Proposed Amendments to the Sentencing Guidelines

January 18, 2013

This compilation contains unofficial text of proposed amendments to the sentencing guidelines and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendments can be found on the Commission's website at www.ussc.gov and will appear in the **January 18, 2013**, edition of the Federal Register.

Written public comment should be received by the Commission not later than **March 19, 2013**, and should be sent to: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs. For further information, see the full contents of the official notice published in the Federal Register (available at www.ussc.gov).

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2013 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

1. PROPOSED AMENDMENT: PRE-RETAIL MEDICAL PRODUCTS

Synopsis of Proposed Amendment: *This proposed amendment responds to the SAFE DOSES Act, Pub. L. 112–186 (October 5, 2012), which created a new criminal offense at 18 U.S.C. § 670 for theft of pre-retail medical products, increased statutory penalties for certain related offenses when a pre-retail medical product is involved, and contained a directive to the Commission to "review and, if appropriate, amend" the federal sentencing guidelines and policy statements applicable to the new offense and the related offenses "to reflect the intent of Congress that penalties for such offenses be sufficient to deter and punish such offenses, and appropriately account for the actual harm to the public from these offenses."*

New Offense at 18 U.S.C. § 670

The new offense at section 670 makes it unlawful for any person in (or using any means or facility of) interstate or foreign commerce to—

- *(1) embezzle, steal, or by fraud or deception obtain, or knowingly and unlawfully take, carry away, or conceal a pre-retail medical product;*
- *(2) knowingly and falsely make, alter, forge, or counterfeit the labeling or documentation (including documentation relating to origination or shipping) of a pre-retail medical product;*
- *(3) knowingly possess, transport, or traffic in a pre-retail medical product that was involved in a violation of paragraph (1) or (2);*
- *(4) with intent to defraud, buy, or otherwise obtain, a pre-retail medical product that has expired or been stolen;*
- *(5) with intent to defraud, sell, or distribute, a pre-retail medical product that is expired or stolen; or*
- *(6) attempt or conspire to violate any of paragraphs (1) through (5).*

The offense generally carries a statutory maximum term of imprisonment of three years. If the offense is an "aggravated offense," however, higher statutory maximum terms of imprisonment are provided. The offense is an "aggravated offense" if—

- *(1) the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product; or*
- *(2) the violation—*
  - *(A) involves the use of violence, force, or a threat of violence or force;*
  - *(B) involves the use of a deadly weapon;*
  - *(C) results in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved; or*
  - *(D) is subsequent to a prior conviction for an offense under*

section 670.

Specifically, the higher statutory maximum terms of imprisonment are:

(1) Five years, if—

(A) the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product; or

(B) the violation (i) involves the use of violence, force, or a threat of violence or force, (ii) involves the use of a deadly weapon, or (iii) is subsequent to a prior conviction for an offense under section 670.

(2) 15 years, if the value of the medical products involved in the offense is $5,000 or greater.

(3) 20 years, if both (1) and (2) apply.

(4) 30 years, if the offense results in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved.

The proposed amendment amends Appendix A (Statutory Index) to reference the new offense at 18 U.S.C. § 670 to §2B1.1 (Theft, Property Destruction, and Fraud). In addition, the possibility of providing an additional reference to §2A1.4 (Involuntary Manslaughter) is bracketed.

The proposed amendment also adds a new specific offense characteristic to §2B1.1. The new specific offense characteristic provides an enhancement of [2][4] levels if the offense involves a pre-retail medical product [and (A) the offense involved (i) the use of violence, force, or a threat of violence or force; or (ii) the use of a deadly weapon; (B) the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved; or (C) the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product]. It also provides a minimum offense level of level 14. It also amends the commentary to §2B1.1 to specify that the term "pre-retail medical product" has the meaning given that term in section 670(e).

Issue for Comment

A multi-part issue for comment is also included on whether any changes to the guidelines instead of, or in addition to, the changes in the proposed amendment should be made to respond to the new offense, the statutory penalty increases made by the Act, and the directive to the Commission.

Proposed Amendment:

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

(a) Base Offense Level:

(1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) **6**, otherwise.

(b) Specific Offense Characteristics

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

Loss (Apply the Greatest)		Increase in Level
(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 pre-retail medical product **[**and (A) the offense involved the use of (i) violence, force, or a threat of violence or force; or (ii) a deadly weapon; (B) the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved; or (C) the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product**]**, increase by **[2][4]** levels. If the resulting offense level is less than level **14**, increase to level **14**.

[also renumber succeeding paragraphs and related application notes accordingly]

(~~14~~15) 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~~16) (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~~16)(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~~17) 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~~18) (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~~19) If the offense involved—

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

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

increase by **4** levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive

material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

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

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"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.

"Pre-retail medical product" has the meaning given that term in 18 U.S.C. § 670(e).

"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).

"Supply chain" has the meaning given that term in 18 U.S.C. § 670(e).

* * *

Background:

* * *

Subsection (b)(12) implements the directive in section 5 of Public Law 110–179.

Subsection (b)(14) implements the directive to the Commission in section 7 of Public Law 112–186.

Subsection (b)(~~14~~15)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(~~15~~16)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (b)(~~15~~16)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(~~16~~17) implements the directive in section 209 of Public Law 110–326.

Subsection (b)(~~17~~18) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(~~17~~18)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.

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APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 669	2B1.1
18 U.S.C. § 670	[2A1.4,] 2B1.1

* * *

Issue for Comment:

1. In addition to creating the new offense under section 670, the Act increased penalties for some related offenses when those offenses involve a pre-retail medical product. In particular, the Act added an increased penalty provision to each of the following statutes:

(A) 18 U.S.C. § 659 (theft from interstate or foreign shipments by carrier), which is referenced to §2B1.1.

(B) 18 U.S.C. § 1952 (travel in aid of racketeering), which is referenced to §2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise).

(C) 18 U.S.C. § 1957 (money laundering in aid of racketeering), which is referenced to §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity).

(D) 18 U.S.C. § 2117 (breaking or entering facilities of carriers in interstate or foreign commerce), which is referenced to §2B2.1 (Burglary of a Residence or a Structure Other than a Residence).

(E) 18 U.S.C. §§ 2314 (transportation of stolen goods) and 2315 (sale or receipt of stolen goods), each of which are referenced to both §§2B1.1 and 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).

For each of these existing statutes, the Act amended the penalty provision to provide that if the offense involved a pre-retail medical product, the punishment for the offense shall be the same as the punishment for an offense under section 670, unless the punishment under the existing statute is greater.

An additional statutory provision identified in the directive to the Commission (but not amended by the Act) is 18 U.S.C. § 2118 (robberies and burglaries involving controlled substances), which contains several distinct offenses. The guidelines to which these various offenses are referenced include §§2A1.1, 2A2.1, 2A2.2, 2B2.1, 2B3.1 (Robbery), and 2X1.1.

The directive to the Commission provided that the Commission shall "review and, if appropriate, amend" the federal sentencing guidelines and policy statements applicable to offenses under section 670; under section 2118 of title 18, United States Code; or under any other section amended by the Act "to reflect the intent of Congress that penalties for such offenses be sufficient to deter and punish such offenses, and appropriately account for the actual harm to the public from these offenses." The Act further states that, in carrying out the directive, the Commission shall—

(1) consider the extent to which the Federal sentencing guidelines and policy statements appropriately reflect—
(A) the serious nature of such offenses;

(B) the incidence of such offenses; and
(C) the need for an effective deterrent and appropriate punishment to prevent such offenses;

(2) consider establishing a minimum offense level under the Federal sentencing guidelines and policy statements for offenses covered by this Act;

(3) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;

(4) ensure reasonable consistency with other relevant directives, Federal sentencing guidelines and policy statements;

(5) make any necessary conforming changes to the Federal sentencing guidelines and policy statements; and

(6) ensure that the Federal sentencing guidelines and policy statements adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.

Issue for Comment

The Commission seeks comment on whether any changes to the guidelines instead of, or in addition to, the changes in the proposed amendment should be made to respond to the new offense, the statutory penalty increases made by the Act, and the directive to the Commission.

(1) First, the Commission seeks comment on the guideline or guidelines to which offenses under section 670, and other offenses covered by the directive, should be referenced. In particular:

(A) The proposed amendment would reference offenses under section 670 to §2B1.1, and brackets the possibility of an additional reference to §2A1.4. Should the Commission reference section 670 to one or more guidelines — such as §2B5.3 (Criminal Infringement of Copyright or Trademark), §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury), or §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product) — instead of, or in addition to, the proposed reference(s) to §2A1.4 and §2B1.1? If so, which ones?

(B) Similarly, should the Commission reference any of the other offenses covered by the directive to one or more guidelines instead of, or in addition to, the guideline or guidelines to which they are currently referenced? If so, which ones?

