

**United States Sentencing Commission Public Meeting Minutes
January 12, 2010**

Chair William K Sessions III called the meeting to order at 11:01 a.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge William K. Sessions III, Chair
- William B. Carr, Jr. Vice Chair
- Judge Ruben Castillo, Vice Chair
- Dabney L. Friedrich, Commissioner
- Judge Ricardo H. Hinojosa, Commissioner
- Beryl A. Howell, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director
- Kenneth Cohen, General Counsel

Chair Sessions noted that this was his first public meeting as Chair and thanked Commissioner Hinojosa for his leadership over the past five years, stating that he led the Commission through many challenges in a way that strengthened the Commission. The Chair also thanked the other Commissioners for their continued service and their dedication to protecting the public while ensuring the fairness of the federal criminal sentencing system. The Chair stated it was an honor to serve with the current Commissioners and looks forward to the upcoming year. The Chair also expressed his appreciation to staff for its dedication. The Chair welcomed members of the Commission's Practitioners Advocacy Group ("PAG"). He noted that PAG represents practitioners from across the country and the Commission looks forward to working with the group.

The Chair reported that the last of the Commission's seven regional public hearings will take place in Phoenix, Arizona, on January 20-21, 2010. The hearings provide the Commission with valuable insight into how the advisory guidelines are working. The Chair stated that the work of the Commission is greatly advanced by the thoughtful involvement of the participants in each regional hearing.

Ms. Sheon thanked staff for its hard work over the past few months. Ms. Sheon also announced

that the Commission's annual national training program will be held in New Orleans, Louisiana, on June 16-18, 2010.

The Chair called for a motion to adopt the August 31 and September 16, 2009, public meeting minutes. Vice Chair Castillo made a motion to adopt the minutes, with Commissioner Hinojosa seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

The Chair called on Mr. Cohen to inform the Commission on possible votes to publish in the Federal Register a set of proposed guideline amendments and issues for public comment.

Mr. Cohen stated that the first proposed amendment, attached hereto as Exhibit A, makes various technical and conforming changes to the guidelines by correcting typographical errors and updating references to guidelines, statutes, or regulations that have become incorrect or obsolete. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with the staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to publish the proposed amendment, with Commissioner Howell seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit B, responds to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues. Part A of the proposed amendment responds to the Fraud Enforcement and Recovery Act of 2009 (Pub. L. 111-21), which expanded the securities fraud statute, 18 U.S.C. § 1348, so that it also covers commodities fraud. Section 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction: Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) contains an enhancement at subsection (b)(17)(B) that applies when a violation of commodities law is committed by certain specified persons who have fiduciary duties. The proposed amendment adds 18 U.S.C. § 1348 to the list of offenses that qualify as "commodities law" for purposes of this enhancement. Part B of the proposed amendment responds to the Omnibus Public Land Management Act of 2009 (Pub. L. 111-11), which established a new offense at 16 U.S.C. § 470aaa-5. The proposed amendment adds 16 U.S.C. § 470aaa-5 to Appendix A (Statutory Index) and references it to §§2B1.1 and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources). Part C of the proposed amendment responds to the Children's Health Insurance Program Reauthorization Act of 2009 (Pub. L. 111-3), which amends the Social Security Act to establish a new offense at 42 U.S.C. § 1396w-2. This provision provides limited authority for private entities to disclose certain personal information related to eligibility determinations to appropriate State agencies,

and also creates a new Class A misdemeanor offense for those who abuse this authority. The proposed amendment adds 42 U.S.C. § 1396w-2 to Appendix A and references it to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Part D of the proposed amendment responds to a regulatory change in the status of iodine as a listed chemical. The proposed amendment changes the Chemical Quantity Table in §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to reflect the upgrade from a List II chemical to a List I chemical. The proposed amendment also extends iodine's maximum base offense level to level 30 and specifies the amount of Iodine that would be needed (1.3 kilograms) for a base offense level of 30 to apply. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with staff authorized to make technical and conforming changes if needed.

