level as follows:

- (a) If the defendant was convicted of an offense under 18 U.S.C. § 1091(c), increase by 2 levels.
- (b) If the defendant was convicted of any other serious human rights offense, increase by 4 levels. If (1) death resulted, and (2) the resulting offense level is less than level 37, increase to level 37.

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, "serious human rights offense" means violations of

federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code. See 28 U.S.C. § 509B(e).

2. *Application of Minimum Offense Level in Subsection (b).—The minimum offense level in subsection (b) is cumulative with any other provision in the guidelines. For example, if death resulted and this factor was specifically incorporated into the Chapter Two offense guideline, the minimum offense level in subsection (b) may also apply.*

Background: This guideline covers a range of conduct considered to be serious human rights offenses, including genocide, war crimes, torture, and the recruitment or use of child soldiers. See generally 28 U.S.C. § 509B(e).

Serious human rights offenses generally have a statutory maximum term of imprisonment of 20 years, but if death resulted, a higher statutory maximum term of imprisonment of any term of years or life applies. See 18 U.S.C. §§ 1091(b), 2340A(a), 2442(b). For the offense of war crimes, a statutory maximum term of imprisonment of any term of years or life always applies. See 18 U.S.C. § 2441(a). For the offense of incitement to genocide, the statutory maximum term of imprisonment is five years. See 18 U.S.C. § 1091(c).

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APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 2425 2G1.3

18 U.S.C. § 2441 2X5.1

(B) Immigration and Naturalization Offenses Involving Serious Human Rights Offenses

§2L2.2. Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by **2** levels.

(2) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.

- (3) If the defendant fraudulently obtained or used (A) a United States passport, increase by 4 levels; or (B) a foreign passport, increase by 2 levels.
- (4) (Apply the Greater):
 - (A) If the defendant committed any part of the instant offense to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense during the period in which the defendant was such a member or had such authority, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.
 - (B) If the defendant committed any part of the instant offense to conceal the defendant's participation in (i) the offense of incitement to genocide, increase by 6 levels; or (ii) any other serious human rights offense, increase by 10 levels. If clause (ii) applies and the resulting offense level is less than level 25, increase to level 25.

(c) Cross Reference

- (1) If the defendant used a passport or visa in the commission or attempted commission of a felony offense, other than an offense involving violation of the immigration laws, apply --
 - (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above; or
 - (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (5), 1325(c), (d); 18 U.S.C. §§ 911, 1015, 1028, 1423-1426, 1542-1544, 1546.

Application Notes:

1. Definition.—For purposes of this guideline, "immigration and naturalization offense" means any offense covered by Chapter Two, Part L.
2. Application of Subsection (b)(2).— Prior felony conviction(s) resulting in an adjustment under subsection (b)(2) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).
3. Application of Subsection (b)(3).—The term "used" is to be construed broadly and includes the

attempted renewal of previously-issued passports.

4. Application of Subsection (b)(4).—*For purposes of subsection (b)(4):*

"Serious human rights offense" means (A) violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code, see 28 U.S.C. § 509B(e); and (B) conduct that would have been a violation of any such law if the offense had occurred within the jurisdiction of the United States or if the defendant or the victim had been a national of the United States.

"The offense of incitement to genocide" means (A) violations of 18 U.S.C. § 1091(c); and (B) conduct that would have been a violation of such section if the offense had occurred within the jurisdiction of the United States or if the defendant or the victim had been a national of the United States.

45. Multiple Counts.—*For the purposes of Chapter Three, Part D (Multiple Counts), a count of conviction for unlawfully entering or remaining in the United States covered by §2L1.2 (Unlawfully Entering or Remaining in the United States) arising from the same course of conduct as the count of conviction covered by this guideline shall be considered a closely related count to the count of conviction covered by this guideline, and therefore is to be grouped with the count of conviction covered by this guideline.*

56. Upward Departure Provision.—*If the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity, an upward departure may be warranted. See Application Note 4 of the Commentary to §3A1.4 (Terrorism).*