(2) Second, the Commission seeks comment on the proposed amendment to §2B1.1, which

would provide a new specific offense characteristic if the offense involves a pre-retail medical product [and (A) the offense involved the use of (i) violence, force, or a threat of violence or force; or (ii) a deadly weapon; (B) the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved; or (C) the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product]. In particular:

(A) If the Commission were to promulgate the proposed amendment, how should the new specific offense characteristic interact with other specific offense characteristics in §2B1.1? In particular, how should it interact with—

(i) the specific offense characteristic at §2B1.1(b)(13)(B), which provides a 2-level enhancement and a minimum offense level of 14 if the offense involved an organized scheme to steal or to receive stolen goods or chattels that are part of a cargo shipment; and

(ii) the specific offense characteristic currently at §2B1.1(b)(14), which provides a 2-level enhancement and a minimum offense level 14 if the offense involved a risk of death or serious bodily injury or possession of a dangerous weapon?

Should the new specific offense characteristic be fully cumulative with these current specific offense characteristics, or should the impact be less than fully cumulative in cases where more than one apply?

(B) Does the proposed amendment adequately respond to requirement (2) of the directive that the Commission consider establishing a minimum offense level for offenses covered by the Act? If not, what minimum offense level, if any, should the Commission provide for offenses covered by the Act, and under what circumstances should it apply?

(C) Does the proposed amendment adequately respond to requirement (3) of the directive that the Commission account for the aggravating and mitigating circumstances involved in the offenses covered by the Act? If not, what aggravating and mitigating circumstances should be accounted for, and what new provisions, or changes to existing provisions should be made to account for them?

(D) Does the proposed amendment adequately respond to the other requirements of the directive, in paragraphs (1), (4), (5), and (6)? If not, what other changes, if any, should the Commission make to the guidelines to respond to the directive?

(3) Section 670(e) defines the term "pre-retail medical product" to mean "a medical product that has not yet been made available for retail purchase by a consumer." The proposed amendment would adopt this statutory definition. The Commission seeks comment on this definition. Is this definition adequately clear? If not, in what situations is this definition likely to be unclear and what guidance, if any, should the Commission provide

to address such situations? Does the definition of the term "supply chain" (see 18 U.S.C. § 670(e) (stating that the term "supply chain" includes "manufacturer, wholesaler, repacker, own-labeled distributor, private-label distributor, jobber, broker, drug trader, transportation company, hospital, pharmacy, or security company")) inform the determination of whether the medical product has been made available for retail purchase by a consumer?

(4) *The Commission seeks comment on how, if at all, the guidelines should be amended to account for the aggravating factor in section 670 that increases the statutory maximum term of imprisonment if the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product. Is this factor already adequately addressed by existing provisions in the guidelines, such as the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill)? If not, how, if at all, should the Commission amend the guidelines to account for this factor?*

(5) *Finally, the Commission seeks comment on what changes, if any, it should make to the guidelines to which the other offenses covered by the directive are referenced to account for the statutory changes or the directive, or both. For example, if the Commission were to promulgate the proposed amendment to §2B1.1, adding a new specific offense characteristic to that guideline, should the Commission provide a similar specific offense characteristic in the other guidelines to which the other offenses covered by the directive are referenced?*

2. ISSUE FOR COMMENT: TRADE SECRETS

1. Section 3 of the Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. 112–___, contains a directive to the Commission on offenses involving stolen trade secrets or economic espionage. The Commission seeks comment on what, if any, changes to the guidelines are appropriate to respond to the directive.

The Directive

Section 3(a) of the Act directs the Commission to "review and, if appropriate, amend" the guidelines "applicable to persons convicted of offenses relating to the transmission or attempted transmission of a stolen trade secret outside of the United States or economic espionage, in order to reflect the intent of Congress that penalties for such offenses under the Federal sentencing guidelines and policy statements appropriately, reflect the seriousness of these offenses, account for the potential and actual harm caused by these offenses, and provide adequate deterrence against such offenses."

Section 3(b) of the Act states that, in carrying out the directive, the Commission shall—

"(1) consider the extent to which the Federal sentencing guidelines and policy statements appropriately account for the simple misappropriation of a trade secret, including the sufficiency of the existing enhancement for these offenses to address the seriousness of this conduct;

"(2) consider whether additional enhancements in the Federal sentencing guidelines and policy statements are appropriate to account for—

"(A) the transmission or attempted transmission of a stolen trade secret outside of the United States; and

"(B) the transmission or attempted transmission of a stolen trade secret outside of the United States that is committed or attempted to be committed for the benefit of a foreign government, foreign instrumentality, or foreign agent;

"(3) ensure the Federal sentencing guidelines and policy statements reflect the seriousness of these offenses and the need to deter such conduct;

"(4) ensure reasonable consistency with other relevant directives, Federal sentencing guidelines and policy statements, and related Federal statutes;

"(5) make any necessary conforming changes to the Federal sentencing guidelines and policy statements; and

"(6) ensure that the Federal sentencing guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.".

The Offenses Described in the Directive

Offenses described in the directive — the transmission or attempted transmission of a stolen trade secret outside the United States; and economic espionage — may be punished under 18 U.S.C. § 1831 (Economic espionage), which requires as an element of the offense that the defendant specifically intend or know that the offense "will benefit any foreign government, foreign instrumentality, or foreign agent". Offenses described in the directive may also be punished under 18 U.S.C. § 1832 (Trade secrets), which does not require such specific intent or knowledge, but does require that the trade secret relate to a product in interstate or foreign commerce.

Section 2 of the Act amended section 1831 to raise the maximum fine imposable for such an offense. The maximum fine for an individual was raised from $500,000 to $5,000,000, and the maximum fine for an organization was raised from $10,000,000 to either $10,000,000 or "3 times the value of the stolen trade secret to the organization, including expenses for research and design and other costs of reproducing the trade secret that the organization has thereby avoided", whichever is greater.

The statutory maximum terms of imprisonment are 15 years for a section 1831 offense and 10 years for a section 1832 offense. Offenses under sections 1831 and 1832 are referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud).

Offenses described in the directive may also be punished under other criminal statutes relating to trade secrets under specific circumstances. Examples of two such statutes are 18 U.S.C. § 1905 (class A misdemeanor for disclosure of confidential information, including trade secrets, by public employees) and 7 U.S.C. § 136h (class A misdemeanor for disclosure of trade secrets involving insecticides, by Environmental Protection Agency employees). Section 1905 is referenced in Appendix A (Statutory Index) to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Section 136h is not referenced in Appendix A (Statutory Index).

Applicable Provisions in the Guidelines

The following provisions in the guidelines, among others, address offenses involving trade secrets:

(1) Section 2B1.1(b)(5) contains a 2-level enhancement that applies "[i]f 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".

(2) Application Note 3(C)(ii) of the Commentary to §2B1.1 provides that, in a case involving trade secrets or other proprietary information, the court when estimating loss for purposes of the loss enhancement in §2B1.1(b)(1) should consider, among other factors, "the cost of developing that information or the reduction in the value of that information that resulted from the offense."

Request for Comment

The Commission seeks comment on what, if any, changes to the guidelines should be made to respond to the directive. In particular, the Commission seeks comment on the following:

(1) What offenses, if any, other than sections 1831 and 1832 should the Commission consider in responding to the directive? What guidelines, if any, other than §2B1.1 should the Commission consider amending in response to the directive?

(2) What should the Commission consider in reviewing the seriousness of the offenses described in the directive, the potential and actual harm caused by these offenses, and the need to provide adequate deterrence against such offenses?

(3) Do the guidelines appropriately account for the simple misappropriation of a trade secret? Is the existing enhancement at §2B1.1(b)(5), which provides a 2-level enhancement "[i]f 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," sufficient to address the seriousness of the conduct involved in the offenses described in the directive?

(4) Should the Commission provide one or more additional enhancements to account for (A) the transmission or attempted transmission of a stolen trade secret outside of the United States; and (B) the transmission or attempted transmission of a stolen trade secret outside of the United States that is committed or attempted to be committed for the benefit of a foreign government, foreign instrumentality, or foreign agent? If so, under what circumstances should such an enhancement apply, and what level of enhancement should apply?

(5) Should the Commission restructure the existing 2-level enhancement in subsection (b)(5) into a tiered enhancement that directs the court to apply the greatest of the following:

(A) an enhancement of 2 levels if the offense involved the simple misappropriation of a trade secret;

(B) an enhancement of 4 levels if the defendant transmitted or attempted to transmit the stolen trade secret outside of the United States; and

(C) an enhancement of [5][6] levels if the defendant committed economic espionage, i.e., the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent?

(6) Should the Commission provide a minimum offense level of [14][16] if the defendant transmitted or attempted to transmit stolen trade secrets outside of the United States or committed economic espionage?

