**Revised Money Laundering Amendment – Synopsis**
**December 15, 2000**

## Overview

The proposed amendment consolidates the two current money laundering guidelines, §§2S1.1 and 2S1.2, and applies to convictions under both 18 U.S.C. §§ 1956 and 1957. The primary feature of the consolidated amendment structure is that it ties offense levels for money laundering more closely to the underlying criminal conduct that was the source of the criminally derived funds. The amendment accomplishes this objective by separating money laundering offenders, regardless of the statute of conviction, into two categories for purposes of determining the base offense level. The base offense level is determined differently, depending on whether the defendant is a "direct" or a "third party" money launderer (money launderers who commit the underlying offense which generated the criminal proceeds versus money launderers who did not commit the underlying offense). Specific offense characteristics are included in this proposed amendment to increase the total offense level in order to assure greater punishment for those money laundering defendants whose conduct is considered more serious and harmful to the societal interests which the money laundering laws are designed to protect.

## Base Offense Level

Subsection (a) provides two distinct methods for determining the base offense level, depending on whether the defendant is a "direct" money launderer or a "third party" money launderer. Subsection (a)(1) sets the base offense level for "direct" money launderers at the offense level for the underlying offense from which the laundered funds were derived (*i.e.,* the base offense level and all applicable specific offense characteristics for the underlying offense), if the offense level for the underlying offense can be determined. A data analysis of a representative sample of 259 money laundering cases conducted by Commission staff indicates that subsection (a)(1) would apply to 86 percent of defendants sentenced under the guideline (*i.e.*, "direct" money launderers comprise 86 percent of the money laundering defendants).

This proposed amendment excludes from application of subsection (a)(1) offenders who otherwise would be accountable for the underlying offense solely on the basis of §1B1.3(a)(1)(B) (*i.e.*, jointly undertaken criminal activity). However, this limitation has minimal practical consequence. Commission staff analysis indicates that less than one percent of defendants who would not be categorized as "direct" money launderers because of this limitation would be subject to subsection (a)(1) if it were expanded to include defendants who would be otherwise accountable for the underlying offense under §1B1.3(a)(1)(B). The Commission invites comment as to whether application of subsection (a)(1) should be expanded to include offenders who otherwise would be accountable for the underlying offense solely on the basis of §1B1.3(a)(1)(B).

For "third party" money launderers (*i.e.*, defendants who did not commit or would not be accountable for the underlying offense under §1B1.3(a)(1)(A)), subsection (a)(2) sets the base offense level at level eight, plus an increase based on the value of the laundered funds from the

table in subsection (b)(1) of §2F1.1 (Fraud and Deceit). Subsection (a)(2) also applies to "direct" money laundering defendants for whom subsection (a)(1) would apply but the offense level for the underlying offense is impossible or impracticable to determine.

Under the structure of this proposed amendment, there may be some cases in which the "third party" money launderers will receive a higher base offense level than the offenders who committed the underlying offense. This conceivably could occur in cases in which the underlying offense that generated the criminally derived proceeds is a fraud or other economic crime covered by a guideline that uses the table in subsection (b)(1) of §2F1.1, and the loss calculation is less than the value of the laundered funds. For example, the underlying offense may have involved the fraudulent sale of stock for $200,000 that was worth $180,000. The defendant did not commit the underlying offense, but laundered all of the $200,000. In such a case, the value of the laundered funds is $200,000, but the loss amount for purposes of §2F1.1(b)(1) is $20,000. In such a case, the "third party" money laundering defendant may receive a higher base offense level than the chapter 2 offense level for the offender who committed the fraud.

Three options in Application Note 3 are presented for addressing this type of case. Option 1 provides that a downward departure may be warranted in such a case, but limits the extent of such a departure to the offense level for the underlying offense conduct that would result if the base offense level were determined using subsection (a)(1). Option 2 creates a rule that the value of the funds is the lesser of either the actual value of the laundered funds or the value of the loss as calculated for purposes of §2F1.1(b)(1). Option 3 provides no specific provision to address this type of case.

An analysis conducted by Commission staff indicates that this type of case will rarely occur. In its sample of 259 cases, Commission staff identified no cases in which the loss amount was less than the value of laundered funds. In fact, this issue can arise only in "third party" money laundering cases, which comprise only 14 percent (36 of 259 cases) of the money laundering cases in the representative sample. Furthermore, in the overwhelming majority – 89 percent – of those 36 "third party" cases, the underlying offense was a drug offense, which does not give rise to this problem. In its sample, Commission staff identified only three "third party" money laundering cases for which the underlying offense was a fraud or other economic crime.

