

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2015.

SUMMARY: Pursuant to its authority under 28 U.S.C. § 994(p), the Commission has promulgated amendments to the sentencing guidelines, policy statements, commentary, and statutory index. This notice sets forth the amendments and the reason for each amendment.

DATE: The Commission has specified an effective date of November 1, 2015, for the amendments set forth in this notice.

FOR FURTHER INFORMATION CONTACT: Jeanne Doherty, Public Affairs Officer, (202) 502-4502, jdoherty@ussc.gov. The amendments set forth in this notice also may be accessed through the Commission's website at www.ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and generally submits guideline amendments to Congress pursuant to 28 U.S.C. § 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

Notice of proposed amendments was published in the Federal Register on January 16, 2015 (see 80 FR 2569-2590). The Commission held a public hearing on the proposed amendments in Washington, D.C., on March 12, 2015. On April 30, 2015, the Commission submitted these amendments to Congress and specified an effective date of November 1, 2015.

AUTHORITY: 28 U.S.C. § 994(a), (o), and (p); USSC Rules of Practice and Procedure 4.1.

Patti B. Saris

Chair

1. Amendment: Section 1B1.3(a)(1)(B) is amended by striking “all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,” and inserting the following:

“ all acts and omissions of others that were—

- (i) within the scope of the jointly undertaken criminal activity,
- (ii) in furtherance of that criminal activity, and
- (iii) reasonably foreseeable in connection with that criminal activity;”.

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

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

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

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

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

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

In determining the scope of the criminal activity that the particular defendant

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

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

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

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

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

Illustrations of Conduct for Which the Defendant is Accountable

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

- (1) Defendant A is one of ten persons hired by Defendant B to off-load

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

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for

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

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

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

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

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

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

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

connection with that criminal activity.

- (3) Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (see the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).
- (4) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's

criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

- (5) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug

quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (i.e., the one delivery).

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

- (7) Defendant R recruits Defendant S to distribute 500 grams of

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

- (8) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise

operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.”;

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

- “2. Accountability Under More Than One Provision.—In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant’s accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.
3. Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).—

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

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

- (i) within the scope of the jointly undertaken criminal activity;
- (ii) in furtherance of that criminal activity; and
- (iii) reasonably foreseeable in connection with that criminal activity.

The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (i.e., ‘within the scope,’ ‘in furtherance,’ and ‘reasonably foreseeable’) is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.

- (B) Scope.—Because a count may be worded broadly and include the conduct

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

In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as

one jointly undertaken criminal activity or as a number of separate criminal activities.

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

- (C) In Furtherance.—The court must determine if the conduct (acts and omissions) of others was in furtherance of the jointly undertaken criminal activity.

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

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

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

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

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

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

- (i) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific

objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B)(applying to a jointly undertaken criminal activity).

Defendant A engaged in a jointly undertaken criminal activity and all three criteria of subsection (a)(1)(B) are met. First, the conduct was within the scope of the criminal activity (the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity,

as described above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. See Application Note 2.

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

- (i) Defendant C is the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was

within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

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

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

(i) Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise.

Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not within the scope of the jointly undertaken criminal activity (i.e., the forgery of the \$800 check).

- (ii) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the jointly undertaken criminal activity (the scheme to sell fraudulent stocks), was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity.
- (iii) Defendants H and I engaged in an ongoing marijuana importation conspiracy in which Defendant J was hired only to help off-load a

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

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

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

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

criminal activity (i.e., the one delivery).

- (vi) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.
- (vii) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of

cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (i.e., the 500 grams).

- (viii) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably

foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, the scope of the jointly undertaken criminal activity may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. See Application Note 3(B).”.

The Commentary to §2K2.1 captioned “Application Notes” is amended in Note 14(E) by striking “Application Note 9” both places such term appears and inserting “Application Note 11”.

The Commentary to §2X3.1 captioned “Application Notes” is amended in Note 1 by striking “Application Note 10” and inserting “Application Note 12”.

The Commentary to §2X4.1 captioned “Application Notes” is amended in Note 1 by striking “Application Note 10” and inserting “Application Note 12”.

Reason for Amendment: This amendment is a result of the Commission’s effort to clarify the use of relevant conduct in offenses involving multiple participants.

The amendment makes clarifying revisions to §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)). It restructures the guideline and its commentary to set out more clearly the three-step analysis the court applies in determining whether a defendant is accountable for the conduct of others in a jointly undertaken criminal activity under §1B1.3(a)(1)(B). The three-step analysis requires that the court (1) identify the scope of the jointly undertaken criminal activity; (2) determine whether the conduct of others in the jointly undertaken criminal activity was in furtherance of that criminal activity; and (3) determine whether the conduct of others was reasonably foreseeable in connection with that criminal activity.

Prior to this amendment, the “scope” element of the three-step analysis was identified in the commentary to §1B1.3 but was not included in the text of the guideline itself. This amendment makes clear that, under the “jointly undertaken criminal activity” provision, a defendant is accountable for the conduct of others in a jointly undertaken criminal activity if the conduct meets all three criteria of the three-step analysis. This amendment is not intended as a substantive change in policy.

2. Amendment: Section 2B1.1(b) is amended by striking paragraph (1) as follows:

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

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

and inserting the following:

“(1) If the loss exceeded \$6,500, increase the offense level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) \$6,500 or less	no increase
(B) More than \$6,500	add 2
(C) More than \$15,000	add 4
(D) More than \$40,000	add 6
(E) More than \$95,000	add 8
(F) More than \$150,000	add 10
(G) More than \$250,000	add 12
(H) More than \$550,000	add 14
(I) More than \$1,500,000	add 16
(J) More than \$3,500,000	add 18
(K) More than \$9,500,000	add 20
(L) More than \$25,000,000	add 22
(M) More than \$65,000,000	add 24
(N) More than \$150,000,000	add 26
(O) More than \$250,000,000	add 28
(P) More than \$550,000,000	add 30.”.