3. **PROPOSED AMENDMENT: COUNTERFEIT AND ADULTERATED DRUGS; COUNTERFEIT MILITARY PARTS**

Synopsis of Proposed Amendment: *This proposed amendment responds to two recent Acts that made changes to 18 U.S.C. § 2320 (Trafficking in counterfeit goods and services). One Act provided higher penalties for offenses involving counterfeit military goods and services; the other Act provided higher penalties for offenses involving counterfeit drugs, and also included a directive to the Commission. The proposed amendment also responds to recent statutory changes to 21 U.S.C. § 333 (Penalties for violations of the Federal Food, Drug, and Cosmetics Act) that provide higher penalties for offenses involving intentionally adulterated drugs.*

A&B. 18 U.S.C. § 2320 and Offenses Involving Counterfeit Military Goods and Services and Counterfeit Drugs

In general, section 2320 prohibits trafficking in goods or services using a counterfeit mark, and provides a statutory maximum term of imprisonment of 10 years (or, for a repeat offender, 20 years). If the offender knowingly or recklessly causes or attempts to cause serious bodily injury or death, the statutory maximum is increased to 20 years (if serious bodily injury) or to any term of years or life (if death). Offenses under section 2320 are referenced in Appendix A (Statutory Index) to §2B5.3 (Criminal Infringement of Copyright or Trademark).

Two recent Acts made changes to section 2320. First, section 818 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112–81 (December 31, 2011), amended section 2320 to add a new subsection (a)(3) that prohibits trafficking in counterfeit military goods and services, the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or national security. A "counterfeit military good or service" is a good or service that uses a counterfeit mark and that (A) is falsely identified or labeled as meeting military specifications, or (B) is intended for use in a military or national security application. See 18 U.S.C. § 2320(f)(4). An individual who commits an offense under subsection (a)(3) involving a counterfeit military good or service is subject to a statutory maximum term of imprisonment of 20 years, or 30 years for a second or subsequent offense. See 18 U.S.C. § 2320(b)(3).

Second, section 717 of the Food and Drug Administration Safety and Innovation Act, Pub. L. 112–144 (July 9, 2012), amended section 2320 to add a new subsection (a)(4) that prohibits trafficking in a counterfeit drug. A "counterfeit drug" is a drug, as defined by section 201 of the Federal Food, Drug, and Cosmetic Act, that uses a counterfeit mark. See 18 U.S.C. § 2320(f)(6). An individual who commits an offense under subsection (a)(4) involving a counterfeit drug is subject to the same statutory maximum term of imprisonment as for an offense involving a counterfeit military good or service — 20 years, or 30 years for a second or subsequent offense. See 18 U.S.C. § 2320(b)(3).

Section 717 of that Act also contained a directive to the Commission to "review and amend, if appropriate" the guidelines and policy statements applicable to persons convicted of an offense described in section 2320(a)(4) — i.e., offenses involving counterfeit drugs — "in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by the guidelines and policy statements". See Pub. L. 112–144, § 717(b). In addition, section 717(b)(2) provides that, in responding to the directive, the Commission shall—

(A) ensure that the sentencing guidelines and policy statements reflect the intent of Congress that the guidelines and policy statements reflect the serious nature of offenses under section 2320(a)(4) and the need for an effective deterrent and appropriate punishment to prevent such offenses;

(B) consider the extent to which the guidelines may or may not appropriately account for the potential and actual harm to the public resulting from the offense;

(C) assure reasonable consistency with other relevant directives and with other sentencing guidelines;

(D) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;

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

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

Parts A and B of the proposed amendment respond to the statutory changes to section 2320 made by these Acts and implement the directive.

A. Counterfeit Military Goods and Services

Part A addresses the issue of counterfeit military goods and services and contains four options. The first three options each add a new specific offense characteristic to §2B5.3. Each of these three options provides an enhancement of [2][4] levels and a minimum offense level of level 14, but they apply to different circumstances.

Option 1 closely tracks the statutory language. It applies only if the offense involves a counterfeit military good or service "the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security."

Option 2 applies to any offense that involves a counterfeit military good or service.

Option 3 is not limited to counterfeit military goods or services. It applies if the defendant knew the offense involved (A) a critical infrastructure; or (B) a product sold for use in national defense or national security or by law enforcement.

Option 4 takes a different approach than the first three options. It references offenses under section 2320(a)(3) to §2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or

Utilities), with the possibility of an additional reference to §2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) also bracketed.

B. Counterfeit Drugs

Part B addresses the issue of counterfeit drugs and contains three options.

Option 1 adds a new specific offense characteristic to §2B5.3. It provides an enhancement of [2][4] levels and a minimum offense level of level 14 if the offense involves a counterfeit drug.

Option 2 revises the specific offense characteristic currently at §2B5.3(b)(5), which provides an enhancement of 2 levels, and a minimum offense level of level 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. As revised, this specific offense characteristic would have three tiers and an instruction to apply the greatest. The first tier would provide an enhancement of 2 levels, and a minimum offense level of 12, if the offense involved a counterfeit drug. The second tier would provide an enhancement of 2 levels, and a minimum offense level of 14, if the offense involved possession of a dangerous weapon in connection with the offense. The third tier would provide an enhancement of 4 levels, and a minimum offense level of 14, if the offense involved the conscious or reckless risk of death or serious bodily injury.

Options 1 and 2 each would also amend the Commentary to §2B5.3 to indicate that a departure may be warranted it the offense resulted in death or serious bodily injury.

Option 3 takes a different approach than the first two options. It references offenses under section 2320(a)(4) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury).

C. 21 U.S.C. § 333 and Offenses Involving Intentionally Adulterated Drugs

In general, section 333(b) involves prescription drug marketing violations under the Federal Food, Drug, and Cosmetic Act and provides a statutory maximum term of imprisonment of 10 years. Offenses under section 333(b) are referenced in Appendix A (Statutory Index) to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product).

Section 716 of the Food and Drug Administration Safety and Innovation Act, Pub. L. 112–144 (July 9, 2012), amended 21 U.S.C. § 333 to add a new penalty provision at subsection (b)(7). Subsection (b)(7) applies to any person who knowingly and intentionally adulterates a drug such that the drug is adulterated under certain provisions of 21 U.S.C. § 351 and has a reasonable probability of causing serious adverse health consequences or death to humans or animals. It provides a statutory maximum term of imprisonment of 20 years.

Part C of the proposed amendment presents two options for addressing the offense under section 333(b)(7). Option 1 establishes a new alternative base offense level of level 14 in §2N2.1 for cases in which the defendant is convicted under section 333(b)(7). Option 2 amends Appendix A (Statutory Index) to reference offenses under section 333(b)(7) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury).

Issues for Comment

Finally, the proposed amendment provides a series of issues for comment on offenses involving counterfeit military goods and services under section 2320, counterfeit drugs under section 2320, and intentionally adulterated drugs under section 333(b)(7).

Proposed Amendment:

(A) Offenses Under Section 2320 Involving Counterfeit Military Goods and Services

Options 1 through 3 (Changes to 2B5.3):

§2B5.3. Criminal Infringement of Copyright or Trademark

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

(b) Specific Offense Characteristics

(1) If the infringement amount (A) exceeded $2,000 but did not exceed $5,000, increase by **1** level; or (B) 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 the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.

(3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12.**

(4) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but the resulting offense level shall be not less than level **8**.

[Option 1: (5) If the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security, increase by **[2][4]** levels. If the resulting offense level is less than level **14**, increase to level **14**.**]**

[Option 2: (5) If the offense involved a counterfeit military good or service, increase by **[2][4]** levels. If the resulting offense level is less than level **14**, increase to level **14**.**]**

[Option 3: (5) If **[**the defendant knew**]** the offense involved a good or service 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][4]** levels. If the resulting offense level is less than level **14**, increase to level **14**.**]**

~~(5)~~(6) 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.**

Commentary

Statutory Provisions: 17 U.S.C. §§ 506(a), 1201, 1204; 18 U.S.C. §§ 2318-2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Circumvention devices" are devices used to perform the activity described in 17 U.S.C. §§ 1201(a)(3)(A) and 1201(b)(2)(A).

"Commercial advantage or private financial gain" means the receipt, or expectation of receipt, of anything of value, including other protected works.

[definition for Options 1 & 2:
*"Counterfeit military good or service" has the meaning given that term in 18 U.S.C. § 2320(f)(4).***]**

* * *

2. Determination of Infringement Amount.—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).

(A) Use of Retail Value of Infringed Item.—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:

(i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.

(ii) The retail price of the infringing item is not less than 75% of the retail price of the infringed item.

(iii) The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.

(iv) The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the "retail value of the infringed item" is the price the user of the transmission would have paid to lawfully receive that transmission, and the "infringed item" is the satellite transmission rather than the intercepting device.)

(v) The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.

(vi) The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the "retail value of the infringed item" is the value of that item upon its initial commercial distribution.

(vii) A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.

(viii) A case under 17 U.S.C. §§ 1201 and 1204 in which the defendant used a circumvention device. In such an offense, the "retail value of the infringed item" is the price the user would have paid to access lawfully the copyrighted work, and the "infringed item" is the accessed work.

(B) Use of Retail Value of Infringing Item.—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A.