**Adjustments**

In addition to the base offense level, the proposed amendment contains a number of adjustments. Consistent with the approach of tying the base offense level to the underlying offense that generated the criminally derived funds, subsection (b)(1) provides a [**2**][**4**][**6**] level enhancement for "third party" money launderers who know or believe that any of the laundered funds were the proceeds of, or were intended to promote, certain types of more serious underlying criminal conduct; specifically, drug trafficking, crimes of violence, offenses involving firearms, explosives, national security, terrorism, and the sexual exploitation of a minor.

Subsection (b)(2) provides four alternative enhancements, with the greatest applicable

enhancement to be used. Subsection (b)(2)(A) provides a [**2**][**3**][**4**] level increase if the defendant is a "third party" money launderer who is "in the business" of laundering funds. This adjustment reflects the view that, similar to a professional "fence" (*see* §2B1.1(b)(4)(B)), defendants who routinely engage in laundering funds on behalf of third parties and who gain financially from engaging in such transactions warrant additional punishment because they encourage the commission of additional underlying criminal offenses. Application Note 6 directs the court to consider the totality of the circumstances in determining whether a defendant was in the business of laundering funds and provides a non-exhaustive list of factors to be considered in making this determination. The Commission invites comment as to whether eligibility for this enhancement should be expanded to include "direct" money launderers who launder the criminal derived proceeds of others, in addition to their own criminally derived proceeds.

Subsection (b)(2)(B) provides a [**2**][**3**] level enhancement if any of the laundered funds were used [or intended to be used] to [significantly][materially] promote further criminal conduct. Application Note 5 limits applicability of this enhancement to the use of laundered funds to further criminal conduct in addition to, or beyond, the criminal conduct from which the laundered funds were derived, as opposed to underlying offenses that were completed at the time of the laundering. This enhancement attempts to provide increased punishment for two types of offense conduct: (1) cases in which the defendant uses criminally derived funds to cause criminal conduct in addition to or beyond the criminal conduct that initially generated the criminally derived funds that are the subject of the money laundering conviction; or, (2) cases in which the defendant reinvests all or some of the laundered funds back into an ongoing criminal scheme to finance the continued operation or expansion of the criminal scheme.

Subsection (b)(2)(C) provides a [**2**][**3**] level enhancement if the offense involved "sophisticated concealment." Application Note 6 defines "sophisticated concealment" as especially complex or especially intricate offense conduct where the defendant takes deliberate steps to conceal the nature, location, source, ownership or control of the criminally derived funds to make the transaction more difficult to detect. Application Note 6 also provides examples of conduct that typically constitutes sophisticated concealment. The Commission invites comment as to whether the applicability of this enhancement should be expanded to include all forms of concealment, even if the concealment is not sophisticated.

Subsection (b)(2)(D) provides a [**1**][**2**] level enhancement if the defendant launders funds with the intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code. This enhancement is requires a conviction under the relevant subsection of 18 U.S.C. § 1956 for the enhancement to apply. The Commission invites comment as to whether the proposed guideline should include such an enhancement, absent additional aggravating money laundering conduct.

Subsection (b)(3) provides a [**1**] level increase if the defendant is a "direct" money launderer, none of the enhancements under subsection (b)(2) apply, and the value of the laundered funds is greater than $10,000. This enhancement is intended to ensure that defendants who also commit the underlying offense receive some incremental punishment for the money laundering

offense, even if ineligible for any of the other enhancements that reflect more aggravated money laundering offense conduct. The Commission invites comment as to whether the proposed guideline should contain such an enhancement.

Subsection (b)(4) provides a [**2**] level decrease for cases in which three conditions are met: (1) the defendant did not commit the underlying offense that generated the criminally derived funds; (2) the defendant was convicted under 18 U.S.C. § 1957 only; and, (3) none of the other enhancements apply. This downward adjustment recognizes that section 1957 offenses, with no aggravating factors, may be considered less serious than section 1956 offenses because the statutory maximum of the former is half (10 years) that of the latter (20 years), and because the government is not required to prove that the section 1957 defendant knew that the offense from which the laundered funds were derived was a specified unlawful activity (*see* 18 U.S.C. § 1957(c)).