Chair Sessions called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed amendment, with Commissioner Hinojosa seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit C, makes several changes to Chapter Eight of the guidelines regarding the sentencing of organizations. First, the proposed amendment amends the Commentary to §8B2.1 (Effective Compliance and Ethics Program) by adding a new application note that describes the reasonable steps to respond appropriately after criminal conduct is detected. Second, the proposed amendment amends §8D1.4 (Recommended Conditions of Probation – Organizations) (Policy Statement) by consolidating subsections (b) and (c). Accordingly, when a court determines there is a need for organizational probation, all conditional probation terms – those terms imposed solely to enforce a monetary penalty (addressed in subsection (b)) and those imposed for any other reason (addressed in subsection (c)) – are available for consideration by the court. Third, the proposed amendment contains, in brackets, two additions to the Commentary of §8B2.1. The first bracketed addition amends Application Note 3 to include a new paragraph which clarifies what is expected of high-level personnel and substantial authority personnel. The second bracketed addition amends Application Note 6 to clarify that when an organization periodically assesses the risk that criminal conduct will occur, the “nature and operations of the organization with regard to particular ethics and compliance functions” should be included among the other matters assessed.

Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with staff authorized to make technical and conforming changes if needed.

Chair Sessions called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to publish the proposed amendment, with Vice Chair Carr seconding. The Chair called

for discussion on the motion. Vice Chair Castillo commended Commissioner Howell for her leadership on the proposed amendment and looks forward to reviewing the public comment on the proposed amendment. Commissioner Howell stated that Chapter Eight is an important deterrent to criminal activity, and that the Commission must remain abreast of current industry practice in order to ensure that this deterrent effect continues. Commissioner Hinojosa also commended Commissioner Howell for her work on the proposed amendment but stated that he would abstain from the vote because he was uncertain that the Commission followed its normal procedure with regard to considering the proposed amendment. Hearing no further discussion, Chair Sessions called for a vote, and the motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion and that Commissioner Hinojosa abstained from the vote.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit D, responds to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (division E of Pub. L 111-84), which created two new offenses. The proposed amendment amends Appendix A (Statutory Index) to reference the first new offense, 18 U.S.C. § 249 (Hate crime acts), to §2H1.1 (Offenses Involving Individual Rights); amends subsection (a) of §3A1.1 (Hate Crime Motivation or Vulnerable Victim) to include crimes motivated by actual or perceived “gender identity”; and strikes the special instruction at §3A1.1(c). The proposed amendment also amends Appendix A to reference the second new offense, 18 U.S.C. § 1389 (Prohibition on attacks on United States servicemen on account of service), to §§2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault) and 2B1.1 (Theft, Property Destruction, and Fraud). Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with staff authorized to make technical and conforming changes if needed.

Chair Sessions called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to publish the proposed amendment, with Commissioner Howell seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit E, concerns subsection (e) of §4A1.1 (Criminal History Category), known as the “recency” provision. The proposed amendment presents two options for amending §4A1.1 that would eliminate or reduce the cumulative impact of recency. Under Option 1, recency points are eliminated for all offenders. Under Option 2, recency points are retained but are not cumulative with “status” points added under §4A1.1(d). Proposed issues for comment are also included requesting comment on whether the Commission should instead address the cumulative impact of recency more narrowly, *i.e.*, only for cases sentenced under Chapter Two offense guidelines that increase the offense level based on criminal history. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with staff authorized to make technical and conforming changes if needed.

Chair Sessions called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to publish the proposed amendment and the proposed issues for comment, with Vice Chair Castillo seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit F, concerns §1B1.1 (Application Instructions) in light of United States v. Booker, 543 U.S. 220 (2005). The proposed amendment follows the three-step approach adopted by the majority of the federal circuits when determining the appropriate sentence in a particular case and structures §1B1.3 to reflect that approach. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment would be in order, with a 60-day comment period, and with staff authorized to make technical and conforming changes if needed.

Chair Sessions called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to publish the proposed amendment, with Commissioner Howell seconding. The Chair called for discussion on the motion. Vice Chair Castillo stated that the Commission must resolve any confusion regarding the methodology of the Guidelines sentence calculation and must reinforce the viability of guideline departures. Hearing no further discussion, the Chair called for a vote and the motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the next proposed issues for comment, attached hereto as Exhibit G, concern the Commission's review of departures. The Commission is reviewing the relevance of specific offender characteristics addressed in Chapter Five, Part H of the Guidelines Manual, specifically, those offender characteristics that are not listed in 28 U.S.C. § 994(e). The Commission contemplates that work on this priority will continue beyond the amendment cycle ending May 1, 2010. The Commission requests comment on which, and to what extent, specific offender characteristics should be considered at sentencing generally and in the Guidelines Manual in particular. Another proposed issue for comment requests comment on when, if at all, a defendant's status as a non-citizen may warrant a downward departure. Finally, there is a proposed issue for comment regarding when, if at all, a downward departure may be appropriate in an illegal reentry case under §2L1.2 (Unlawfully Entering or Remaining in the United States) on the basis of "cultural assimilation". Mr. Cohen advised the commissioners that a motion to publish the proposed issue for comment would be in order, with a 60-day comment period, and with staff authorized to make technical and conforming changes if needed.