* * *

EXHIBIT I

PROPOSED AMENDMENT: DODD-FRANK/FRAUD

Synopsis of Proposed Amendment: *This proposed amendment responds to the two directives to the Commission in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203 (the "Act"). The first directive relates to securities fraud and similar offenses, and the second directive relates to mortgage fraud and financial institution fraud.*

Each directive requires the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to the offenses covered by the directive and consider whether the guidelines appropriately account for the potential and actual harm to the public and the financial markets from those offenses. Each directive also requires the Commission to ensure that the guidelines reflect (i) the serious nature of the offenses, (ii) the need for deterrence, punishment, and prevention, and (iii) the effectiveness of incarceration in furthering those objectives.

Securities Fraud and Similar Offenses

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

- (i) ensure that the guidelines and policy statements, particularly section 2B1.1(b)(14) and section 2B1.1(b)(17) (and any successors thereto), reflect—
 - (I) the serious nature of the offenses described in subparagraph (A);*
 - (II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and*
 - (III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);**
- (ii) consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;*
- (iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;*
- (iv) make any necessary conforming changes to guidelines; and*
- (v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.*

The proposed amendment responds to this directive in two ways.

First, the proposed amendment amends the fraud guideline, §2B1.1 (Theft, Property Destruction, and Fraud), to provide a special rule for determining loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. The proposed amendment establishes a new Application Note 3(F)(ix) that directs the court to apply a method (based on what is known as the

"modified rescissory method") in determining the actual loss attributable to the change in value of the security or commodity. Specifically, the court is to (I) "calculat[e] the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market," and (II) "multiply[] the difference in average price by the number of shares outstanding."

Under the new Application Note 3(F)(ix), there shall be a rebuttable presumption that the amount so determined is the actual loss. However, the note also provides that, in determining whether the amount so determined is a reasonable estimate of the actual loss, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense.

Second, the proposed amendment amends the insider trading guideline, §2B1.4 (Insider Trading), in two ways. It provides a new specific offense characteristic if the offense involved an organized scheme to engage in insider trading. The new specific offense characteristic provides a minimum offense level of 14 levels in such a case. The commentary is also amended to provide factors that the court may consider in determining whether the specific offense characteristic applies.

It also amends the commentary to §2B1.4 to provide more guidance on the applicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in insider trading cases in which the defendant's employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. It specifies that §3B1.3 would apply in such a case, and provides examples.

Mortgage Fraud and Financial Institution Fraud

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

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

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

The proposed amendment responds to this directive in two ways.

First, the proposed amendment amends the fraud guideline, §2B1.1 (Theft, Property Destruction, and Fraud), to change how the fair market value of the collateral is determined in the case of a fraud involving a mortgage loan. Application Note 3(E)(ii) currently provides that the court is to use the amount that the victim has recovered from disposition of the collateral at the time of sentencing, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing. The proposed amendment establishes a new Application Note 3(E)(iii) that provides that, notwithstanding Note 3(E)(ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, the court is to use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by plea or by trial. In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. Finally, it provides that, in determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.

Second, the proposed amendment broadens the applicability of §2B1.1(b)(15)(B), which provides an enhancement of 4 levels if the offense involved specific types of financial harms (e.g., jeopardizing a financial institution or organization). Application Note 12 to §2B1.1 lists factors to be considered in determining whether to apply the enhancement in subsection (b)(15)(B) for jeopardizing a financial institution or organization. Currently, the court is directed to consider whether the financial institution or organization suffered one or more listed harms (such as becoming insolvent) as a result of the offense. The proposed amendment amends Note 12 to direct the court to consider whether one of the listed harms was likely to result from the offense, but did not result from the offense because of federal government intervention, such as a "bailout".

Departure Provisions

Finally, the proposed amendment expands the departure provisions in §2B1.1 by providing two examples of cases in which a departure may be warranted.

First, the proposed amendment amends Application Note 19(A)(iv), which provides that an upward departure may be warranted if the offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1). To provide an example of such a risk, the proposed amendment adds "such as a risk of a significant disruption of a national financial market."