Section 2B1.4(b)(1) is amended by striking “\$5,000” and inserting “\$6,500”.

Section 2B1.5(b)(1) is amended by striking “\$2,000” and inserting “\$2,500”; and by striking “\$5,000” both places such term appears and inserting “\$6,500”.

Section 2B2.1(b) is amended by striking paragraph (2) as follows:

“(2) If the loss exceeded \$2,500, increase the offense level as follows:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$2,500 or less	no increase
(B)	More than \$2,500	add 1
(C)	More than \$10,000	add 2
(D)	More than \$50,000	add 3
(E)	More than \$250,000	add 4
(F)	More than \$800,000	add 5
(G)	More than \$1,500,000	add 6
(H)	More than \$2,500,000	add 7
(I)	More than \$5,000,000	add 8.”;

and inserting the following:

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

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$5,000 or less	no increase
(B)	More than \$5,000	add 1
(C)	More than \$20,000	add 2
(D)	More than \$95,000	add 3
(E)	More than \$500,000	add 4
(F)	More than \$1,500,000	add 5
(G)	More than \$3,000,000	add 6
(H)	More than \$5,000,000	add 7
(I)	More than \$9,500,000	add 8.”.

Section 2B2.3(b)(3) is amended by striking “\$2,000” and inserting “\$2,500”; and by striking “\$5,000” both places such term appears and inserting “\$6,500”.

Section 2B3.1(b) is amended by striking paragraph (7) as follows:

“(7) If the loss exceeded \$10,000, increase the offense level as follows:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$10,000 or less	no increase
(B)	More than \$10,000	add 1
(C)	More than \$50,000	add 2
(D)	More than \$250,000	add 3
(E)	More than \$800,000	add 4
(F)	More than \$1,500,000	add 5
(G)	More than \$2,500,000	add 6
(H)	More than \$5,000,000	add 7.”;

and inserting the following:

“(7) If the loss exceeded \$20,000, increase the offense level as follows:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$20,000 or less	no increase
(B)	More than \$20,000	add 1
(C)	More than \$95,000	add 2
(D)	More than \$500,000	add 3
(E)	More than \$1,500,000	add 4
(F)	More than \$3,000,000	add 5
(G)	More than \$5,000,000	add 6
(H)	More than \$9,500,000	add 7.”.

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

Sections 2B3.3(b)(1), 2B4.1(b)(1), 2B5.1(b)(1), 2B5.3(b)(1), and 2B6.1(b)(1) are each amended by striking “\$2,000” and inserting “\$2,500”; and by striking “\$5,000” both places such term appears and inserting “\$6,500”.

Sections 2C1.1(b)(2), 2C1.2(b)(2), and 2C1.8(b)(1) are each amended by striking “\$5,000” and inserting “\$6,500”.

Sections 2E5.1(b)(2) and 2Q2.1(b)(3) are each amended by striking “\$2,000” and inserting “\$2,500”; and by striking “\$5,000” both places such term appears and inserting “\$6,500”.

Section 2R1.1(b) is amended by striking paragraph (2) as follows:

“(2) If the volume of commerce attributable to the defendant was more than \$1,000,000, adjust the offense level as follows:

<u>Volume of</u> <u>Commerce (Apply the Greatest)</u>	<u>Adjustment to</u> <u>Offense Level</u>
(A) More than \$1,000,000	add 2
(B) More than \$10,000,000	add 4
(C) More than \$40,000,000	add 6
(D) More than \$100,000,000	add 8
(E) More than \$250,000,000	add 10
(F) More than \$500,000,000	add 12
(G) More than \$1,000,000,000	add 14
(H) More than \$1,500,000,000	add 16.”;

and inserting the following:

“(2) If the volume of commerce attributable to the defendant was more than \$1,000,000, adjust the offense level as follows:

<u>Volume of</u> <u>Commerce (Apply the Greatest)</u>	<u>Adjustment to</u> <u>Offense Level</u>
(A) More than \$1,000,000	add 2
(B) More than \$10,000,000	add 4
(C) More than \$50,000,000	add 6
(D) More than \$100,000,000	add 8
(E) More than \$300,000,000	add 10
(F) More than \$600,000,000	add 12
(G) More than \$1,200,000,000	add 14
(H) More than \$1,850,000,000	add 16.”.

Section 2T3.1(a) is amended by striking “\$1,000” both places such term appears and inserting “\$1,500”; and by striking “\$100” both places such term appears and inserting “\$200”.

Section 2T4.1 is amended by striking the following:

“	<u>Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
	(A) \$2,000 or less	6
	(B) More than \$2,000	8
	(C) More than \$5,000	10
	(D) More than \$12,500	12
	(E) More than \$30,000	14
	(F) More than \$80,000	16
	(G) More than \$200,000	18
	(H) More than \$400,000	20
	(I) More than \$1,000,000	22
	(J) More than \$2,500,000	24
	(K) More than \$7,000,000	26
	(L) More than \$20,000,000	28
	(M) More than \$50,000,000	30
	(N) More than \$100,000,000	32
	(O) More than \$200,000,000	34
	(P) More than \$400,000,000	36.”;

and inserting the following:

“	<u>Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
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(A)	\$2,500 or less	6
(B)	More than \$2,500	8
(C)	More than \$6,500	10
(D)	More than \$15,000	12
(E)	More than \$40,000	14
(F)	More than \$100,000	16
(G)	More than \$250,000	18
(H)	More than \$550,000	20
(I)	More than \$1,500,000	22
(J)	More than \$3,500,000	24
(K)	More than \$9,500,000	26
(L)	More than \$25,000,000	28
(M)	More than \$65,000,000	30
(N)	More than \$150,000,000	32
(O)	More than \$250,000,000	34
(P)	More than \$550,000,000	36.”;

Section 5E1.2 is amended in subsection (c)(3) by striking the following:

“

Fine Table

Offense	A	B
<u>Level</u>	<u>Minimum</u>	<u>Maximum</u>
3 and below	\$100	\$5,000
4-5	\$250	\$5,000
6-7	\$500	\$5,000
8-9	\$1,000	\$10,000
10-11	\$2,000	\$20,000
12-13	\$3,000	\$30,000
14-15	\$4,000	\$40,000
16-17	\$5,000	\$50,000
18-19	\$6,000	\$60,000
20-22	\$7,500	\$75,000
23-25	\$10,000	\$100,000
26-28	\$12,500	\$125,000
29-31	\$15,000	\$150,000
32-34	\$17,500	\$175,000
35-37	\$20,000	\$200,000
38 and above	\$25,000	\$250,000.”,

and inserting the following:

“

Fine Table

Offense	A	B
<u>Level</u>	<u>Minimum</u>	<u>Maximum</u>
3 and below	\$200	\$9,500
4-5	\$500	\$9,500
6-7	\$1,000	\$9,500
8-9	\$2,000	\$20,000
10-11	\$4,000	\$40,000
12-13	\$5,500	\$55,000
14-15	\$7,500	\$75,000
16-17	\$10,000	\$95,000
18-19	\$10,000	\$100,000
20-22	\$15,000	\$150,000
23-25	\$20,000	\$200,000
26-28	\$25,000	\$250,000
29-31	\$30,000	\$300,000
32-34	\$35,000	\$350,000
35-37	\$40,000	\$400,000
38 and above	\$50,000	\$500,000.”;

in subsection (c)(4) by striking “\$250,000” and inserting “\$500,000”;

and by inserting after subsection (g) the following new subsection (h):

“(h) Special Instruction

- (1) For offenses committed prior to November 1, 2015, use the applicable fine guideline range that was set forth in the version of §5E1.2(c) that was in effect on November 1, 2014, rather than the applicable fine guideline range set forth in subsection (c) above.”.

Section 8C2.4 is amended in subsection (d) by striking the following:

“ Offense Level Fine Table

<u>Offense Level</u>	<u>Amount</u>
6 or less	\$5,000
7	\$7,500
8	\$10,000
9	\$15,000
10	\$20,000
11	\$30,000

12	\$40,000
13	\$60,000
14	\$85,000
15	\$125,000
16	\$175,000
17	\$250,000
18	\$350,000
19	\$500,000
20	\$650,000
21	\$910,000
22	\$1,200,000
23	\$1,600,000
24	\$2,100,000
25	\$2,800,000
26	\$3,700,000
27	\$4,800,000
28	\$6,300,000
29	\$8,100,000
30	\$10,500,000
31	\$13,500,000
32	\$17,500,000
33	\$22,000,000

34	\$28,500,000
35	\$36,000,000
36	\$45,500,000
37	\$57,500,000
38 or more	\$72,500,000.”,

and inserting the following:

“ Offense Level Fine Table

<u>Offense Level</u>	<u>Amount</u>
6 or less	\$8,500
7	\$15,000
8	\$15,000
9	\$25,000
10	\$35,000
11	\$50,000
12	\$70,000
13	\$100,000
14	\$150,000
15	\$200,000

16	\$300,000
17	\$450,000
18	\$600,000
19	\$850,000
20	\$1,000,000
21	\$1,500,000
22	\$2,000,000
23	\$3,000,000
24	\$3,500,000
25	\$5,000,000
26	\$6,500,000
27	\$8,500,000
28	\$10,000,000
29	\$15,000,000
30	\$20,000,000
31	\$25,000,000
32	\$30,000,000
33	\$40,000,000
34	\$50,000,000
35	\$65,000,000
36	\$80,000,000
37	\$100,000,000

38 or more \$150,000,000.”;

and by inserting after subsection (d) the following new subsection (e):

“(e) Special Instruction

- (1) For offenses committed prior to November 1, 2015, use the offense level fine table that was set forth in the version of §8C2.4(d) that was in effect on November 1, 2014, rather than the offense level fine table set forth in subsection (d) above.”.

Reason for Amendment: This amendment makes adjustments to the monetary tables in §§2B1.1 (Theft, Property, Destruction, and Fraud), 2B2.1 (Burglary), 2B3.1 (Robbery), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 2T4.1 (Tax Table), 5E1.2 (Fines for Individual Defendants), and 8C2.4 (Base Fine) to account for inflation. The amendment adjusts the amounts in each of the seven monetary tables using a specific multiplier derived from the Consumer Price Index (CPI), and then rounds—

- amounts greater than \$100,000,000 to the nearest multiple of \$50,000,000;
- amounts greater than \$10,000,000 to the nearest multiple of \$5,000,000;
- amounts greater than \$1,000,000 to the nearest multiple of \$500,000;

- amounts greater than \$100,000 to the nearest multiple of \$50,000;
- amounts greater than \$10,000 to the nearest multiple of \$5,000;
- amounts greater than \$1,000 to the nearest multiple of \$500; and
- amounts of \$1,000 or less to the nearest multiple of \$50.

In addition, the amendment includes conforming changes to other Chapter Two guidelines that refer to the monetary tables.

Congress has generally mandated that agencies in the executive branch adjust the civil monetary penalties they impose to account for inflation using the CPI. See 28 U.S.C. § 2461 note (Federal Civil Penalties Inflationary Adjustment Act of 1990). Although the Commission's work does not involve civil monetary penalties, it does establish appropriate criminal sentences for categories of offenses and offenders, including appropriate amounts for criminal fines. While some of the monetary values in the Chapter Two guidelines have been revised since they were originally established in 1987, none of the tables has been specifically revised to account for inflation.

Due to inflationary changes, there has been a gradual decrease in the value of the dollar over time. As a result, monetary losses in current offenses reflect, to some degree, a lower degree of harm and culpability than did equivalent amounts when the monetary tables were established or last substantively amended. Similarly, the fine levels recommended by the guidelines are lower in value than when they were last adjusted, and

therefore, do not have the same sentencing impact as a similar fine in the past. Based on its analysis and widespread support for inflationary adjustments expressed in public comment, the Commission concluded that aligning the above monetary tables with modern dollar values is an appropriate step at this time.