Chair Sessions called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to publish the proposed issues for comment, with Vice Chair Carr seconding. Commissioner Howell stated that the testimony from judges at the regional hearings over the past year suggests that although judges continue to consult the Guidelines Manual, they do not find the departure provisions useful. Commissioner Howell noted that it is important to update the departure provisions so that the guidelines will be as useful to sentencing judges as practicable,

within the Commission's statutory requirements. Vice Chair Castillo stated that it is time to update Chapter Five, but recognized that changing the departure provisions will be a two year process. Chair Sessions agreed with Commissioner Howell and Vice Chair Castillo. The Chair stated that the Commission is recognized as the expert in sentencing policy and must use this expertise to inform Congress and judges on sentencing policy. The Chair invited a broad response from the public in making such important changes to sentencing policy through the departure provisions of the Guidelines. Hearing no further discussion, Chair Sessions called for a vote on the motion to publish the proposed issues for comment and the motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

Mr. Cohen stated that the final proposed amendment, hereto attached as Exhibit H, concerns alternatives to incarceration and contains two parts, A and B, that are not mutually exclusive. Part A expands the authority of the court to impose an alternative to incarceration for certain drug offenders who need treatment for drug addiction and who meet certain criteria. This part creates a new guideline, §5C1.3, (Substance Abuse Treatment Program as an Alternative to Incarceration for Certain Drug Offenders) that provides the court with authority under the guidelines to impose a sentence of probation rather than a sentence of imprisonment without regard to the applicable Zone of the Sentencing Table (with a requirement that the offender participate in a treatment program). Part B expands Zones B and C in the Sentencing Table in Chapter Five. Specifically, it expands Zone B by one level in each of Criminal History Categories I through VI (taking this area from Zone C), and expands Zone C by one level in each of Criminal History Categories I through VI (taking this area from Zone D). Part B also provides guidance on the effectiveness of residential treatment programs. Finally, Part B makes conforming changes to §§5B1.1 (Imposition of a Term of Probation) and 5C1.1 (Imposition of a Term of Imprisonment). Issues for comment are also included. Mr. Cohen advised the commissioners that a motion to publish the proposed amendment and issues for comment would be in order, with a 60-day comment period, and with staff authorized to make technical and conforming changes if needed.

Chair Sessions called for a motion as suggested by Mr. Cohen. Vice Chair Castillo made a motion to publish the proposed amendment and issues for comment, with Vice Chair Carr seconding. The Chair called for discussion on the motion. Commissioner Friedrich stated that she opposed publishing Part A of the proposed amendment because it only benefits one class of offenders, namely, defendants with drug abuse problems. Commissioner Hinojosa stated his agreement with Commissioner Friedrich's concern. Both Commissioner Friedrich and Commissioner Hinojosa stated their support for publishing Part B of the amendment. Vice Chair Castillo stated that the proposed amendment is a modest effort by the Commission to examine drug abuse problems for certain defendants who meet certain criteria. Vice Chair Castillo suggested the Commission should take a leadership role in devising alternatives to incarceration. Vice Chair Castillo also called upon Congress to demonstrate its leadership on crack cases and other drug offenses, as many experts in the field believe the offense levels should be reduced in these cases.

Commissioner Hinojosa stated that he would vote to publish for comment Part B, which would

give the Commission the opportunity to receive comment and consider the availability and use of rehabilitation programs for more than a particular class of defendants and would give the Commission the opportunity to address some of the concerns which he shares with Chair Sessions and Vice Chair Castillo regarding the availability of rehabilitation programs.

Commissioner Howell commented that she is particularly interested in receiving comment from the public on the types of alternative treatments available and what types of alternative treatments work best. She hopes to find out what makes an effective treatment program and offer a focused source of information for judges that would outline key features that constitute an effective program.