Application Note 7 provides that in a case in which the defendant is to be sentenced on a count of conviction for money laundering and a count of conviction for the underlying offense that generated the laundered funds, such counts shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely-Related Counts), thereby resolving circuit splits on this issue.

The proposed amendment provides that convictions under 18 U.S.C. § 1960 (Illegal Money Transmitting Businesses failure to obtain appropriate licenses or comply with registration requirements for money transmitting businesses) be referenced to §2T2.2 (Regulatory Offenses). The Commission invites comment as to whether such violations are more appropriately referenced to §2S1.3 (Structuring Transactions to Evade Reporting Requirements). Finally, the proposed amendment provides that convictions under 31 U.S.C. § 5326 relevant to structuring violations be referenced to §2S1.3 (Structuring Transactions).

**REVISED AMENDMENT - MONEY LAUNDERING**
**December 11, 2000**

(Redline and strike through indicate changes made to the money laundering draft amendment presented to the Commission at the November 2000 meeting.)

Delete §§2S1.1 and 2S1.2 and insert the following:

**§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity**

(a) Base Offense Level:

(1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or otherwise would be accountable for the underlying offense under §1B1.3(a)(1)(A) (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

(2) **8** plus the number of offense levels from the table in subsection (b)(1) of §2F1.1 (Fraud and Deceit) corresponding to the value of the laundered funds, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies because the defendant did not commit the underlying offense; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence [as defined under §4B1.2(a)(1) (Definitions of Terms Used in §4B1.1)]; or (iii) an offense involving firearms, explosives, national security, terrorism, or the sexual exploitation of a minor, increase by [**2**][**4**][**6**] levels.

~~[Promotion - Option One (includes promotion enhancement and other enhancements are alternative):~~

(2) (Apply the greatest):

(A) If [(A) subsection (a)(2) applies because the defendant did not commit the underlying offense; and (B)] the defendant was in the business of laundering funds, increase by [**2**][**3**][**4**] levels.

(B) If any ~~all or part~~ of the laundered funds were used [or were intended to be used] to [significantly] [materially] promote further criminal conduct, increase by [**2**][**3**] levels.

(C) If the offense involved sophisticated concealment, increase by [**2**][**3**] levels.

[(D) If the defendant is convicted (A) under 18 U.S.C. § 1956(a)(1)(A)(ii); (B) under 18 U.S.C. § 1956(a)(1)(B)(ii); (C) under 18 U.S.C. § 1956(a)(2)(B)(ii); (D) under 18 U.S.C. § 1956(a)(3)(C); or (E) of attempting, aiding or abetting,

or conspiracy to commit any of the offenses referred to in subdivisions (A) through (D), increase by [**1**][**2**] levels.]

[(3)~~(4)~~ If (A) subsection (a)(1) applies; (B) subsection (b)(2) does not apply; and (C) the value of the laundered funds is greater than $10,000, increase by [**1**] level.]

[(4) If (A) subsection (a)(2) applies because the defendant did not commit the underlying offense; (B) the defendant is ~~was~~ convicted under 18 U.S.C. § 1957; and (C) none of the enhancements in subsections (b)(1) and ~~through~~ (b)(2)~~(3)~~ apply, decrease by [**2**] levels.]

~~[Promotion - Option Two (does not include promotion enhancement and other enhancements are cumulative):~~

~~(2) If the offense involved sophisticated concealment, increase by [**2**][**3**] levels.~~

~~(3) If the defendant is convicted (A) under 18 U.S.C. § 1956(a)(1)(A)(ii); (B) under 18 U.S.C. § 1956(a)(1)(B)(ii); (C) under 18 U.S.C. § 1956(a)(2)(B)(ii); (D) under 18 U.S.C. § 1956(a)(3)(C); or (E) of attempting, aiding or abetting, or conspiracy to commit any of the offenses referred to in subdivisions (A) through (D), increase by [**1**] level.~~

~~(4) If (A) subsection (a)(2) applies because the defendant did not commit the underlying offense; and (B) the defendant was in the business of laundering funds, increase by [**2**][**3**][**4**] levels.~~