The amendment adjusts each table based on inflationary changes since the year each monetary table was last substantially amended:

- Loss table in §2B1.1 and tax table in §2T4.1: adjusting for inflation from 2001 (\$1.00 in 2001 = \$1.34 in 2014);
- Loss tables in §§2B2.1 and 2B3.1 and fine table for individual defendants at §5E1.2(c)(3): adjusting for inflation from 1989 (\$1.00 in 1989 = \$1.91 in 2014);
- Volume of Commerce table in §2R1.1: adjusting for inflation from 2005 (\$1.00 in 2005 = \$1.22 in 2014); and
- Fine table for organizational defendants at §8C2.4(d): adjusting for inflation from 1991 (\$1.00 in 1991 = \$1.74 in 2014).

Adjusting from the last substantive amendment year appropriately accounts for the

Commission's previous work in revising these tables at various times. Although not specifically focused on inflationary issues, previous Commissions engaged in careful examination (and at times, a wholesale rewriting) of the monetary tables and ultimately included monetary and enhancement levels that it considered appropriate at that time. The Commission estimates that this amendment would result in the Bureau of Prisons having approximately 224 additional prison beds available at the end of the first year after implementation, and approximately 956 additional prison beds available at the end of its fifth year of implementation.

Finally, the amendment adds a special instruction to both §§5E1.2 and 8C2.4 providing that, for offenses committed prior to November 1, 2015, the court shall use the fine provisions that were in effect on November 1, 2014, rather than the fine provisions as amended for inflation. This addition responds to concerns expressed in public comment that changes to the fine tables might create ex post facto problems. It ensures that an offender whose offense level is calculated under the current Guidelines Manual is not subject to the inflated fine provisions if his or her offense was committed prior to November 1, 2015. Such guidance is similar to that provided in the commentary to §5E1.3 (Special Assessment) relating to the amount of the special assessment to be imposed in a given case.

3. Amendment: Section 2B1.1 is amended in subsection (b)(2) by striking the following:

- “ (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.”,

and inserting the following:

- “ (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;
 - (B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or
 - (C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.”;

in subsection (b)(10)(C) by inserting after “the offense otherwise involved sophisticated means” the following: “and the defendant intentionally engaged in or caused the conduct constituting sophisticated means”;

and in subsection (b)(16)(B) by inserting “or” at the end of subdivision (i), and by striking “; or (iii) substantially endangered the solvency or financial security of 100 or more victims”.

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

in Note 3(F)(ix) by striking “there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—” and inserting “the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by—”;

in Note 4 by striking “50 victims” and inserting “10 victims” at subdivision (C)(ii); and

by inserting at the end the following new subdivision (F):

“(F) Substantial Financial Hardship.—In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—

- (i) becoming insolvent;
- (ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);
- (iii) suffering substantial loss of a retirement, education, or other savings or investment fund;
- (iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;
- (v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and
- (vi) suffering substantial harm to his or her ability to obtain credit.”;

in Note 9 by striking “Sophisticated Means Enhancement under” in the heading and inserting “Application of”; and by inserting at the end of the heading of subdivision (B) the following: “under Subsection (b)(10)(C)”;

and in Note 20(A)(vi) by striking both “or credit record” and “or a damaged credit record”.

Reason for Amendment: This amendment makes several changes to the guideline applicable to economic crimes, §2B1.1 (Theft, Property Destruction, and Fraud), to better account for harm to victims, individual culpability, and the offender’s intent. This amendment is a result of the Commission’s multi-year study of §2B1.1 and related guidelines, and follows extensive data collection and analysis relating to economic offenses and offenders. Using this Commission data, combined with legal analysis and public comment, the Commission identified a number of specific areas where changes were appropriate.

Victims Table

First, the amendment revises the victims table in §2B1.1(b)(2) to specifically incorporate substantial financial hardship to victims as a factor in sentencing economic crime offenders. As amended, the first tier of the victims table provides for a 2-level enhancement where the offense involved 10 or more victims or mass-marketing, or if the

offense resulted in substantial financial hardship to one or more victims. The 4-level enhancement applies if the offense resulted in substantial financial hardship to five or more victims, and the 6-level enhancement applies if the offense resulted in substantial financial hardship to 25 or more victims. As a conforming change, the special rule in Application Note 4(C)(ii)(I), pertaining to theft of undelivered mail, is also revised to refer to 10 rather than 50 victims.

In addition, the amendment adds a non-exhaustive list of factors for courts to consider in determining whether the offense caused substantial financial hardship. These factors include: becoming insolvent; filing for bankruptcy; suffering substantial loss of a retirement, education, or other savings or investment fund; making substantial changes to employment; making substantial changes to living arrangements; or suffering substantial harm to the victim's ability to obtain credit. Two conforming changes are also included. First, one factor — substantial harm to ability to obtain credit — was previously included in Application Note 20(A)(vi) as a potential departure consideration. The amendment removes this language from the Application Note. Second, the amendment deletes subsection (b)(16)(B)(iii), which provided for an enhancement where an offense substantially endangered the solvency or financial security of 100 or more victims.

The Commission continues to believe that the number of victims is a meaningful measure of the harm and scope of an offense and can be indicative of its seriousness. It is for this reason that the amended victims table maintains the 2-level enhancement for offenses that

involve 10 or more victims or mass marketing. However, the revisions to the victims table also reflect the Commission's conclusion that the guideline should place greater emphasis on the extent of harm that particular victims suffer as a result of the offense. Consistent with the Commission's overall goal of focusing more on victim harm, the revised victims table ensures that an offense that results in even one victim suffering substantial financial harm receives increased punishment, while also lessening the cumulative impact of loss and the number of victims, particularly in high-loss cases.