Hearing no further discussion, Chair Sessions asked the commissioners who made the original motion if they would consent to splitting the motion into two parts, the first to publish Part A of the proposed amendment and the second to publish Part B. Vice Chairs Castillo and Carr agreed to split the motion accordingly. The Chair called for a vote on the motion to publish Part A of the proposed amendment and the motion was adopted, with the Chair noting that at least three Commissioners voted in favor of the amendment and that Commissioners Friedrich and Hinojosa voted no. The Chair called for a vote on the motion to publish Part B of the proposed amendment. The motion was adopted with the Chair noting that at least three commissioners voted in favor of the motion.

The Chair asked if there was any further business before the Commission. Commissioner Wroblewski thanked Commissioner Hinojosa for his tenure as Chair and Acting Chair. He stated that 2010 would be an important year for the Commission because Congress tasked the Commission to issue reports on mandatory minimums, general sentencing practices post-*Booker*, and alternatives to incarceration. Furthermore, the Supreme Court will decide several important cases this year regarding sentencing law and policy. Commissioner Wroblewski also expressed his hope that, after fifteen years, the crack-powder issue might finally be resolved. Finally, he suggested the Commission complete the evaluation of the sentencing system post-*Booker* and develop a new vision of federal sentencing policy that will yield a stable sentencing system supported by the public and practitioners.

Chair Sessions stated on behalf of the Commission that he looks forward to working with the Department of Justice, the PAG, and other groups with the goal of protecting the public and maintaining fairness in sentencing.

Commissioner Hinojosa thanked Chair Sessions and Commissioner Wroblewski for their generous comments regarding his service as Chair and Acting Chair. He credited the dedication of the entire Commission for the work that was accomplished during his tenure. He also commended the dedication and work of staff.

Chair Sessions asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Vice Chair Castillo made a motion to adjourn, with Commissioner Hinojosa seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 11:44 a.m.

EXHIBIT A

PROPOSED AMENDMENT: TECHNICAL AMENDMENT

Synopsis of Proposed Amendment: *This two-part proposed amendment makes various technical and conforming changes to the guidelines.*

Part A of the proposed amendment makes changes to the Guidelines Manual to promote accuracy and completeness. For example, it corrects typographical errors, and it addresses cases in which the Guidelines Manual provides information (such as a reference to a guideline, statute, or regulation) that has become incorrect or obsolete. Specifically, it amends:

- (1) §1B1.3 (Relevant Conduct), Application Note 6, to ensure that two quotations contained in that note are accurate;*
- (2) §1B1.8 (Use of Certain Information), Application Note 2, to revise a reference to the "Probation Service";*
- (3) §1B1.9 (Class B or C Misdemeanors and Infractions), Application Note 1, to reflect that some infractions do not have any authorized term of imprisonment;*
- (4) §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), Application Note 2, to correct a typographical error;*
- (5) §2A1.1 (First Degree Murder), Application Note 1, to provide specific citations for the examples given;*
- (6) §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), Application Note 5, to correct typographical errors;*
- (7) §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), Application Note 1, to correct a typographical error;*
- (8) §2A3.5 (Failure to Register as a Sex Offender), Application Note 1, to ensure that the statutory definitions referred to in that note are accurately cited;*
- (9) §2B1.4 (Insider Trading), Application Note 1, to correct a typographical error;*
- (10) §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), Application Note 1, to provide updated citations to statutes and regulations;*
- (11) §2B3.1 (Robbery), Application Note 2, to correct a typographical error;*
- (12) §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), Background, to provide an updated description and reference to the statute criminalizing bribery in connection with Medicare and Medicaid referrals;*
- (13) §2B6.1 (Altering or Removing Motor Vehicle Identification Numbers), Background, to update the statutory maximum term of imprisonment for violations of 18 U.S.C. § 553(a)(2);*