(C) Retail Value Defined.—For purposes of this Application Note, the "retail value" of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.

(D) Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B) of this Application Note. For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the

infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (i.e., the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (i.e., the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).

(E) Indeterminate Number of Infringing Items.—In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.

[Commentary for Option 3 (and redesignate succeeding application notes accordingly):

3. Application of Subsection (b)(5).—

(A) Definitions.—In subsection (b)(5):

"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) Application.—Subsection (b)(5) applies to offenses in which the good or service was important in furthering the administration of justice, national defense, national security, economic security, or public health or safety. The enhancement ordinarily would apply, for example, in a case in which the defendant sold counterfeit semiconductors for use in a military system. But it ordinarily would not apply in a case in which the defendant sold counterfeit toner cartridges for use in printers at military headquarters.

3. Application of §3B1.3.—If the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.

4. Departure Considerations.—If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:

(A) The offense involved substantial harm to the reputation of the copyright or trademark owner.

(B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.

(C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.

* * *

Option 4 (Appendix A reference):

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2320(a)(1),(2)	2B5.3
18 U.S.C. § 2320(a)(3)	[2M2.1,] 2M2.3

(B) Offenses Under Section 2320 Involving Counterfeit Drugs

Options 1 and 2 (Changes to 2B5.3):

§2B5.3. Criminal Infringement of Copyright or Trademark

* * *

(4) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but the resulting offense level shall be not less than level **8**.

[Option 1:

(5) If the offense involved a counterfeit drug, increase by **[2][4]** levels. If the resulting offense level is less than level **14**, increase to level **14**.

~~(5)~~(6) 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**.**]**

[Option 2:

(5) (Apply the Greatest):

(A) If the offense involved a counterfeit drug, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

~~(5)~~(B) 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**.

(C) If the offense involved the conscious or reckless risk of death or serious bodily injury, increase by **4** levels. If the resulting offense level is less than level **14**, increase to level **14**.**]**

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

"Circumvention devices" are devices used to perform the activity described in 17 U.S.C. §§ 1201(a)(3)(A) and 1201(b)(2)(A).

"Commercial advantage or private financial gain" means the receipt, or expectation of receipt, of anything of value, including other protected works.

"Counterfeit drug" has the meaning given that term in 18 U.S.C. § 2320(f)(6).

* * *

4. Departure Considerations.—If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:

(A) The offense involved substantial harm to the reputation of the copyright or trademark owner.

(B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.

(C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.

(D) The offense resulted in death or serious bodily injury.

* * *

Option 3 (Appendix A reference):

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2320(a)(1),(2)	2B5.3
18 U.S.C. § 2320(a)(4)	2N1.1

(C) Offenses Under Section 333(b)(7) Involving Intentionally Adulterated Drugs

Option 1 (Changes to 2N2.1):

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

(a) Base Offense Level: **6** (Apply the Greater)

(1) **14**, if the defendant was convicted under 21 U.S.C. § 333(b)(7); or

(2) **6**, otherwise.

(b) Specific Offense Characteristic

(1) If the defendant was convicted under 21 U.S.C. § 331 after sustaining a prior conviction under 21 U.S.C. § 331, increase by **4** levels.

(c) Cross References

(1) If the offense involved fraud, apply §2B1.1 (Theft, Property Destruction, and Fraud) **[**, if the resulting offense level is greater than that determined above**]**.

(2) If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above.

Commentary

* * *

Application Notes:

1. This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted. See Chapter Five, Part

K (Departures).

2. *The cross reference at subsection (c)(1) addresses cases in which the offense involved fraud. The cross reference at subsection (c)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (e.g., bribery).*

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

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

   (B) The defendant was convicted under 7 U.S.C. § 7734.

* * *

Option 2 (Appendix A reference):

APPENDIX A - STATUTORY INDEX

* * *

21 U.S.C. § 333(b)(1)–(6)	2N2.1
21 U.S.C. § 333(b)(7)	2N1.1

Issues for Comment:

1. *Offenses Under 18 U.S.C. § 2320 Involving Counterfeit Military Goods and Services*

   Options 1, 2, and 3 of the proposed amendment would provide a new specific offense characteristic in §2B5.3 for offenses involving counterfeit military goods and services. If the Commission were to adopt Option 1, 2, or 3, how should this new specific offense characteristic interact with other specific offense characteristics in §2B5.3? In particular, how should it interact with the specific offense characteristic currently at §2B5.3(b)(5), which provides a 2-level enhancement and a minimum offense level 14 if the offense involved a risk of death or serious bodily injury or possession of a dangerous weapon? Should the new specific offense characteristic be fully cumulative with the current one, or should they be less than fully cumulative in cases where both apply?

   Option 2 of the proposed amendment would apply to any case in which the offense involved a counterfeit military good or service. Is the scope of this option overly broad? Are there types of cases involving a counterfeit military good or service that should not be covered by Option 2? If so, what types of cases? For example, should the Commission provide an application note for Option 2 similar to the proposed application note 3(B) contained in Option 3, requiring that the

counterfeit military good or service be important in furthering national security?

Option 3 of the proposed amendment would apply to any case in which the offense involved a good or service 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. The language used in this option parallels the language regarding critical infrastructure in §2B1.1 (Theft, Property Destruction, and Fraud). In this new context, is the scope of this language overly broad? Are there types of cases that should not be covered by Option 3? If so, what types of cases?

Option 4 of the proposed amendment would reference offenses under section 2320 that involve counterfeit military goods or services (e.g., offenses described in section 2320(a)(3)) to [§2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) and] §2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities). If the Commission were to adopt Option 4, what changes, if any, should the Commission make to those guidelines to better account for such offenses?

2. *Offenses Under 18 U.S.C. § 2320 Involving Counterfeit Drugs (and Response to Directive)*

Option 1 of the proposed amendment would provide a new specific offense characteristic in §2B5.3 for offenses involving counterfeit drugs. If the Commission were to adopt Option 1, how should this new specific offense characteristic interact with other specific offense characteristics in §2B5.3? In particular, how should it interact with the specific offense characteristic currently at §2B5.3(b)(5), which provides a 2-level enhancement and a minimum offense level 14 if the offense involved a risk of death or serious bodily injury or possession of a dangerous weapon? Should the new specific offense characteristic be fully cumulative with the current one, or should they be less than fully cumulative in cases where both apply?

Option 3 of the proposed amendment would reference offenses under section 2320 that involve counterfeit drugs (e.g., offenses described in section 2320(a)(4)) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Serious Bodily Injury). If the Commission were to adopt Option 3, what changes, if any, should the Commission make to that guideline to better account for such offenses?

In addition, to assist the Commission in determining how best to respond to the directive, the Commission seeks comment on offenses under section 2320 involving counterfeit drugs. What actual and potential harms to the public do such offenses pose? What aggravating and mitigating circumstances may be involved in such offenses that are not already adequately addressed in the guidelines? For example, if death or serious bodily injury resulted from the offense, should that circumstance be addressed by a departure provision, by a specific offense characteristic, by a cross-reference to another guideline (e.g., a homicide guideline), or in some other manner?

Does the new specific offense characteristic in Option 1, or the revised specific offense characteristic in Option 2, adequately respond to the directive? If not, what changes, if any, should the Commission make to §2B5.3 to better account for offenses under section 2320(a)(4) and the factors identified in the directive?

In the alternative, does Option 3 of the proposed amendment — referencing offenses involving counterfeit drugs to §2N1.1 — adequately respond to the directive? If not, what changes, if any, should the Commission make to §2N1.1 to better account for offenses under section 2320(a)(4) and the factors identified in the directive?

3. Offenses Under 21 U.S.C. § 333(b)(7) Involving Intentionally Adulterated Drugs

Option 2 of the proposed amendment amends Appendix A (Statutory Index) to reference offenses under section 333(b)(7) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury). Section 2N1.1 provides a base offense level of 25 and an enhancement of 2 to 4 levels if the victim sustained serious bodily injury, depending on whether the injury was permanent or life-threatening. Section 2N1.1 also contains cross-references to other guidelines and a special instruction for certain cases involving more than one victim.

If the Commission were to reference offenses under section 333(b)(7) to §2N1.1, as the proposed amendment provides, what changes, if any, should the Commission make to §2N1.1 to better account for offenses under section 333(b)(7)?

Option 1 of the proposed amendment contemplates that offenses under section 333(b)(7) would be referenced to §2N2.1. Section 2N2.1 provides a base offense level 6 and an enhancement for repeat offenders under 21 U.S.C. § 331. It also provides a cross reference to §2B1.1 (Theft, Property Destruction, and Fraud) if the offense involved fraud and a cross reference to any other offense guideline if the offense was committed in furtherance of, or to conceal, an offense covered by that other offense guideline. If offenses under section 333(b)(7) are to be sentenced under §2N2.1, what changes, if any, should the Commission make to §2N2.1? For example, should the Commission adopt Option 1, which would provide an alternative base offense level of 14 if the defendant was convicted under section 333(b)(7)? Should the Commission provide a different alternative base offense level instead? Or should the Commission provide additional specific offense characteristics, additional cross references, or a combination of such provisions to better account for offenses under section 333(b)(7)? If so, what provisions should the Commission provide?