~~(5) If (A) subsection (a)(2) applies because the defendant did not commit the underlying offense; (B) the defendant was convicted under 18 U.S.C. § 1957; and (C) none of the enhancements in subsections (b)(1) through (b)(4) apply, decrease by [**2**] levels.]~~

<u>*Commentary*</u>

<u>*Statutory Provisions*</u>*: 18 U.S.C. §§ 1956, 1957.*

<u>*Application Notes*</u>*:*

*1. <u>Definitions</u>.—For purposes of this guideline:*

*"Crime of violence" has the meaning given that term in subsection (a)(1) of §4B1.2 (Definitions of Terms Used in §4B1.1).*

*"Criminally derived funds" means any funds derived [or represented to be derived] from conduct constituting a criminal offense.*

*"Laundered funds" means the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. § 1956 or § 1957.*

*"Laundering funds" means the making of a transaction, financial transaction, monetary transaction,*

or transmission, or the transporting of, property, funds, or a monetary instrument in violation of 18 U.S.C. § 1956 or § 1957.

"Sexual exploitation of a minor" means an offense involving (A) promoting prostitution by a minor; (B) sexually exploiting a minor by production of sexually explicit visual or printed material; (C) distribution of material involving the sexual exploitation of a minor, or possession of material involving the sexual exploitation of a minor with intent to distribute; or (D) aggravated sexual abuse sexual abuse, or abusive sexual contact, involving a minor. "Minor" means an individual under the age of 18 years.

2. Application of Subsection (a)(1).—

(A) Multiple Underlying Offenses.— In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to §1B1.5 (Interpretation of References to Other Guidelines).

(B) Defendants Otherwise Accountable~~ as Aiders and Abettors~~.—~~Under subsection (a)(1), in order for a defendant to be otherwise accountable for the underlying offense as an aider and abettor under §1B1.3 (Relevant Conduct), the commission of the underlying offense must have been a specific objective of the defendant. Similarly, under subsection (a)(1), the commission of the underlying offense must have been within the specific conduct and objectives embraced by the defendant's agreement in order for the underlying offense to be considered jointly undertaken criminal activity for which the defendant may be otherwise accountable under §1B1.3.~~ In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be otherwise accountable for the underlying offense under §1B1.3(a)(1)(A) (Relevant Conduct). The fact that the defendant was involved in laundering criminally derived funds after the commission of the underlying offense, without ~~more~~ additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.

(C) Non-Applicability of Enhancements —If ~~(A)~~ subsection (a)(1) applies,~~;~~ and ~~(B)~~ the conduct that forms the basis for an enhancement under the guideline applicable to the underlying offense ~~(for purposes of determining the base offense level under subsection (a)(1))~~ is the only conduct that forms the basis for application of any of the enhancements in subsection (b) of this guideline, do not apply the ~~that~~ subsection (b) enhancement under this guideline.

3. Application of Subsection (a)(2).—

(A) In General.—Subsection (a)(2) applies to cases in which (A) the defendant did not commit the underlying offense; or (B) the defendant committed the underlying offense (or otherwise would be accountable for the underlying offense under §1B1.3(a)(1)(A) (Relevant Conduct), but the offense level for the underlying offense is impossible or impracticable to determine.

(B)Commingled Funds.—In a case in which a transaction, financial transaction, monetary transaction, transportation, transfer, or transmission results in the commingling of legitimately derived funds with criminally derived funds, the value of the laundered funds, for purposes of

*subsection (a)(2), is the amount of the criminally derived funds, not the total amount of the commingled funds, if the defendant provides sufficient information to determine the amount of criminally derived funds without unduly complicating or prolonging the sentencing process. ~~However, i~~If the amount of the criminally derived funds is difficult or impracticable to determine, the value of the laundered funds, for purposes of subsection (a)(2), is the total amount of the commingled funds.*