- (14) *§2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe), Application Note 3, to ensure that the subsection relating to "loss" is accurately cited;*
- (15) *§2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), Application Note 4, to correct a typographical error;*
- (16) *§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking), in the Notes to the Drug Quantity Table, to provide updated citations to regulations;*
- (17) *both §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical), Application Note 6, and §2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material) to provide a more accurate statutory citation and description;*
- (18) *§2D1.14 (Narco-Terrorism), subsection (a)(1), to provide an updated guideline reference;*
- (19) *§2D2.1 (Unlawful Possession), Commentary, to provide updated statutory references;*
- (20) *§2G3.1 (Importing, Mailing, or Transporting Obscene Matter), Application Note 1, to make the definition of "distribution" in that guideline more consistent with the definition of "distribution" in the child pornography guidelines;*
- (21) *§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), Application Note 2, to ensure that a quotation contained in that note is accurate;*
- (22) *§2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone), Application Notes 2 and 3, to provide updated statutory references;*
- (23) *both §2L2.2 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport), Statutory Provisions, and §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use), Statutory Provisions, to provide updated statutory references;*
- (24) *§2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government), Application Note 1, to provide an updated reference to an executive order;*
- (25) *§2M3.3 (Transmitting National Defense Information), to provide an updated statutory reference;*
- (26) *§2M3.9 (Disclosure of Information Identifying a Covert Agent), Application Note 3, to provide an updated statutory reference;*
- (27) *§2M6.1 (Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxiins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction), Application Note 1, to provide updated statutory references;*
- (28) *§2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides), Background, to*

provide updated guideline references;

- (29) §2Q1.6 (*Hazardous or Injurious Devices on Federal Lands*), subsection (a)(1), to correct a typographical error;
- (30) §2Q2.1 (*Offenses Involving Fish, Wildlife, and Plants*), Application Note 3, to provide a more complete reference to regulations;
- (31) Chapter Two, Part T, Subpart 2 (*Alcohol and Tobacco Taxes*), Introductory Commentary, to provide a more complete statutory reference;
- (32) §2X5.2 (*Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)*), to strike an erroneous statutory reference;
- (33) Appendix A (*Statutory Index*), to provide updated statutory references and strike an erroneous statutory reference.

Part B of the proposed amendment makes a series of changes to the Guidelines Manual to promote stylistic consistency in how subdivisions are designated. Specifically, when dividing guideline sections into subdivisions, the guidelines generally follow the structure used by Congress to divide statutory sections into subdivisions. Thus, a section is broken into subsections (starting with "(a)"), which are broken into paragraphs (starting with "(1)"), which are broken into subparagraphs (starting with "(A)"), which are broken into clauses (starting with "(i)"), which are broken into subclauses (starting with "(I)"). See Koons Buick Pontiac GMC, Inc., v. Nigh, 543 U.S. 50, 60 (2004). For a generic term, "subdivision" is also used. When dividing application notes into subdivisions, the guidelines generally follow the same structure, except that subsections and paragraphs are not used; the first subdivisions used are subparagraphs (starting with "(A)"). Part B of the proposed amendment identifies places in the Guidelines Manual where these principles are not followed and brings them into conformity.

Proposed Amendment:

(A) Changes to Promote Accuracy and Completeness

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

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Commentary

Application Notes:

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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; Engaging in Monetary Transactions in Property Derived from Unlawful Activity*), subsection (b)(2)(B) applies if the defendant ~~is~~**was** convicted under 18 U.S.C. § 1956". 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~~**involved conduct***

described in 18 U.S.C. § 2242").

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§1B1.8. Use of Certain Information

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Commentary

Application Notes:

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2. *Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender). The ~~Probation Service~~ **probation office** generally will secure information relevant to the defendant's criminal history independent of information the defendant provides as part of his cooperation agreement.*

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§1B1.9. Class B or C Misdemeanors and Infractions

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Commentary

Application Notes:

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1. *Notwithstanding any other provision of the guidelines, the court may impose any sentence authorized by statute for each count that is a Class B or C misdemeanor or an infraction. A Class B misdemeanor is any offense for which the maximum authorized term of imprisonment is more than thirty days but not more than six months; a Class C misdemeanor is any offense for which the maximum authorized term of imprisonment is more than five days but not more than thirty days; an infraction is any offense for which the maximum authorized term of imprisonment is not more than five days **or for which no imprisonment is authorized.** See 18 U.S.C. § 3559.*

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§1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

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Commentary

Application Notes:

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2. *Under subsection (b)(1), the last date of the offense of conviction is the controlling date for ex post facto purposes. For example, if the offense of conviction (*i.e.*, the conduct charged in the count of the indictment or information of which the defendant was convicted) was determined by the court*

to have been committed between October 15, 1991 and October 28, 1991, the date of October 28, 1991 is the controlling date for *ex post facto* purposes. This is true even if the defendant's conduct relevant to the determination of the guideline range under §1B1.3 (Relevant Conduct) included an act that occurred on November 2, 1991 (after a revised Guidelines Manual took effect).