Finally, the Commission seeks comment comparing and contrasting offenses involving intentionally adulterated drugs under section 333(b)(7) and offenses involving counterfeit drugs under section 2320(a)(4). How do these offenses compare to each other in terms of the conduct involved in the offense, the culpability of the offenders, the actual and potential harms posed by the offense, and other factors relevant to sentencing? Which offenses should be treated more seriously by the guidelines and which should be treated less seriously?

4. PROPOSED AMENDMENT: TAX DEDUCTIONS

Synopsis of Proposed Amendment: *This proposed amendment addresses a circuit conflict over whether a sentencing court, in calculating the tax loss in a tax case, may subtract the unclaimed deductions that the defendant legitimately could have claimed if he or she had filed an accurate tax return.*

Circuits have disagreed over whether the tax loss in such a case may be reduced by the defendant's legitimate but unclaimed deductions. Specifically, the issue is whether a defendant is allowed to present evidence of unclaimed deductions that would have the effect of reducing the tax loss for purposes of the guidelines and thereby reducing the ultimate sentence, or whether the defendant is categorically barred from offering such evidence.

The Tenth Circuit recently joined the Second Circuit in holding that a sentencing court may give the defendant credit for a legitimate but unclaimed deduction. See United States v. Hoskins, 654 F.3d 1086, 1094 (10th Cir. 2011) ("But where defendant offers convincing proof — where the court's exercise is neither nebulous nor complex — nothing in the Guidelines prohibits a sentencing court from considering evidence of unclaimed deductions in analyzing a defendant's estimate of the tax loss suffered by the government."); United States v. Martinez-Rios, 143 F.3d 662, 671 (2d Cir. 1998) ("the sentencing court need not base its tax loss calculation on gross unreported income if it can make a more accurate determination of the intended loss and that determination of the tax loss involves giving the defendant the benefit of legitimate but unclaimed deductions"); United States v. Gordon, 291 F.3d 181, 187 (2d Cir. 2002) (applying Martinez-Rios, the court held that the district erred when it refused to consider potential unclaimed deductions in its sentencing analysis). These cases generally reason that where a defendant offers convincing proof—where the court's exercise is neither nebulous nor complex—nothing in the Guidelines prohibits a sentencing court from considering evidence of unclaimed deductions in analyzing a defendant's estimate of the tax loss suffered by the government. See Hoskins, 654 F.3d at 1094-95.

Six other circuits — the Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh — have reached the opposite conclusion, finding that a defendant may not present evidence of unclaimed deductions to reduce the tax loss. See United States v. Delfino, 510 F.3d 468, 473 (4th Cir. 2007) ("The law simply does not require the district court to engage in [speculation as to what deductions would have been allowed], nor does it entitle the Delfinos to the benefit of deductions they might have claimed now that they stand convicted of tax evasion."); United States v. Phelps, 478 F.3d 680, 682 (5th Cir. 2007) (holding that the defendant could not reduce tax loss by taking a social security tax deduction that he did not claim on the false return); United States v. Chavin, 316 F.3d 666, 679 (7th Cir. 2002) (holding that the definition of tax loss "excludes consideration of unclaimed deductions"); United States v. Psihos, 683 F.3d 777, 781-82 (7th Cir. 2012) (following Chavin in disallowing consideration of unclaimed deductions); United States v. Sherman, 372 F.App'x 668, 676-77 (8th Cir. 2010); United States v. Blevins, 542 F.3d 1200, 1203 (8th Cir. 2008) (declining to decide "whether an unclaimed tax benefit may ever offset tax loss," but finding the district court properly declined to reduce tax loss based on taxpayers' unclaimed deductions); United States v. Yip, 592 F.3d 1035, 1041 (9th Cir. 2010) ("We hold that § 2T1.1 does not entitle a defendant to reduce the tax loss charged to him by the amount of potentially legitimate, but unclaimed, deductions even if those deductions are related to the offense."); United States v. Clarke, 562 F.3d 1158, 1164 (11th Cir. 2009) (holding that the defendant was not entitled to a tax loss calculation based on a filing status other than the one he actually used; "[t]he district court did not err in computing the tax loss based on the fraudulent return Clarke actually filed, and not on the tax return Clarke could have filed but did not.").

The proposed amendment presents three options for resolving the conflict. They would amend the Commentary to §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), as follows:

> *Option 1 provides that the determination of the tax loss shall account for any credit, deduction, or exemption to which the defendant was entitled, whether or not the defendant claimed the deduction at the time the tax offense was committed.*
>
> *Option 2 provides that the determination of the tax loss shall not account for any credit, deduction, or exemption, unless the defendant was entitled to the credit, deduction, or exemption and claimed the credit, deduction, or exemption at the time the tax offense was committed.*
>
> *Option 3 provides that the determination of the tax loss shall not account for any unclaimed credit, deduction, or exemption, unless the defendant demonstrates by contemporaneous documentation that the defendant was entitled to the credit, deduction, or exemption.*

Issues for comment are also included.

Proposed Amendment:

§2T1.1. **Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents**

(a) Base Offense Level:

(1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or

(2) **6**, if there is no tax loss.

(b) Specific Offense Characteristics

(1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(2) If the offense involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(c) Special Instructions

For the purposes of this guideline --

(1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that

was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

Notes:

(A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved improperly claiming a deduction or an exemption, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction or exemption (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(C) If the offense involved improperly claiming a deduction to provide a basis for tax evasion in the future, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(D) If the offense involved (i) conduct described in subdivision (A), (B), or (C) of these Notes; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses added together.

(2) If the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay.

Notes:

(A) If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved (i) conduct described in subdivision (A) of these Notes; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses added together.

(3) If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.

(4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.

(5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

Commentary

Statutory Provisions: 26 U.S.C. §§ 7201, 7203 (other than a violation based upon 26 U.S.C. § 6050I), 7206 (other than a violation based upon 26 U.S.C. § 6050I or § 7206(2)), and 7207. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"Tax loss" is defined in subsection (c). The tax loss does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203. Although the definition of tax loss corresponds to what is commonly called the "criminal figures," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.*

   Notes under subsections (c)(1) and (c)(2) address certain situations in income tax cases in which the tax loss may not be reasonably ascertainable. In these situations, the "presumptions" set forth are to be used unless the government or defense provides sufficient information for a more accurate assessment of the tax loss. In cases involving other types of taxes, the presumptions in the notes under subsections (c)(1) and (c)(2) do not apply.

   Example 1: A defendant files a tax return reporting income of $40,000 when his income was actually $90,000. Under Note (A) to subsection (c)(1), the tax loss is treated as $14,000 ($90,000 of actual gross income minus $40,000 of reported gross income = $50,000 x 28%) unless sufficient information is available to make a more accurate assessment of the tax loss.

   Example 2: A defendant files a tax return reporting income of $60,000 when his income was actually $130,000. In addition, the defendant claims $10,000 in false tax credits. Under Note (A) to subsection (c)(1), the tax loss is treated as $29,600 ($130,000 of actual gross income minus $60,000 of reported gross income = $70,000 x 28% = $19,600, plus $10,000 of false tax credits) unless sufficient information is available to make a more accurate assessment of the tax loss.

   Example 3: A defendant fails to file a tax return for a year in which his salary was $24,000, and $2,600 in income tax was withheld by his employer. Under the note to subsection (c)(2), the tax loss is treated as $2,200 ($24,000 of gross income x 20% = $4,800, minus $2,600 of tax withheld) unless sufficient information is available to make a more accurate assessment of the tax loss.