Intended Loss

Second, the amendment revises the commentary at §2B1.1, Application Note 3(A)(ii), which has defined intended loss as “pecuniary harm that was intended to result from the offense.” In interpreting this provision, courts have expressed some disagreement as to whether a subjective or an objective inquiry is required. Compare United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011) (holding that a subjective inquiry is required), United States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013) (“To make this determination, we look to the defendant’s subjective expectation, not to the risk of loss to which he may have exposed his victims.”), United States v. Confredo, 528 F.3d 143, 152 (2d Cir. 2008) (remanding for consideration of whether defendant had “proven a subjective intent to cause a loss of less than the aggregate amount” of fraudulent loans), and United States v. Sanders, 343 F.3d 511, 527 (5th Cir. 2003) (“our case law requires the government prove by a preponderance of the evidence that the defendant had the subjective intent to cause

the loss that is used to calculate his offense level”), with United States v. Innarelli, 524 F.3d 286, 291 (1st Cir. 2008) (“we focus our loss inquiry for purposes of determining a defendant’s offense level on the objectively reasonable expectation of a person in his position at the time he perpetrated the fraud, not on his subjective intentions or hopes”) and United States v. Lane, 323 F.3d 568, 590 (7th Cir. 2003) (“The determination of intended loss under the Sentencing Guidelines therefore focuses on the conduct of the defendant and the objective financial risk to victims caused by that conduct”).

The amendment adopts the approach taken by the Tenth Circuit by revising the commentary in Application Note 3(A)(ii) to provide that intended loss means the pecuniary harm that “the defendant purposely sought to inflict.” The amendment reflects the Commission’s continued belief that intended loss is an important factor in economic crime offenses, but also recognizes that sentencing enhancements predicated on intended loss, rather than losses that have actually accrued, should focus more specifically on the defendant’s culpability.

Sophisticated Means

Third, the amendment narrows the focus of the specific offense characteristic at §2B1.1(b)(10)(C) to cases in which the defendant intentionally engaged in or caused conduct constituting sophisticated means. Prior to the amendment, the enhancement applied if “the offense otherwise involved sophisticated means.” Based on this

language, courts had applied this enhancement on the basis of the sophistication of the overall scheme without a determination of whether the defendant's own conduct was "sophisticated." See, e.g., United States v. Green, 648 F.3d 569, 576 (7th Cir. 2011); United States v. Bishop-Oyedepo, 480 Fed. App'x 431, 433-34 (7th Cir. 2012); United States v. Jenkins-Watt, 574 F.3d 950, 965 (8th Cir. 2009). The Commission concluded that basing the enhancement on the defendant's own intentional conduct better reflects the defendant's culpability and will appropriately minimize application of this enhancement to less culpable offenders.

Fraud on the Market

Finally, the amendment revises the special rule at Application Note 3(F)(ix) relating to the calculation of loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. When this special rule was added to the guidelines, it established a rebuttable presumption that the specified loss calculation methodology provides a reasonable estimate of the actual loss in such cases. As amended, the method provided in the special rule is no longer the presumed starting point for calculating loss in these cases. Instead, the revised special rule states that the provided method is one method that courts may consider, but that courts, in determining loss, are free to use any method that is appropriate and practicable under the circumstances. This amendment reflects the Commission's view that the most appropriate method to determine a reasonable estimate of loss will often vary in these

highly complex and fact-intensive cases.

This amendment, in combination with related revisions to the mitigating role guideline at §3B1.2 (Mitigating Role), reflects the Commission’s overall goal of focusing the economic crime guideline more on qualitative harm to victims and individual offender culpability.

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

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

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

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

“ 1 gm of Hydrocodone (actual) = 6700 gm of marihuana”;

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

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

“ Schedule III Hydrocodone*****

1 unit of Schedule III hydrocodone = 1 gm of marihuana

*****Provided, that the combined equivalent weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 2,999.99 kilograms of marihuana.”;

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

Reason for Amendment: This amendment changes the way the primary drug trafficking guideline calculates a defendant’s drug quantity in cases involving hydrocodone in response to recent administrative actions by the Food and Drug Administration and the Drug Enforcement Administration. The amendment adopts a marihuana equivalency for

hydrocodone (1 gram equals 6700 grams of marihuana) based on the weight of the hydrocodone alone.

In 2013 and 2014, the Food and Drug Administration approved several new pharmaceuticals containing hydrocodone which can contain up to twelve times as much hydrocodone in a single pill than was previously available. Separately, in October 2014, the Drug Enforcement Administration moved certain commonly-prescribed pharmaceuticals containing hydrocodone from the less-restricted Schedule III to the more-restricted Schedule II. Among other things, the scheduling doubled the statutory maximum term of imprisonment available for trafficking in the pharmaceuticals that were previously controlled under Schedule III from 10 years to 20 years. The change also rendered obsolete the entries in the Drug Quantity Table and Drug Equivalency Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) that set a marihuana equivalency for the pharmaceuticals that were previously controlled under Schedule III.

As a result of these administrative actions, all pharmaceuticals that include hydrocodone are now subject to the same statutory penalties. There is wide variation in the amount of hydrocodone available in these pharmaceuticals and in the amount of other ingredients (such as binders, coloring, acetaminophen, etc.) they contain. This variation raises significant proportionality issues within §2D1.1, where drug quantity for hydrocodone

offenses has previously been calculated based on the weight of the entire substance that contains hydrocodone or on the number of pills. Neither of these calculations directly took into account the amount of actual hydrocodone in the pills.

The amendment addresses these changed circumstances by setting a new marijuana equivalency for hydrocodone based on the weight of the hydrocodone alone. Without this change, defendants with less actual hydrocodone could have received a higher guideline range than those with more hydrocodone because pills with less hydrocodone can sometimes contain more non-hydrocodone ingredients, leading the lower-dose pills to weigh more.