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§2A1.1. First Degree Murder

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Commentary

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Application Notes:

1. Applicability of Guideline.—This guideline applies in cases of premeditated killing. This guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference (e.g., a kidnapping in which death occurs, *see* §2A4.1(c)(1)), or in cases in which the offense level of a guideline is calculated using the underlying crime (e.g., murder in aid of racketeering, *see* §2E1.3(a)(2)).

* * *

§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

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Commentary

Application Notes:

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5. Cross Reference.— Subsection (c)(1) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if (A) the victim had not attained the age of 12 years (*see* 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnapping (*see* 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnapping (*see* 18 U.S.C. § 2242(1)).

* * *

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

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Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline:

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"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

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§2A3.5. Failure to Register as a Sex Offender

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Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline:

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"Sex offense" has the meaning given that term in 42 U.S.C. § 16911(5).

"Tier I offender", "Tier II offender", and "Tier III offender" have the meaning given ~~those terms in 42 U.S.C. § 16911(2), (3) and (4), respectively~~ *the terms "tier I sex offender", "tier II sex offender", and "tier III sex offender", respectively, in 42 U.S.C. § 16911.*

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§2B1.4. Insider Trading

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Commentary

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Application Note:

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

"tippee".

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources

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Commentary

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Application Notes:

1. "Cultural Heritage Resource" Defined.—For purposes of this guideline, "cultural heritage resource" means any of the following:

* * *

(C) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. pt. 7; 36 C.F.R. pt. 296; 32 C.F.R. pt. ~~299~~229; 18 C.F.R. pt. 1312).

* * *

(E) A commemorative work. "Commemorative work" (A) has the meaning given that term in section 2(c) of Public Law 99-652 (40 U.S.C. § 1002(c))40 U.S.C. § 8902(a)(1); and (B) includes any national monument or national memorial.

* * *

§2B3.1. Robbery

* * *

Commentary

* * *

Application Notes:

* * *

2. Consistent with Application Note 1(~~d~~D)(ii) of §1B1.1 (Application Instructions), an object shall be considered to be a dangerous weapon for purposes of subsection (b)(2)(E) if (A) the object closely resembles an instrument capable of inflicting death or serious bodily injury; or (B) the defendant used the object in a manner that created the impression that the object was an instrument capable of inflicting death or serious bodily injury (e.g., a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

* * *

§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery

* * *

Commentary

Background:

* * *

This guideline also applies to making prohibited payments to induce the award of subcontracts on federal projects for which the maximum term of imprisonment authorized was recently increased from two to is ten years. 41 U.S.C. §§ 51, 53-54. ~~Violations of 42 U.S.C. §§ 1395nn(b)(1) and (b)(2), involve the offer or acceptance of a payment to refer an individual for services or items paid for under the Medicare program. Similar provisions in 42 U.S.C. §§ 1396h(b)(1) and (b)(2) cover the offer or acceptance of a payment for referral to the Medicaid program.~~Violations of 42 U.S.C. § 1320a-7b involve the offer or acceptance of a payment to refer an individual for services or items paid for under a federal health care program (e.g., the Medicare and Medicaid programs).

* * *

§2B6.1. Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers

* * *

Background: *The statutes covered in this guideline prohibit altering or removing motor vehicle identification numbers, importing or exporting, or trafficking in motor vehicles or parts knowing that the identification numbers have been removed, altered, tampered with, or obliterated. Violations of 18 U.S.C. §§ 511 ~~and 553(a)(2)~~ carry a maximum of five years imprisonment. Violations of 18 U.S.C. §§ 553(a)(2) and 2321 carry a maximum of ten years imprisonment.*

* * *

§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions

* * *

Commentary

* * *

Application Notes:

* * *

3. *Application of Subsection (b)(2).—"Loss", for purposes of subsection (b)(2)(A), shall be determined in accordance with Application Note 3 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud). The value of "the benefit received or to be received" means the net value of such benefit. Examples: (A) A government employee, in return for a \$500 bribe, reduces the price of a piece of surplus property offered for sale by the government from \$10,000 to \$2,000; the value of the benefit received is \$8,000. (B) A \$150,000 contract on which \$20,000 profit was made was awarded in return for a bribe; the value of the benefit received is \$20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the preceding examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.*

* * *

§2C1.2. Offering, Giving, Soliciting, or Receiving a Gratuity

* * *

Commentary

* * *

Application Notes:

* * *

- 4. Inapplicability of §3B1.3.—Do not apply the adjustment in §3B1.3 (*Abuse of Position or of Trust or Use of Special Skill*).