   In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances

of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

2. *In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: (a) there is a continuing pattern of violations of the tax laws by the defendant; (b) the defendant uses a consistent method to evade or camouflage income, e.g., backdating documents or using off-shore accounts; (c) the violations involve the same or a related series of transactions; (d) the violation in each instance involves a false or inflated claim of a similar deduction or credit; and (e) the violation in each instance involves a failure to report or an understatement of a specific source of income, e.g., interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive.*

[Option 1:

3. *Credits, Deductions, and Exemptions.—The determination of the tax loss shall account for any credit, deduction, or exemption to which the defendant was entitled, whether or not the defendant claimed the deduction at the time the tax offense was committed.**]***

[Option 2:

3. *Credits, Deductions, and Exemptions.—The determination of the tax loss shall not account for any credit, deduction, or exemption, unless the defendant was entitled to the credit, deduction, or exemption and claimed the credit, deduction, or exemption at the time the tax offense was committed.**]***

[Option 3:

3. *Credits, Deductions, and Exemptions.—The determination of the tax loss shall not account for any unclaimed credit, deduction, or exemption, unless the defendant demonstrates by contemporaneous documentation that the defendant was entitled to the credit, deduction, or exemption.**]***

~~3~~4. *"Criminal activity" means any conduct constituting a criminal offense under federal, state, local, or foreign law.*

~~4~~5. *Sophisticated Means Enhancement.— For purposes of subsection (b)(2), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.*

~~5~~6. *A "credit claimed against tax" is an item that reduces the amount of tax directly. In contrast, a "deduction" is an item that reduces the amount of taxable income.*

~~6~~7. *"Gross income," for the purposes of this section, has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61.*

~~7~~8. *If the offense involved both individual and corporate tax returns, the tax loss is the aggregate tax loss from the individual tax offense and the corporate tax offense added together. Accordingly, in a case in which a defendant fails to report income derived from a corporation on both the defendant's individual tax return and the defendant's corporate tax return, the tax loss is the sum of (A) the unreported or diverted amount multiplied by (i) 28%; or (ii) the tax rate for the individual tax offense, if sufficient information is available to make a more accurate assessment of that tax rate; and (B) the unreported or diverted amount multiplied by (i) 34%; or (ii) the tax rate for the corporate tax offense, if sufficient information is available to make a more accurate assessment of that tax rate. For example, the defendant, the sole owner of a Subchapter C corporation, fraudulently understates the corporation's income in the amount of $100,000 on the corporation's tax return, diverts the funds to the defendant's own use, and does not report these funds on the defendant's individual tax return. For purposes of this example, assume the use of 34% with respect to the corporate tax loss and the use of 28% with respect to the individual tax loss. The tax loss attributable to the defendant's corporate tax return is $34,000 ($100,000 multiplied by 34%). The tax loss attributable to the defendant's individual tax return is $28,000 ($100,000 multiplied by 28%). The tax loss for the offenses are added together to equal $62,000 ($34,000 + $28,000).*

* * *

Issues For Comment:

1. *If the Commission were to adopt Option 1 or 3, what requirements, if any, should be met before an unclaimed deduction is counted, other than the requirement that the unclaimed deduction be legitimate? In particular:*

   (A) Should a legitimate but unclaimed deduction be counted only if the defendant establishes that the deduction would have been claimed if an accurate return had been filed? If so, should this determination be a subjective one (e.g., this particular defendant would have claimed the deduction) or an objective one (e.g., a reasonable taxpayer in the defendant's position would have claimed the deduction)?

   (B) Should a legitimate but unclaimed deduction be counted only if it is related to the offense? See United States v. Hoskins, 654 F.3d 1086, 1095 n.9 (10th Cir. 2011) ("We must emphasize, however, that § 2T1.1 does not permit a defendant to benefit from deductions unrelated to the offense at issue."); see also United States v. Yip, 592 F.3d 1035, 1040 (9th Cir. 2010) ("[D]eductions are not permissible if they are unintentionally created or are unrelated to the tax violation, because such deductions are not part of the 'object of the offense' or intended loss.").

   (C) Are there differences among the various types of tax offenses that would make it appropriate to have different rules on the use of unclaimed deductions? If so, what types of tax offenses warrant different rules, and what should those different rules be? Additionally, are there certain cases in which the legitimacy of the deductions, credits, or exemptions and the likelihood that the defendant would have claimed them had an accurate return been filed is evident by the nature of the crime? For example, if a restaurant owner failed to report some gross receipts and made some payments to

employees or vendors in cash, but actually keeps two sets of books (one accurate and one fraudulent), should the unclaimed deductions reflected in the accurate set of books be counted?

2. *The proposed amendment presents options for resolving the circuit conflict, each of which is based on whether a defendant's tax loss may be reduced by unclaimed "credits, deductions, or exemptions." The Commission seeks comment regarding whether this list of potential offsets provides sufficient clarity as to what the court may or may not consider depending on which option is chosen. In particular, should the Commission expand the language to clarify that the list includes any type of deduction? See, e.g., United States v. Psihos, 683 F.3d 777, 781-82 (7th Cir. 2012) (noting a dispute between the parties regarding whether the unclaimed cash payments at issue were to be used in computing adjusted gross income (an "above-the-line" deduction) or to be used in computing taxable income (a "below-the-line" deduction)).*

5. PROPOSED AMENDMENT: ACCEPTANCE OF RESPONSIBILITY

Synopsis of Proposed Amendment: *This proposed amendment and issue for comment address two circuit conflicts involving the guideline for acceptance of responsibility, §3E1.1 (Acceptance of Responsibility). A defendant who clearly demonstrates acceptance of responsibility receives a 2-level reduction under subsection (a) of §3E1.1. The two circuit conflicts both involve the circumstances under which the defendant is eligible for a third level of reduction under subsection (b) of §3E1.1. Subsection (b) provides:*

> *(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.*

This is the language of the guideline after it was directly amended by Congress in section 401(g) of the PROTECT Act, Public Law 108–21, effective April 30, 2003. The PROTECT Act also directly amended Application Note 6 (including adding the last paragraph of that application note), and the Background Commentary. Section 401(j)(4) of the PROTECT Act states, "At no time may the Commission promulgate any amendment that would alter or repeal the amendments made by subsection (g) of this section."

Whether the Court Has Discretion to Deny the Third Level of Reduction

Circuits have disagreed over whether the court has discretion to deny the third level of reduction for acceptance of responsibility when the government has filed a motion under subsection (b) and the defendant is otherwise eligible.

The Seventh Circuit recently held that if the government makes the motion (and the other two requirements of subsection (b) are met, i.e., the defendant qualifies for the 2-level decrease and the offense level is level 16 or greater), the third level of reduction must be awarded. See United States v. Mount, 675 F.3d 1052 (7th Cir. 2012).

The Fifth Circuit has held to the contrary, that the decision whether to grant the third level of reduction "is the district court's — not the government's — even though the court may only do so on the government's motion." See United States v. Williamson, 598 F.3d 227, 230 (5th Cir. 2010).

The proposed amendment adopts the approach of the Fifth Circuit by recognizing that the court has discretion to deny the third level of reduction. Specifically, it amends Application Note 6 to §3E1.1 by adding a statement that "The court may grant the motion if the court determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. In such a case, the 1-level decrease under subsection (b) applies."

An issue for comment is also provided on whether the Commission should instead resolve this issue in a different manner.

Whether the Government Has Discretion to Withhold Making a Motion

Circuits have also disagreed over whether the government has discretion to withhold making a motion under subsection (b) when there is no evidence that the government was required to prepare for trial. An issue for comment is also provided on whether the Commission should resolve this circuit conflict and, if so, how it should do so.

Proposed Amendment:

§3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

Commentary

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

(A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;

(B) voluntary termination or withdrawal from criminal conduct or associations;

(C) voluntary payment of restitution prior to adjudication of guilt;

(D) voluntary surrender to authorities promptly after commission of the offense;

(E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(F) voluntary resignation from the office or position held during the commission of the offense;

(G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and

(H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.

6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For

example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Public Law 108–21. The court may grant the motion if the court determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. In such a case, the 1-level decrease under subsection (b) applies.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

Section 401(g) of Public Law 108–21 directly amended subsection (b), Application Note 6 (including adding the first sentence of the last paragraph of that application note), and the Background Commentary, effective April 30, 2003.

Issues for Comment:

1. Whether the Court Has Discretion to Deny the Third Level of Reduction

The Commission seeks comment on whether it should resolve this circuit conflict in a manner other than that provided in the proposed amendment. If so, how should the conflict be resolved and how should the Commission amend the guidelines to do so?

2. Whether the Government Has Discretion to Withhold Making a Motion

Circuits have also disagreed over whether the government has discretion to withhold making a motion

under subsection (b) when there is no evidence that the government was required to prepare for trial.

The Second and Fourth Circuits have held that the government may withhold the motion only if it determines that it has been required to prepare for trial. See United States v. Lee, 653 F.3d 170, 173-174 (2d Cir. 2011) (government withheld the motion because it was required to prepare for a Fatico hearing; court held this was "an unlawful reason"); United States v. Divens, 650 F.3d 343, 346 (4th Cir. 2011) (government withheld the motion because the defendant failed to sign an appellate waiver; court held the defendant was "entitled" to the motion and the reduction).

The majority of circuits, in contrast, have held that §3E1.1 recognizes that the government has an interest both in being permitted to avoid preparing for trial and in being permitted to allocate its resources efficiently, see §3E1.1(b), and that both are legitimate government interests that justify the withholding of the motion. See, e.g., United States v. Collins, 683 F.3d 697, 704-708 (6th Cir. 2012) (government withheld the motion because it was required to litigate pretrial motion to suppress evidence; court held the government did not abuse its discretion); United States v. Newson, 515 F.3d 374 (5th Cir. 2008) (government withheld the motion because the defendant refused to waive right to appeal; court held the government did not abuse its discretion); United States v. Johnson, 581 F.3d 994 (9th Cir. 2009) (same).

The Commission seeks comment on whether it should resolve this circuit conflict and, if so, how it should do so.