In setting the marijuana equivalency, the Commission considered: potency of the drug, medical use of the drug, and patterns of abuse and trafficking, such as prevalence of abuse, consequences of misuse including death or serious bodily injury from use, and incidence of violence associated with its trafficking. The Commission noted that the Drug Enforcement Administration's rescheduling decision relied in part on the close relationship between hydrocodone and oxycodone, a similar and commonly-prescribed drug that was already controlled under Schedule II. Scientific literature, public comment, and testimony supported the conclusion that the potency, medical use, and patterns of abuse and trafficking of hydrocodone are very similar to oxycodone. In particular, the Commission heard testimony from abuse liability specialists and reviewed scientific literature indicating that, in studies conducted under standards established by

the Food and Drug Administration for determining the abuse liability of a particular drug, the potencies of hydrocodone and oxycodone when abused are virtually identical, even though some physicians who prescribe the two drugs in a clinical setting might not prescribe them in equal doses. Public comment indicated that both hydrocodone and oxycodone are among the top ten drugs most frequently encountered by law enforcement and that their methods of diversion and rates of diversion per kilogram of available drug are similar. Public comment and review of the scientific literature also indicated that the users of the two drugs share similar characteristics, and that some users may use them interchangeably, a situation which may become more common as the more powerful pharmaceuticals recently approved by the Food and Drug Administration become available.

Based on proportionality considerations and the Commission's assessment that, for purposes of the drug guideline, hydrocodone and oxycodone should be treated equivalently, the amendment adopts a marijuana equivalency for hydrocodone (actual) that is the same as the existing equivalency for oxycodone (actual): 1 gram equals 6,700 grams of marijuana.

5. Amendment: The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 3(A) by inserting after "that makes him substantially less culpable than the average participant" the following: "in the criminal activity", by striking "concerted" and inserting "the", by striking "is not precluded from consideration for" each place such

term appears and inserting “may receive”, by striking “role” both places such term appears and inserting “participation”, and by striking “personal gain from a fraud offense and who had limited knowledge” and inserting “personal gain from a fraud offense or who had limited knowledge”;

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

- “ In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:
- (i) the degree to which the defendant understood the scope and structure of the criminal activity;
 - (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
 - (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
 - (iv) the nature and extent of the defendant’s participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;

- (v) the degree to which the defendant stood to benefit from the criminal activity.

For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.

The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.”;

in Note 4 by striking “concerted” and inserting “the criminal”;

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

Reason for Amendment: This amendment is a result of the Commission’s study of §3B1.2 (Mitigating Role). The Commission conducted a review of cases involving low-level offenders, analyzed case law, and considered public comment and testimony. Overall, the study found that mitigating role is applied inconsistently and more sparingly

than the Commission intended. In drug cases, the Commission’s study confirmed that mitigating role is applied inconsistently to drug defendants who performed similar low-level functions (and that rates of application vary widely from district to district). For example, application of mitigating role varies along the southwest border, with a low of 14.3 percent of couriers and mules receiving the mitigating role adjustment in one district compared to a high of 97.2 percent in another. Moreover, among drug defendants who do receive mitigating role, there are differences from district to district in application rates of the 2-, 3-, and 4-level adjustments. In economic crime cases, the study found that the adjustment was often applied in a limited fashion. For example, the study found that courts often deny mitigating role to otherwise eligible defendants if the defendant was considered “integral” to the successful commission of the offense.

This amendment provides additional guidance to sentencing courts in determining whether a mitigating role adjustment applies. Specifically, it addresses a circuit conflict and other case law that may be discouraging courts from applying the adjustment in otherwise appropriate circumstances. It also provides a non-exhaustive list of factors for the court to consider in determining whether an adjustment applies and, if so, the amount of the adjustment.

Section 3B1.2 provides an adjustment of 2, 3, or 4 levels for a defendant who plays a part in committing the offense that makes him or her “substantially less culpable than the average participant.” However, there are differences among the circuits about what

determining the “average participant” requires. The Seventh and Ninth Circuits have concluded that the “average participant” means only those persons who actually participated in the criminal activity at issue in the defendant’s case, so that the defendant’s relative culpability is determined only by reference to his or her co-participants in the case at hand. See, e.g., United States v. Benitez, 34 F.3d 1489, 1498 (9th Cir. 1994); United States v. Cantrell, 433 F.3d 1269, 1283 (9th Cir. 2006); United States v. DePriest, 6 F.3d 1201, 1214 (7th Cir. 1993). The First and Second Circuits have concluded that the “average participant” also includes “the universe of persons participating in similar crimes.” See United States v. Santos, 357 F.3d 136, 142 (1st Cir. 2004); see also United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999). Under this latter approach, courts will ordinarily consider the defendant’s culpability relative both to his co-participants and to the typical offender.

The amendment generally adopts the approach of the Seventh and Ninth Circuits, revising the commentary to specify that, when determining mitigating role, the defendant is to be compared with the other participants “in the criminal activity.” Focusing the court’s attention on the individual defendant and the other participants is more consistent with the other provisions of Chapter Three, Part B. See, e.g., §3B1.2 (the adjustment is based on “the defendant’s role in the offense”); §3B1.2, comment. (n.3(C)) (a determination about mitigating role “is heavily dependent upon the facts of the particular case”); Ch. 3, Pt. B, intro. comment. (the determination about mitigating role “is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct)”).