Second, the proposed amendment amends Application Note 19(C), which provides that a downward departure may be warranted if the offense level substantially overstates the seriousness of the offense. To provide an example of such a case, the proposed amendment adds the following: "For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted."

Proposed Amendment:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen

Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

(1) If the loss exceeded \$5,000, increase the offense level as follows:

<u>Loss</u> (Apply the Greatest)	<u>Increase in Level</u>
(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$30,000	add 6
(E) More than \$70,000	add 8
(F) More than \$120,000	add 10
(G) More than \$200,000	add 12
(H) More than \$400,000	add 14
(I) More than \$1,000,000	add 16
(J) More than \$2,500,000	add 18
(K) More than \$7,000,000	add 20
(L) More than \$20,000,000	add 22
(M) More than \$50,000,000	add 24
(N) More than \$100,000,000	add 26
(O) More than \$200,000,000	add 28
(P) More than \$400,000,000	add 30 .

(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;

(B) involved 50 or more victims, increase by **4** levels; or

(C) involved 250 or more victims, increase by **6** levels.

(3) If the offense involved a theft from the person of another, increase by **2** levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.

(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.

- (6) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.
- (7) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.
- (8) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than \$1,000,000, increase by **2** levels; (ii) more than \$7,000,000, increase by **3** levels; or (iii) more than \$20,000,000, increase by **4** levels.
- (9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.
- (10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (13) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

- (14) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (15) (Apply the greater) If—
- (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or
 - (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by **4** levels.
 - (C) The cumulative adjustments from application of both subsections (b)(2) and (b)(15)(B) shall not exceed **8** levels, except as provided in subdivision (D).
 - (D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.
- (16) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.
- (17) (A) (Apply the greatest) If the defendant was convicted of an offense under:
- (i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.
 - (ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.
 - (iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.
- (B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.
- (18) If the offense involved—

- (A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or
- (B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by 4 levels.

* * *

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

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

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

"Government health care program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. Examples of such programs are the Medicare program, the Medicaid program, and the CHIP program.

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

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

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

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

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

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

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

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

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

* * *

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

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

- (i) Actual Loss.—“Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.
- (ii) Intended Loss.—“Intended loss” (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).
- (iii) Pecuniary Harm.—“Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.
- (iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, “reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.
- (v) Rules of Construction in Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:
 - (I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim’s business operations caused by the product substitution.
 - (II) Procurement Fraud Cases.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.
 - (III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.
- (B) Gain.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.
- (C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss

based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

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

- (i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.
- (ii) In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.
- (iii) The cost of repairs to damaged property.
- (iv) The approximate number of victims multiplied by the average loss to each victim.
- (v) The reduction that resulted from the offense in the value of equity securities or other corporate assets.
- (vi) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(D) Exclusions from Loss.—Loss shall not include the following:

- (i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.
- (ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

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

- (i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.
- (ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.
- (iii) Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.

- (F) Special Rules.—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:
- (i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 9(A).
 - (ii) Government Benefits.—In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, loss is \$50.
 - (iii) Davis-Bacon Act Violations.—In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 3142, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.
 - (iv) Ponzi and Other Fraudulent Investment Schemes.—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).
 - (v) Certain Other Unlawful Misrepresentation Schemes.—In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.

- (vi) Value of Controlled Substances.—In a case involving controlled substances, loss is the estimated street value of the controlled substances.
- (vii) Value of Cultural Heritage Resources or Paleontological Resources.—In a case involving a cultural heritage resource or paleontological resource, loss attributable to that resource shall be determined in accordance with the rules for determining the "value of the resource" set forth in Application Note 2 of the Commentary to §2B1.5.
- (viii) Federal Health Care Offenses Involving Government Health Care Programs.—In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted.
- (ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities.—In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—
 - (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and
 - (II) multiplying the difference in average price by the number of shares outstanding.

In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).

4. Application of Subsection (b)(2).—

- (A) Definition.—For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.
- (B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages.—For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a

two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.

(C) Undelivered United States Mail.—

(i) In General.—In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.

(ii) Special Rule.—A case described in subdivision (C)(i) of this note that involved—

(I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.

(II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.