6. PROPOSED AMENDMENT: SETSER

Synopsis of Proposed Amendment: *A federal court imposing a sentence on a defendant generally has discretion to order that the sentence run consecutive to (or, in the alternative, concurrently with) a term of imprisonment previously imposed but not yet discharged. See 18 U.S.C. § 3584(a); USSG §5G1.3, comment. (backg'd.). Recently, the Supreme Court held that a federal court also generally has discretion to order that the sentence run consecutive to (or concurrently with) an anticipated, but not yet imposed, term of imprisonment. See Setser v. United States, __ U.S. __ (March 28, 2012).*

For cases in which there is a term of imprisonment previously imposed but not yet discharged, §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) provides guidance to the court in determining whether the sentence for the instant offense should run consecutive to (or, in the alternative, concurrently with) the undischarged term of imprisonment. This proposed amendment responds to Setser by ensuring that §5G1.3 also applies to cases covered by Setser, i.e., cases in which there is an anticipated, but not yet imposed, term of imprisonment. The proposed amendment revises §5G1.3 in two ways.

First, when the offense with the undischarged term of imprisonment is relevant conduct to the instant offense and resulted in an increase in the Chapter Two or Three offense level for the instant offense, the instant offense already includes an incremental punishment to account for the prior offense. Accordingly, subsection (b) of §5G1.3 provides that the court generally should order the sentence for the instant offense to run concurrently with the undischarged term of imprisonment. The proposed amendment ensures that subsection (b) also applies to a case in which there is an anticipated, but not yet imposed, term of imprisonment for an offense that is relevant conduct to the instant offense and resulted in an increase in the Chapter Two or Three offense level for the instant offense.

Second, when the offense with the undischarged term of imprisonment is not covered by subsection (b), the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense. See §5G1.3(c) (Policy Statement). The proposed amendment ensures that subsection (c) also applies to any other case in which there is an anticipated, but not yet imposed, term of imprisonment.

Conforming changes to the relevant application notes, to the background commentary, and to the heading of the guideline are also made.

Proposed Amendment:

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged or Anticipated Term of Imprisonment

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted or is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment or to the anticipated term of imprisonment, as applicable.

(c) (Policy Statement) In any other case involving an undischarged term of imprisonment or an anticipated term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the ~~prior~~ undischarged term of imprisonment or to the anticipated term of imprisonment, as applicable, to achieve a reasonable punishment for the instant offense.

Commentary

Application Notes:

1. *Consecutive Sentence - Subsection (a) Cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.*

2. *Application of Subsection (b).—*

(A) In General.—Subsection (b) applies in cases in which all of the prior offense (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Three offense level for the instant offense but was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior

offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

(C) Imposition of Sentence.—If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgment in a Criminal Case Order (i) the applicable subsection (e.g., §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.

(D) Example.—The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

The defendant is convicted of a federal offense charging the sale of 40 grams of cocaine. Under §1B1.3, the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court. The defendant received a nine-month sentence of imprisonment for the state offense and has served six months on that sentence at the time of sentencing on the instant federal offense. The guideline range applicable to the defendant is 12-18 months (Chapter Two offense level of level 16 for sale of 55 grams of cocaine; 3 level reduction for acceptance of responsibility; final offense level of level 13; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

3. Application of Subsection (c).—

(A) In General.—Under subsection (c), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment or to the anticipated but not yet imposed term of imprisonment, as applicable. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:

(i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));

(ii) the type (e.g., determinate, indeterminate/parolable) and length of the ~~prior~~ undischarged or anticipated sentence;

(iii) the time served on the undischarged sentence and the time likely to be served before release;

(iv) the fact that the ~~prior~~ undischarged sentence may have been imposed, or the fact that the anticipated sentence may be imposed, in state court rather than federal

court, or at a different time before the same or different federal court; and

(v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

(B) Partially Concurrent Sentence.—In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the ~~prior~~ undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged or anticipated term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged or anticipated term of imprisonment by that date.

(C) Undischarged or Anticipated Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—Subsection (c) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and ~~has had~~ such probation, parole, or supervised release has been or is anticipated to be revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence that has been, or that is anticipated to be, imposed for the revocation.

(D) Complex Situations.—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged or anticipated terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

(E) Downward Departure.—Unlike subsection (b), subsection (c) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (c), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the

Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(c), rather than as a credit for time served.

4. Downward Departure Provision.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. See §5K2.23 (Discharged Terms of Imprisonment).

Background: ~~In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S.C. § 3584(a).~~ Federal courts generally "have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings." See Setser v. United States, 132 S.Ct. 1463, 1468 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently or consecutively with other sentences that are anticipated but not yet imposed. See Setser, 132 S.Ct. at 1468. Exercise of that ~~authority~~discretion, however, is predicated on the court's consideration of the factors listed in 18 U.S.C. § 3553(a), including any applicable guidelines or policy statements issued by the Sentencing Commission.

7. PROPOSED AMENDMENT: MISCELLANEOUS AND TECHNICAL

Synopsis of Proposed Amendment: *This proposed amendment responds to recently enacted legislation and miscellaneous and technical guideline issues.*

A. Recently Enacted Legislation

Part A amends Appendix A (Statutory Index) to provide guideline references for four offenses not currently referenced in Appendix A that were established or revised by recently enacted legislation. They are as follows:

1. *18 U.S.C. § 39A. Section 311 of the Federal Aviation Administration Modernization and Reform Act of 2012, Pub. L. 112–95 (February 14, 2012), established a new criminal offense at 18 U.S.C. § 39A (Aiming a laser pointer at an aircraft). The offense applies to whoever knowingly aims the beam of a laser pointer at an aircraft in the special aircraft jurisdiction of the United States or at the flight path of such an aircraft. The statutory maximum term of imprisonment is five years.*

   The proposed amendment amends Appendix A (Statutory Index) to reference section 39A offenses to §2A5.2 (Interference with Flight Crew or Flight Attendant).

2. *18 U.S.C. § 1514(c). Section 3(a) of the Child Protection Act of 2012, Pub. L. 112–206 (December 7, 2012), established a new offense at 18 U.S.C. § 1514(c) that makes it a criminal offense to knowingly and intentionally violate or attempt to violate an order issued under section 1514 (Civil action to restrain harassment of a victim or witness). The new offense has a statutory maximum term of imprisonment of five years.*

   The proposed amendment amends Appendix A (Statutory Index) to reference the new offense at section 1514(c) to §2J1.2 (Obstruction of Justice).

3. *18 U.S.C. § 1752. The Federal Restricted Buildings and Grounds Improvement Act of 2011, Pub. L. 112–98 (March 8, 2012), amended the criminal offense at 18 U.S.C. § 1752 (Restricted building or grounds). As so amended, the statute defines "restricted buildings or grounds" to mean any restricted area (A) of the White House or its grounds, or the Vice President's residence or its grounds; (B) of a building or grounds where the President or other person protected by the United States Secret Service is or will be temporarily visiting; or (C) of a building or grounds restricted in conjunction with an event designated as a special event of national significance. The statute makes it a crime to enter or remain; to impede or disrupt the orderly conduct of business or official functions; to obstruct or impede ingress or egress; or to engage in any physical violence against any person or property. The Act did not change the statutory maximum term of imprisonment, which is ten years if the person used or carried a deadly or dangerous weapon or firearm or if the offense results in significant bodily injury, and one year in any other case.*

   The proposed amendment amends Appendix A (Statutory Index) to reference section 1752 offenses to §2A2.4 (Obstructing or Impeding Officers) and §2B2.3 (Trespass).

4. 19 U.S.C. § 1590. The Ultralight Aircraft Smuggling Prevention Act of 2012, Pub. L. 112–93 (February 10, 2012), amended the criminal offense at 19 U.S.C. § 1590 (Aviation smuggling) to provide a more specific definition of the term "aircraft" (i.e., to include ultralight aircraft) and to cover attempts and conspiracies. Section 1590 makes it unlawful for the pilot of an aircraft to transport, or for any individual on board any aircraft to possess, merchandise knowing that the merchandise will be introduced into the United States contrary to law. It is also unlawful for a person to transfer merchandise between an aircraft and a vessel on the high seas or in the customs waters of the United States unlawfully. The Act did not change the statutory maximum terms of imprisonment, which are 20 years if any of the merchandise involved was a controlled substance, see § 1590(c)(2), and five years otherwise, see § 1590(c)(1).

The proposed amendment amends Appendix A (Statutory Index) to reference section 1590 offenses to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property).

The proposed amendment also includes an issue for comment on the offenses described above.

B. Interaction Between Offense Guidelines in Chapter Two, Part J and Certain Adjustments in Chapter Three, Part C

Part B responds to an application issue that arises in cases in which the defendant is sentenced under an offense guideline in Chapter Two, Part J (Offenses Involving the Administration of Justice) and the defendant may also be subject to an adjustment under Chapter Three, Part C (Obstruction and Related Adjustments).