Next, the amendment addresses cases in which the defendant was “integral” or “indispensable” to the commission of the offense. Public comment suggested, and a review of case law confirmed, that in some cases a defendant may be denied a mitigating role adjustment solely because he or she was “integral” or “indispensable” to the commission of the offense. See, e.g., United States v. Skinner, 690 F.3d 772, 783-84 (6th Cir. 2012) (a “defendant who plays a lesser role in a criminal scheme may nonetheless fail to qualify as a minor participant if his role was indispensable or critical to the success of the scheme”); United States v. Panaigua-Verdugo, 537 F.3d 722, 725 (7th Cir. 2008) (defendant “played an integral part in the transactions and therefore did not deserve a minor participant reduction”); United States v. Deans, 590 F.3d 907, 910 (8th Cir. 2010) (“Numerous decisions have upheld the denial of minor role adjustments to defendants who . . . play a critical role”); United States v. Carter, 971 F.2d 597, 600 (10th Cir. 1992) (because defendant was “indispensable to the completion of the criminal activity . . . to debate which one is less culpable than the others . . . is akin to the old argument over which leg of a three-legged stool is the most important leg.”). However, a finding that the defendant was essential to the offense does not alter the requirement, expressed in Note 3(A), that the court must assess the defendant’s culpability relative to the average participant in the offense. Accordingly, the amendment revises the commentary to emphasize that “the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative” and that such a defendant may receive a mitigating role adjustment, if he or she is otherwise eligible.

The amendment also revises two paragraphs in Note 3(A) that illustrate how mitigating role interacts with relevant conduct principles in §1B1.3. Specifically, the illustrations provide that certain types of defendants are “not precluded from consideration for” a mitigating role adjustment. The amendment revises these paragraphs to state that these types of defendants “may receive” a mitigating role adjustment. The Commission determined that the double-negative tone (“not precluded”) may have had the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances.

Finally, the amendment provides a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment. The factors direct the court to consider the degree to which the defendant understood the scope and structure of the criminal activity, participated in planning or organizing the criminal activity, and exercised decision-making authority, as well as the acts the defendant performed and the degree to which he or she stood to benefit from the criminal activity. The Commission was persuaded by public comment and a detailed review of cases involving low-level offenders, particularly in fraud cases, that providing a list of factors will give the courts a common framework for determining whether to apply a mitigating role adjustment (and, if so, the amount of the adjustment) and will help promote consistency.

The amendment further provides, as an example, that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for a mitigating role adjustment.

6. Amendment: The Commentary to §2L1.2 captioned “Application Notes” is amended in Note 4(B) by striking “not counted as a single sentence” and inserting “not treated as a single sentence”.

Section 4A1.1(e) is amended by striking “such sentence was counted as a single sentence” and inserting “such sentence was treated as a single sentence”.

The Commentary to §4A1.1 captioned “Application Notes” is amended in Note 5 by striking “are counted as a single sentence” and inserting “are treated as a single sentence”; and by striking “are counted as a single prior sentence” and inserting “are treated as a single prior sentence”.

Section 4A1.2(a)(2) is amended by striking “those sentences are counted separately or as a single sentence” and inserting “those sentences are counted separately or treated as a single sentence”; by striking “Count any prior sentence” and inserting “Treat any prior sentence”; and by striking “if prior sentences are counted as a single sentence” and inserting “if prior sentences are treated as a single sentence”.

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

“ Application of ‘Single Sentence’ Rule (Subsection (a)(2)).—

- (A) Predicate Offenses.—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (see §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted “separately” from each other (see §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant’s criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year

sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. See §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.”;

and in Note 3(B) (as so redesignated) by striking “Counting multiple prior sentences as a single sentence” and inserting “Treating multiple prior sentences as a single sentence”; and by striking “and the resulting sentences were counted as a single sentence” and inserting “and the resulting sentences were treated as a single sentence”.

The Commentary to §4B1.2 captioned “Application Notes” is amended in Note 1 by striking “the sentences for the two prior convictions will be counted as a single sentence” and inserting “the sentences for the two prior convictions will be treated as a single

sentence”.

Reason for Amendment: This amendment responds to a circuit conflict regarding the meaning of the “single sentence” rule, set forth in subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History), and its implications for the career offender guideline and other guidelines that provide sentencing enhancements for predicate offenses.

When the defendant’s criminal history includes two or more prior sentences that meet certain criteria specified in §4A1.2(a)(2), those prior sentences are counted as a “single sentence” rather than separately. Generally, this operates to reduce the cumulative impact of prior sentences in determining a defendant’s criminal history score. Courts, however, are divided over whether this “single sentence” rule also causes certain prior convictions that ordinarily would qualify as predicate offenses under the career offender guideline to be disqualified from serving as predicate offenses. See §4B1.2 (Definitions of Terms Used in Section 4B1.1), comment. (n.3).

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

of the career offender guideline. Id. at 849, 852.

In 2014, in United States v. Williams, a panel of the Sixth Circuit considered and rejected King, because it permitted the defendant to “evade career offender status because he committed more crimes.” Williams, 753 F.3d 626, 639 (6th Cir. 2014) (emphasis in original). See also United States v. Cornog, 945 F.2d 1504, 1506 n.3 (11th Cir. 1991) (“It would be illogical . . . to ignore a conviction for a violent felony just because it happened to be coupled with a nonviolent felony conviction having a longer sentence.”).

After the Williams decision, a different panel of the Eighth Circuit agreed with the Sixth Circuit’s analysis but was not in a position to overrule the earlier panel’s decision in King. See Donnell v. United States, 765 F.3d 817, 820 (8th Cir. 2014). The Eighth Circuit has applied the analysis from King to a case involving the firearms guideline and to a case in which the prior sentences were consecutive rather than concurrent. See, e.g., Pierce v. United States, 686 F.3d 529, 533 n.3 (8th Cir. 2012) (firearms); United States v. Parker, 762 F.3d 801, 808 (8th Cir. 2014) (consecutive sentences). This issue has also been addressed by other courts, some which have followed the Sixth Circuit’s approach in Williams. See, e.g., United States v. Carr, 2013 WL 4855341 (N.D. Ga. 2013); United States v. Agurs, 2014 WL 3735584 (W.D. Pa., July 28, 2014). Other decisions have been consistent with the Eighth Circuit’s approach in King. See, e.g., United States v. Santiago, 387 F. App’x 223 (3d Cir. 2010); United States v. McQueen, 2014 WL 3749215 (E.D. Wash., July 28, 2014).