* * *

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

* * *

(c) DRUG QUANTITY TABLE

* * *

*Notes to Drug Quantity Table:

* * *

- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(2530)), (ii) at least two of the following: cannabiniol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).
- (I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(2530)), (ii) at least two of the following: cannabiniol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

* * *

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

* * *

Commentary

* * *

Application Notes:

* * *

6. *Subsection (b)(3) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ ~~5124~~, 9603(b), and 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).*

* * *

§2D1.12. Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy

* * *

Commentary

* * *

Application Notes:

* * *

3. *Subsection (b)(2) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ ~~5124~~, 9603(b), and 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(2) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of*

Supervised Release).

* * *

§2D1.14. Narco-Terrorism

(a) Base Offense Level:

- (1) The offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying offense, except that §2D1.1(a)(35)(A), (a)(35)(B), and (b)(11) shall not apply.

* * *

§2D2.1. Unlawful Possession; Attempt or Conspiracy

* * *

Commentary

* * *

Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under ~~Section 6371 of the Anti-Drug Abuse Act of 1988~~ 21 U.S.C. § 844(a). Other cases for which enhanced penalties are provided under ~~Section 6371 of the Anti-Drug Abuse Act of 1988~~ 21 U.S.C. § 844(a) (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b).

* * *

§2G3.1. Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names

* * *

Commentary

* * *

Application Notes:

- 1. Definitions.—For purposes of this guideline:

* * *

*"Distribution" means any act, including possession with intent to distribute, production, **transmission**,*

advertisement, and transportation, related to the transfer of obscene matter. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

* * *

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

Commentary

* * *

Application Notes:

* * *

2. *Semiautomatic Firearm **That Is** Capable of Accepting a Large Capacity Magazine.*—For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm **that is** capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

* * *

§2K2.5. Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone

* * *

Commentary

* * *

Application Notes:

* * *

2. "Federal court facility" includes the courtroom; judges' chambers; witness rooms; jury deliberation rooms; attorney conference rooms; prisoner holding cells; offices and parking facilities of the court clerks, the United States attorney, and the United States marshal; probation and parole offices; and adjoining corridors and parking facilities of any court of the United States. See 18 U.S.C. § 930(fg)(3).
3. "School zone" is defined at 18 U.S.C. § 922(q). A sentence of imprisonment under 18 U.S.C. § 922(q) must run consecutively to any sentence of imprisonment imposed for any other offense. See 18 U.S.C. § 924(a)(4). In order to comply with the statute, when the guideline range is based on the underlying offense, and the defendant is convicted both of the underlying offense and 18 U.S.C.

§ 922(q), the court should apportion the sentence between the count for the underlying offense and the count under 18 U.S.C. § 922(q). For example, if the guideline range is 30-37 months and the court determines "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense, plus 6 months under 18 U.S.C. § 922(q) would satisfy this requirement.

* * *

§2L2.1. Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

* * *

Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), 1325~~(b)~~(c), (d); 18 U.S.C. §§ 1015, 1028, 1425-1427, 1542, 1544, 1546. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

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

* * *

Commentary

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

* * *

§2M3.1. Gathering or Transmitting National Defense Information to Aid a Foreign Government

* * *

Commentary

* * *

Application Notes:

1. "Top secret information" is information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security." Executive Order ~~12356~~12958 (50 U.S.C. § 435 note).

* * *

§2M3.3. Transmitting National Defense Information; Disclosure of Classified Cryptographic Information; Unauthorized Disclosure to a Foreign Government or a Communist Organization of Classified Information by Government Employee; Unauthorized Receipt of Classified Information

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 793(d), (e), (g), 798; 50 U.S.C. § 783 ~~(b)~~, ~~(c)~~.

* * *

§2M3.9. Disclosure of Information Identifying a Covert Agent

* * *

Commentary

* * *

Application Notes:

* * *

3. A term of imprisonment imposed for a conviction under 50 U.S.C. § 421 shall be imposed consecutively to any other term of imprisonment. *See 50 U.S.C. § 421(d).*

* * *

§2M6.1. Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

* * *

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"Foreign terrorist organization" (A) means an organization that engages in terrorist activity that threatens the security of a national of the United States or the national security of the United States; and (B) includes

an organization designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. § ~~1189~~1189). "National of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(22)).