(iii) Definition.—"Undelivered United States mail" means mail that has not actually been received by the addressee or the addressee's agent (e.g., mail taken from the addressee's mail box).

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

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

* * *

11. Gross Receipts Enhancement under Subsection (b)(15)(A).—

(A) In General.—For purposes of subsection (b)(15)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.

(B) Definition.—"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

12. Application of Subsection (b)(15)(B).—

(A) Application of Subsection (b)(15)(B)(i).—The following is a non-exhaustive list of factors

that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:

- (i) *The financial institution became insolvent.*
- (ii) *The financial institution substantially reduced benefits to pensioners or insureds.*
- (iii) *The financial institution was unable on demand to refund fully any deposit, payment, or investment.*
- (iv) *The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.*
- (v) *One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".*

(B) Application of Subsection (b)(15)(B)(ii).—

- (i) Definition.—*For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).*
- (ii) In General.—*The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:*
 - (I) *The organization became insolvent or suffered a substantial reduction in the value of its assets.*
 - (II) *The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).*
 - (III) *The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.*
 - (IV) *The organization substantially reduced its workforce.*
 - (V) *The organization substantially reduced its employee pension benefits.*
 - (VI) *The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.*
 - (VII) *One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".*

13. Application of Subsection (b)(17).—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (B) In General.—A conviction under a securities law or commodities law is not required in order for subsection (b)(18) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.
- (C) Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(18) applies, do not apply §3B1.3.

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19. Departure Considerations.—

- (A) Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:
- (i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.
- (ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.
- (iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).
- (iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.
- (v) In a case involving stolen information from a "protected computer", as defined in

18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.

(vi) *In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:*

(I) *The offense caused substantial harm to the victim’s reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim’s reputation or a damaged credit record.*

(II) *An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual’s name.*

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

(B) *Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(17)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.*

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

For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.

(D) *Downward Departure for Major Disaster or Emergency Victims.—If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.*

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§2B1.4. Insider Trading

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

(1) If the gain resulting from the offense exceeded \$5,000, increase by the

number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

- (2) If the offense involved an organized scheme to engage in insider trading and the offense level determined above is less than level 14, increase to level 14.

Commentary

Statutory Provisions: 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(2).—For purposes of subsection (b)(2), an "organized scheme to engage in insider trading" means a scheme to engage in insider trading that involves considered, calculated, systematic, or repeated efforts to obtain and trade on inside information, as distinguished from fortuitous or opportunistic instances of insider trading.

The following is a non-exhaustive list of factors that the court may consider in determining whether the offense involved an organized scheme to engage in insider trading:

- (A) the number of transactions;
- (B) the dollar value of the transactions;
- (C) the number of securities involved;
- (D) the duration of the offense;
- (E) the number of participants in the scheme (although such a scheme may exist even in the absence of more than one participant);
- (F) the efforts undertaken to obtain material, nonpublic information;
- (G) the number of instances in which material, nonpublic information was obtained; and
- (H) the efforts undertaken to conceal the offense.

2. Application of §3B1.3.—Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should be applied only if the defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary "tippee".

Furthermore, §3B1.3 should be applied if the defendant's employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. It would apply, for example, to a hedge fund professional who regularly participates in securities transactions or to a lawyer who regularly provides professional assistance in securities transactions, if the defendant's employment in such a position was used to facilitate

significantly the commission or concealment of the offense. It ordinarily would not apply to a position such as a clerical worker in an investment firm, because such a position ordinarily does not involve special skill. See §3B1.3, comment. (n. 4).

Background: This guideline applies to certain violations of Rule 10b-5 that are commonly referred to as "insider trading". Insider trading is treated essentially as a sophisticated fraud. Because the victims and their losses are difficult if not impossible to identify, the gain, i.e., the total increase in value realized through trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information, is employed instead of the victims' losses.

Certain other offenses, e.g., 7 U.S.C. § 13(e), that involve misuse of inside information for personal gain also appropriately may be covered by this guideline.

Subsection (b)(2) implements the directive to the Commission in section 1079A(a)(1)(A) of Public Law 111-203.