The amendment generally follows the Sixth Circuit’s approach in Williams. It amends the commentary to §4A1.2 to provide that, for purposes of determining predicate offenses, a prior sentence included in a single sentence should be treated as if it received criminal history points if it independently would have received criminal history points. It also provides examples, including an example to illustrate the potential impact of the applicable time periods prescribed in §4A1.2(e). Finally, §§4A1.1 (Criminal History Category) and 4A1.2 are revised stylistically so that sentences “counted” as a single sentence are referred to instead as sentences “treated” as a single sentence.

The amendment ensures that those defendants who have committed more crimes, in addition to a predicate offense, remain subject to enhanced penalties under certain guidelines such as the career offender guideline. Conversely, by clarifying how the single sentence rule interacts with the time limits set forth in §4A1.2(e), the amendment provides that when a prior sentence was so remote in time that it does not independently receive criminal history points, it cannot serve as a predicate offense.

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

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

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

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

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

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

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

The Commentary to §2H4.2 captioned “Application Notes” is amended in Note 2 by

striking “et. seq.” and inserting “et seq.”.

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

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

“ Illustrations of the Operation of the Multiple-Count Rules”,

and inserting the following new heading:

“ Concluding Commentary to Part D of Chapter Three

Illustrations of the Operation of the Multiple-Count Rules”;

in Example 1 by striking “convicted on” and inserting “convicted of”; and by striking “\$12,000” and inserting “\$21,000”;

in Example 2 by striking “Defendant C” and inserting “Defendant B”; by striking “convicted on” and inserting “convicted of”; and by striking “offense level for bribery (22)” and inserting “offense level for bribery (20)”;

and in Example 3 by striking “Defendant D” and inserting “Defendant C”; by striking “\$27,000”, “\$12,000”, “\$15,000”, and “\$20,000” and inserting “\$1,000” in each place such terms appear; by striking “\$74,000” and inserting “\$4,000”; and by striking “16” both places such term appears and inserting “9”.

The Commentary to §5E1.2 captioned “Application Notes” is amended in Note 5 by striking “2 U.S.C. § 437g(d)(1)(D)” and inserting “52 U.S.C. § 30109(d)(1)(D)”; and by striking “2 U.S.C. § 441f” and inserting “52 U.S.C. § 30122”.

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

“2 U.S.C. § 437g(d)	2C1.8
2 U.S.C. § 439a	2C1.8
2 U.S.C. § 441a	2C1.8
2 U.S.C. § 441a-1	2C1.8
2 U.S.C. § 441b	2C1.8
2 U.S.C. § 441c	2C1.8
2 U.S.C. § 441d	2C1.8
2 U.S.C. § 441e	2C1.8
2 U.S.C. § 441f	2C1.8
2 U.S.C. § 441g	2C1.8

2 U.S.C. § 441h(a)	2C1.8
2 U.S.C. § 441i	2C1.8
2 U.S.C. § 441k	2C1.8”,

and inserting at the end the following new line references:

“52 U.S.C. § 30109(d)	2C1.8
52 U.S.C. § 30114	2C1.8
52 U.S.C. § 30116	2C1.8
52 U.S.C. § 30117	2C1.8
52 U.S.C. § 30118	2C1.8
52 U.S.C. § 30119	2C1.8
52 U.S.C. § 30120	2C1.8
52 U.S.C. § 30121	2C1.8
52 U.S.C. § 30122	2C1.8
52 U.S.C. § 30123	2C1.8
52 U.S.C. § 30124(a)	2C1.8
52 U.S.C. § 30125	2C1.8
52 U.S.C. § 30126	2C1.8”;

by striking the following line references:

“42 U.S.C. § 1973i(c)	2H2.1
42 U.S.C. § 1973i(d)	2H2.1
42 U.S.C. § 1973i(e)	2H2.1
42 U.S.C. § 1973j(a)	2H2.1
42 U.S.C. § 1973j(b)	2H2.1
42 U.S.C. § 1973j(c)	2X1.1
42 U.S.C. § 1973aa	2H2.1
42 U.S.C. § 1973aa-1	2H2.1
42 U.S.C. § 1973aa-1a	2H2.1
42 U.S.C. § 1973aa-3	2H2.1
42 U.S.C. § 1973bb	2H2.1
42 U.S.C. § 1973gg-10	2H2.1”,

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

“52 U.S.C. § 10307(c)	2H2.1
52 U.S.C. § 10307(d)	2H2.1
52 U.S.C. § 10307(e)	2H2.1
52 U.S.C. § 10308(a)	2H2.1
52 U.S.C. § 10308(b)	2H2.1
52 U.S.C. § 10308(c)	2X1.1

52 U.S.C. § 10501	2H2.1
52 U.S.C. § 10502	2H2.1
52 U.S.C. § 10503	2H2.1
52 U.S.C. § 10505	2H2.1
52 U.S.C. § 10701	2H2.1
52 U.S.C. § 20511	2H2.1”;

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

“50 U.S.C. § 3121 2M3.9”.

Reason for Amendment: This amendment makes certain technical changes to the Guidelines Manual.

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

- (1) the Commentary to §2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property);
- (2) the Commentary to §2H2.1 (Obstructing an Election or Registration);
- (3) the Commentary to §2M3.9 (Disclosure of Information Identifying a Covert Agent);
- (4) Application Note 5 to §5E1.2 (Fines for Individual Defendants); and
- (5) Appendix A (Statutory Index).

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

Finally, it makes clerical changes to—

- (1) the Background Commentary to §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)), to correct a typographical error in a U.S. Reports citation;
- (2) the Commentary to §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), to correct certain United States Code citations to correspond with their respective references in Appendix A that were revised by Amendment 769 (effective November 1, 2012);
- (3) subsection (e)(7) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), to add a missing measurement unit to the line referencing Norpseudoephedrine; and
- (4) Application Note 2 to §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), to correct a typographical error in an abbreviation.