*[Value of Funds - Option 1:*

*(C) Value of Laundered Funds for Certain Defendants.—There may be cases in which (A) subsection (a)(2) applies; (B) the defendant did not commit the underlying offense; (C) the underlying offense is a fraud or another economic crime covered by a guideline that uses the table in subsection (b)(1) of §2F1.1 (Fraud and Deceit); and (D) the value of the laundered funds under subsection (a)(2) is substantially greater than the value of the loss or other monetary amount attributable to the underlying offense for purposes of §2F1.1(b)(1). In such cases, a downward departure may be warranted to ensure that the seriousness of the punishment for the money laundering offense is reasonably related to the seriousness of the punishment that would be warranted for the underlying offense. However, any such downward departure shall not result in an offense level lower than that which would result if the sentence were determined using the base offense level under subsection (a)(1). For example, the underlying offense may have involved the fraudulent sale of stock for $200,000 that was worth $180,000. The defendant did not commit the underlying offense but laundered all of the $200,000. The value of the laundered funds is $200,000, but the loss amount for purposes of §2F1.1(b)(1) is $20,000. In such a case, the downward departure shall not result in an offense level lower than the sum of the base offense level under §2F1.1(a) and the enhancement under §2F1.1(b)(1) for the value of the loss. Accordingly, a downward departure, if warranted, shall not result in an offense level lower than level 9 (§2F1.1(a) base offense level of level 6 plus §2F1.1(b)(1) increase of 3 offense levels to account for loss amount of $20,000). ~~In such a case, a downward departure may be warranted.~~]*

*[Value of Funds - Option 2:*

*(C) Value of Laundered Funds for Certain Defendants.—In a case in which (A) subsection (a)(2) applies, (B) the defendant did not commit the underlying offense, and (C) the underlying offense is a fraud or another economic crime covered by a guideline that uses the table in subsection (b)(1) of §2F1.1 (Fraud and Deceit), the value of the laundered funds is the lesser of the actual value of the laundered funds or the value of the loss or other monetary amount attributable to the underlying offense for purposes of §2F1.1(b)(1). For example, the underlying offense may have involved the fraudulent sale of stock for $200,000 that was worth $180,000. The defendant did not commit the underlying offense but laundered all of the $200,000. The actual value of the laundered funds is $200,000, but the loss amount for purposes of §2F1.1(b)(1) is $20,000. In such a case, the value of the laundered funds, for purposes of subsection (a)(2), is $20,000. Accordingly, the base offense level under subsection (a)(2) is the sum of the base offense level under §2F1.1(a) and the enhancement under §2F1.1(b)(1) for the value of the loss. Therefore, in this example, the base offense level under subsection (a)(2) is level 9 (§2F1.1(a) base offense level of level 6 plus §2F1.1(b)(1) increase of 3 offense levels to account for loss amount of $20,000).*

*[Value of Funds - Option Three: No specific provision]*

4. *Enhancement for Business of Laundering Funds.—*

(A) *In General.—The court shall consider the totality of the circumstances to determine whether a defendant who did not commit the underlying offense was in the business of laundering funds, for purposes of subsection (b)(2)(A) ~~[(b)(3)(C)][(b)(4)]~~.*

(B) *Factors to Consider.—The court shall consider the following factors in determining whether, under the totality of circumstances, the defendant was in the business of laundering funds for purposes of subsection (b)(2)(A): ~~The following factors may, under the totality of the circumstances, indicate that the defendant was in the business of laundering funds, for purposes of subsection [(b)(3)(C)][(b)(4)].~~*

(i) *The defendant regularly [routinely] engaged in ~~repeated~~ acts of laundering funds during ~~over~~ an extended period of time.*

(ii) *The defendant laundered criminally derived funds from multiple sources during an extended period of time.*

(iii) *The defendant generated a substantial amount of revenue ~~charged or otherwise expected financial compensation~~ in return for laundering the funds.*

(iv) *At the time the defendant committed the instant offense, the defendant had one or more prior convictions of an offense under 18 U.S.C. § 1956 or §1957, [31 U.S.C. §§ 5313, 5314, 5316, 5324 or 5326] or any similar offense under state law, or an attempt or conspiracy to commit any such federal or state offense. Prior convictions taken into account under subsection (b)(2)(A) ~~[(b)(3)(C)][(b)(4)]~~ are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

~~*[Promotion - Option One:*~~

5. *[Significant][Material]Promotion of Further Criminal Conduct.—In order for subsection (b)(2)(B) to apply, all or part of the laundered funds must have been used to further criminal conduct in addition to or beyond the criminal conduct from which the laundered funds were derived. [Subsection (b)(2)(B) does not apply if the defendant laundered criminally derived proceeds that were generated from an underlying offense that was completed at the time of the laundering.] For example, subsection (b)(2)(B) would apply in a case in which the defendant reinvested (i.e., plowed-back) all or part of the laundered funds from an ongoing, fraudulent telemarketing scheme to finance the continued operation of that scheme but would not apply in a case in which the defendant used all or part of the laundered funds only to finance a lavish lifestyle. Similarly, subsection (b)(2)(B) would apply in a case in which the defendant used laundered funds from an underlying drug offense to purchase additional drugs for distribution but would not apply in a case in which the defendant used those laundered funds to pay for drugs the defendant had already distributed as part of the underlying drug offense.*