In the Commentary to four of the Chapter Two, Part J offense guidelines, there is an application note stating that Chapter Three, Part C, does not apply, unless the defendant obstructed the investigation or trial of the instant offense. See §§2J1.2, comment. (n.2(A)); 2J1.3, comment. (n.2); §2J1.6, comment. (n.2); 2J1.9, comment. (n.1). These application notes in Chapter Two, Part J, originated when Chapter Three, Part C, contained only one guideline — §3C1.1 (Obstructing or Impeding the Administration of Justice).

Chapter Three, Part C, now contains three additional guidelines, and these application notes in Chapter Two, Part J, appear to encompass these three additional guidelines as well and generally prohibit the court from applying them. See, e.g., United States v. Duong, 665 F.3d 364 (1st Cir. January 6, 2012) ("Thus, according to the literal terms of Application Note 2, 'Chapter 3, Part C' — presumably including section 3C1.3 — 'does not apply.'"). The First Circuit in Duong, however, determined that the application note in §2J1.6 was in conflict with §3C1.3 (Commission of Offense While on Release) and its underlying statute, 18 U.S.C. § 3147, and indicated that the Commission's stated purpose in establishing §3C1.3 "was not to bring that guideline within the purview of Application Note 2 of section 2J1.6". Id. at 368. Accordingly, the First Circuit held that the application note must be disregarded. Id.

Consistent with Duong, the proposed amendment clarifies the scope of Application Note 2 by striking the general reference to Chapter Three, Part C, and replacing it with a specific reference to §3C1.1. It makes the same change to the corresponding application notes in §§2J1.2, 2J1.3, and 2J1.9, and conforming changes to other parts of the Commentary in those guidelines.

C. Appendix A (Statutory Index) References for Offenses Under 18 U.S.C. § 554

Section 554 of title 18, United States Code (Smuggling goods from the United States), makes it unlawful to export or send from the United States (or attempt to do so) any merchandise, article, or object contrary to any law or regulation of the United States. It also makes it unlawful to receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise, article, or object, prior to exportation, knowing the same to be intended for exportation contrary to any law or regulation of the United States. Offenses under section 554 have a statutory maximum term of imprisonment of ten years, and they are referenced in Appendix A (Statutory Index) to three guidelines: §§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), 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), and 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).

The Department of Justice in its annual letter to the Commission has proposed that section 554 offenses should also be referenced to a fourth guideline, §2M5.1. The Department indicates that section 554 is used to prosecute a range of export offenses related to national security and that some cases would more appropriately be sentenced under §2M5.1 than §2M5.2. For example, when the section 554 offense involves a violation of export controls on arms, munitions, or military equipment (e.g., export controls under the Arms Export Control Act, 22 U.S.C. § 2778), the section 554 offense may appropriately be sentenced under §2M5.2, because other offenses involving a violation of export controls on arms, munitions, or military equipment (such as offenses under 22 U.S.C. § 2778) are referenced to §2M5.2.

In contrast, when the section 554 offense involves a violation of export controls not involving munitions (e.g., violations of economic sanctions or other export controls under the International Emergency Economic Powers Act, 50 U.S.C. § 1705), the Department proposes that the section 554 offense be sentenced under §2M5.1 rather than under §2M5.2, because other offenses involving evasion of export controls (such as offenses under 50 U.S.C. § 1705) are referenced to §2M5.1 (among other guidelines).

Part C of the proposed amendment amends Appendix A (Statutory Index) to broaden the range of guidelines to which offenses under 18 U.S.C. § 554 are referenced. Specifically, it adds a reference to §2M5.1. The proposed amendment also brackets the possibility of adding a reference to §2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose).

D. Technical and Stylistic Changes

Part D makes certain technical and stylistic changes to the Guidelines Manual.

First, it amends the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud) to provide updated references to the definitions contained in 7 U.S.C. §1a, which were renumbered by Public Law 111–203 (July 21, 2010).

Second, it amends the Notes to the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or

Conspiracy) to provide updated references to the definition of tetrahydrocannabinols contained in 21 C.F.R. § 1308.11(d), which were renumbered by 75 FR 79296 (December 20, 2010).

Third, it makes several stylistic revisions in the Guidelines Manual to change "court martial" to "court-martial".

Proposed Amendment:

(A) Recently Enacted Legislation

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 38	2B1.1
18 U.S.C. § 39A	2A5.2

* * *

18 U.S.C. § 1513	2A1.1, 2A1.2, 2A1.3, 2A2.1, 2A2.2, 2A2.3, 2B1.1, 2J1.2
18 U.S.C. § 1514(c)	2J1.2

* * *

18 U.S.C. § 1751(e)	2A2.2, 2A2.3
18 U.S.C. § 1752	2A2.4, 2B2.3

* * *

19 U.S.C. § 1586(e)	2T3.1
19 U.S.C. § 1590	2D1.1, 2T3.1

* * *

(B) Interaction Between 2J and 3C

§2J1.2. Obstruction of Justice

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Commentary

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Application Notes:

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2. Chapter Three Adjustments.—

(A) Inapplicability of ~~Chapter Three, Part C~~§3C1.1.—For offenses covered under this section, ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply, unless the defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.

(B) Interaction with Terrorism Adjustment.—If §3A1.4 (Terrorism) applies, do not apply subsection (b)(1)(C).

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

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Commentary

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Application Notes:

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2. For offenses covered under this section, ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply, unless the defendant obstructed the investigation or trial of the perjury count.

3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which he committed perjury, subornation of perjury, or witness bribery), see the Commentary to ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1, and to §3D1.2(c) (Groups of Closely Related Counts).

* * *

§2J1.6. Failure to Appear by Defendant

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Commentary

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Application Notes:

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2. For offenses covered under this section, ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply, unless the defendant obstructed the investigation or trial of the failure to appear count.

* * *

§2J1.9. Payment to Witness

* * *

Commentary

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Application Notes:

1. *For offenses covered under this section, ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply unless the defendant obstructed the investigation or trial of the payment to witness count.*

2. *In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which the payment was made), see the Commentary to ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1, and to §3D1.2(c) (Groups of Closely Related Counts).*

* * *

(C) 18 U.S.C. § 554

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 554	2B1.5, 2M5.1, 2M5.2, [2M5.3,] 2Q2.1

* * *

(D) Technical and Stylistic Changes

§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

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Commentary

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Application Notes:

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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~~11) of the Commodity Exchange Act (7 U.S.C. § 1a(~~5~~11)).

"Commodity trading advisor" has the meaning given that term in section 1a(~~6~~12) of the Commodity Exchange Act (7 U.S.C. § 1a(~~6~~12)).

"Futures commission merchant" has the meaning given that term in section 1a(~~20~~28) of the Commodity Exchange Act (7 U.S.C. § 1a(~~20~~28)).

"Introducing broker" has the meaning given that term in section 1a(~~23~~31) of the Commodity Exchange Act (7 U.S.C. § 1a(~~23~~31)).

* * *

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

* * *

***Notes to Drug Quantity Table:**

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(H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(~~30~~31)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

(I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(~~30~~31)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

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§4A1.1. Criminal History Category

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Commentary

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Application Notes:

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2. *§4A1.1(b). Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term "prior sentence" is defined at §4A1.2(a). The term "sentence of imprisonment" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).*

Certain prior sentences are not counted or are counted only under certain conditions:

* * *

A military sentence is counted only if imposed by a general or special court-martial. See §4A1.2(g).

* * *

3. *§4A1.1(c). One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this subsection. The term "prior sentence" is defined at §4A1.2(a).*

Certain prior sentences are not counted or are counted only under certain conditions:

* * *

A military sentence is counted only if imposed by a general or special court-martial. See §4A1.2(g).

* * *

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

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(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.

* * *

Issue for Comment:

1. Part A of the proposed amendment would reference offenses under 18 U.S.C. § 39A, 18 U.S.C. § 1514(c), 18 U.S.C. § 1752, and 19 U.S.C. § 1590 to various guidelines. The Commission invites comment on offenses under these statutes, including in particular the conduct involved in such offenses

and the nature and seriousness of the harms posed by such offenses. Do the guidelines covered by the proposed amendment adequately account for these offenses? If not, what revisions to the guidelines would be appropriate to account for these offenses? In particular, should the Commission provide one or more new alternative base offense levels, specific offense characteristics, or departure provisions in one or more of these guidelines to better account for these offenses? If so, what should the Commission provide?

Similarly, are there any guideline application issues that the Commission should address for cases involving these statutes? For example, the proposed amendment would reference offenses under 19 U.S.C. § 1590 to §2D1.1 and §2T3.1. In a section 1590 case sentenced under §2T3.1, should the use of an aircraft be considered a form of "sophisticated means," such that the defendant should receive the specific offense characteristic at §2T3.1(b)(1), which provides an increase of 2 levels and a minimum offense level of 12 if the offense involved sophisticated means? If not, then under what circumstances (if any) should the defendant in a section 1590 case receive that specific offense characteristic?