*Subsection(b)(2)(B) does not apply to transactions that only give the defendant access to, or the use*

*of for otherwise legal purposes, the criminally derived funds. For example, subsection (b)(2)(B) does not apply in a case in which the defendant deposits checks that represent the criminally derived proceeds from a fraudulent scheme into an account, and subsequently spends the funds for items that are not inherently illegal or items that do not further additional criminal conduct.*

*[Subsection (b)(2)(B) does not apply if the value of laundered funds used or intended to be used to promote criminal conduct was de minimis relative to the value of the laundered funds.]*

6. *Sophisticated Concealment.—~~(A) In General.—~~For purposes of subsection (b)(2)(C) ~~[(b)(3)(A)][(b)(2)]~~, "sophisticated concealment" means especially complex or especially intricate offense conduct in which deliberate steps were taken to conceal the nature, location, source, ownership, or control of the criminally derived funds, in order to make the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. § 1956 or § 1957, or the extent of that violation, difficult to detect.*

   ~~*(B) Conduct Typically Constituting Sophisticated Concealment.—The following non-exhaustive list describes conduct that typically constitutes sophisticated concealment:*~~

   *Sophisticated concealment typically involves ~~(i)II~~ hiding assets or hiding transactions, or both, through:*

   *(A) ~~(I)~~ the use of fictitious entities;~~;~~*

   *(B) ~~(II)~~ the use of shell corporations;~~, or~~*

   *(C) c~~C~~reating two or more levels (i.e., layering) of transactions, transportation, transfers, or transmissions, of criminally derived funds that were intended to appear legitimate; or~~.~~*

   *(D) ~~(III)~~ the transportation, transmission, or transfer of criminally derived funds from or through a place inside the United States to or through a place outside the United States (e.g., an offshore bank account) or from or through a place outside the United States to or through a place inside the United States. For purposes of this subdivision, "United States" has the meaning given that term in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).*

7. *Grouping of Multiple Counts.—In a case in which the defendant is to be sentenced on a count (or a Group of counts) for the underlying offense from which the laundered funds were derived, the count for the offense under this guideline shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely-Related Counts) with the count for the underlying offense or, in the case of a Group of counts for the underlying offense, with the most serious of the counts comprising the Group, i.e., the count resulting in the greatest offense level.*

[Note: If the Commission decides to provide for grouping under §3D1.2(c), a conforming amendment may be appropriate to application note 5 of §3D1.2 to provide that grouping under §3D1.2(c) also applies in cases in which the base offense level from the guideline applicable to one count specifically incorporates the offense level applicable to the other related count. In such cases, the conduct that forms the basis for the base offense level in one count is the same aggravating conduct that forms the basis for the offense level of the other count.]

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**§2S1.3.** **Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports**

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*Commentary*

*Statutory Provisions: 26 U.S.C. § 7203 (if a violation based upon 26 U.S.C. § 6050I), § 7206 (if a violation based upon 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316, 5324, 5326. For additional statutory provision(s), see Appendix A (Statutory Index).*

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**§2T2.2.** **Regulatory Offenses**

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

*Commentary*

*Statutory Provisions: 18 U.S.C. § 1960; 26 U.S.C. §§ 5601, 5603-5605, 5661, 5671, 5762, ~~provided~~if the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes; 31 U.S.C. § 5326. For additional statutory provision(s), see Appendix A (Statutory Index).*

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## APPENDIX A - STATUTORY INDEX

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| | |
|---|---|
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| 18 U.S.C. § 1957 | ~~2S1.2~~2S1.1 |
| 18 U.S.C. § 1958 | 2E1.4 |
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|---|---|
| ~~31 U.S.C. § 5322~~ | ~~2S1.3~~ |
| 31 U.S.C. § 5324 | 2S1.3 |
| 31 U.S.C. § 5326 | 2S1.3, 2T2.2 |
| 33 U.S.C. § 403 | 2Q1.3 |

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**Conforming Amendments:**

**§1B1.3.** **Relevant Conduct (Factors that Determine the Guideline Range)**

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<u>Commentary</u>

*<u>Application Notes</u>:*

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6. *A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. ~~For example, in §2S1.1 (Laundering of Monetary Instruments), subsection (a)(1) applies if the defendant "is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)."~~ Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense was committed by the means set forth in 18 U.S.C. § 2242").*

   *An express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. ~~For example, §2S1.1(a)(1) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).~~*

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**§3D1.2. <u>Groups of Closely Related Counts</u>**

* * *

(d) * * *

Offenses covered by the following guidelines are to be grouped under this subsection:

* * *

§§2S1.1, ~~2S1.2,~~ 2S1.3;

* * *

**§8C2.1. <u>Applicability of Fine Guidelines</u>**

The provisions of §§8C2.2 through 8C2.9 apply to each count for which the applicable guideline offense level is determined under:

* * *

§§2S1.1~~, 2S1.2,~~ 2S1.3;

* * *

**§8C2.4. <u>Base Fine</u>**

* * *

*Commentary*

*Application Notes:*

* * *

5. *Special instructions regarding the determination of the base fine are contained in §§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery); 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); 2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations); 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors)~~; 2S1.1 (Laundering of Monetary Instruments); and 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity)~~.*

* * *

*Background: Under this section, the base fine is determined in one of three ways: (1) by the amount, based on the offense level, from the table in subsection (d); (2) by the pecuniary gain to the organization from the offense; and (3) by the pecuniary loss caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly. In certain cases, special instructions for determining the loss or offense level amount apply. As a general rule, the base fine measures the seriousness of the offense. The determinants of the base fine are selected so that, in conjunction with the multipliers derived from the culpability score in §8C2.5 (Culpability Score), they will result in guideline fine ranges appropriate to deter organizational criminal conduct and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct. In order to deter organizations from seeking to obtain financial reward through criminal conduct, this section provides that, when greatest, pecuniary gain to the organization is used to determine the base fine. In order to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances. Chapter Two provides special instructions for fines that include specific rules for determining the base fine in connection with certain types of offenses in which the calculation of loss or gain is difficult, e.g., price-fixing ~~and money laundering~~. For these offenses, the special instructions tailor the base fine to circumstances that occur in connection with such offenses and that generally relate to the magnitude of loss or gain resulting from such offenses.*

**Issues for Comment:** *The Commission invites comment on:*

*(i) whether application of subsection (a)(1) of proposed §2S1.1 should be expanded to include defendants who are otherwise accountable for the underlying offense under §1B1.3(a)(1)(B)(Relevant Conduct), in addition to defendants who commit or are otherwise accountable for the underlying offense under §1B1.3(a)(1)(A);*

*(ii) whether proposed §2S1.1 should include enhancements for conduct that constitutes elements of the money laundering offense, even if the conduct did not constitute an aggravated form of money laundering offense conduct. Specifically, the Commission invites comment on whether and, if so, to what extent, proposed §2S1.1 should include an enhancement if :*

*(A) the offense involved concealment (coextensive with the meaning of the term under 18 U.S.C. § 1956) , even if the conduct did not constitute sophisticated concealment*;

*(B) if the defendant is convicted (A) under 18 U.S.C. § 1956(a)(1)(A)(ii); (B) under 18 U.S.C. § 1956(a)(1)(B)(ii); (C) under 18 U.S.C. § 1956(a)(2)(B)(ii); (D) under 18 U.S.C. § 1956(a)(3)(C); or (E) of attempting, aiding or abetting, or conspiracy to commit any of the offenses referred to in subdivisions (A) through (D);*

*(C) if subsection (a)(1) applies and (1) the defendant did not engage in an aggravated form of money laundering as accounted for by subsection (b)(2), and (2) the value of funds laundered exceeded $10,000;*

*(iii) whether application of subsection (b)(2)(A) ("in the business of laundering funds") should be expanded to include defendants (1) whose base offense level is determined under subsection (a)(1) and (2) who launder criminally derived funds generated by offenses which they did not commit and are not otherwise accountable under §1B1.3(a)(1)(A); and*

*(iii) whether violations of 18 U.S.C. § 1960 (Illegal Money Transmitting Businesses) should be referenced to §2S1.3 (Structuring Transactions to Evade Reporting Requirements).*