* * *

"Restricted person" has the meaning given that term in 18 U.S.C. § 175b(b)(2).

* * *

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

* * *

Commentary

* * *

Background: This section applies both to substantive violations of the statute governing the handling of pesticides and toxic and hazardous substances and to recordkeeping offenses. The first four specific offense characteristics provide enhancements when the offense involved a substantive violation. The ~~last two~~ *fifth and sixth* specific offense characteristics apply to recordkeeping offenses. Although other sections of the guidelines generally prescribe a base offense level of 6 for regulatory violations, §2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous and toxic substances and pesticides. A decrease of 2 levels is provided, however, for "simple recordkeeping or reporting violations" under §2Q1.2(b)(6).

* * *

§2Q1.6. Hazardous or Injurious Devices on Federal Lands

(a) Base Offense Level (Apply the greatest):

- (1) If the intent was to violate the Controlled Substances Act, apply §2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy);

* * *

§2Q2.1. Offenses Involving Fish, Wildlife, and Plants

* * *

Commentary

Application Notes:

* * *

- 3. For purposes of subsection (b)(2), the quarantine requirements include those set forth in 9 C.F.R. Part 92, and 7 C.F.R., *Subtitle B*, Chapter III. State quarantine laws are included as well.

* * *

PART T - OFFENSES INVOLVING TAXATION

* * *

2. ALCOHOL AND TOBACCO TAXES

Introductory Commentary

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

* * *

§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

- (a) Base Offense Level: 6

Commentary

Statutory Provisions: 18 U.S.C. §§ 1365(f), 1801; 42 U.S.C. §§ ~~H29(a)~~, 14133; 49 U.S.C. § 31310.

* * *

APPENDIX A - STATUTORY INDEX

		* * *
7 U.S.C. § 13(fe)	2B1.4	* * *
8 U.S.C. § 1325(bc)	2L2.1, 2L2.2	* * *
8 U.S.C. § 1325(ed)	2L2.1, 2L2.2	* * *
18 U.S.C. § 247	2H1.1	* * *
18 U.S.C. § 248	2H1.1	

18 U.S.C. § 1129(a)	2X5.2	* * *
42 U.S.C. § 1320a-7b	2B1.1, 2B4.1	* * *
42 U.S.C. § 1320a-8b	2X5.1, 2X5.2	* * *
50 U.S.C. § 783(b)	2M3.3	* * *
50 U.S.C. § 783(c)	2M3.3	* * *

(B) Changes to Promote Stylistic Consistency

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

* * *

Commentary

Application Notes:

* * *

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:

- (iA) in furtherance of the jointly undertaken criminal activity; and*
- (iiB) reasonably foreseeable in connection with that criminal activity.*

* * *

§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement)

* * *

Commentary

Application Notes:

1. Application of ~~Subsection~~Subdivision (1)(A).—

* * *

§2H4.2. Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act

* * *

(b) Specific Offense Characteristics

- (1) If the offense involved (iA) serious bodily injury, increase by 4 levels; or (iiB) bodily injury, increase by 2 levels.

* * *

§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials

* * *

Commentary

Application Notes:

* * *

10. *An upward departure may be warranted in any of the following circumstances: (1A) the quantity of explosive materials significantly exceeded 1000 pounds; (2B) the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives (e.g., plastic explosives); (3C) the defendant knowingly distributed explosive materials to a person under twenty-one years of age; or (4D) the offense posed a substantial risk of death or bodily injury to multiple individuals.*

* * *

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

Commentary

Application Notes:

* * *

11. *Upward Departure Provisions.—An upward departure may be warranted in any of the following circumstances: (1A) the number of firearms substantially exceeded 200; (2B) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (4D) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).*

* * *

§3C1.1. Obstructing or Impeding the Administration of Justice

* * *

Commentary

Application Notes:

* * *

4. Examples of Covered Conduct.—*The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:*

- (~~a~~A) *threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;*
- (~~b~~B) *committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;*
- (~~c~~C) *producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;*
- (~~d~~D) *destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;*
- (~~e~~E) *escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;*
- (~~f~~F) *providing materially false information to a judge or magistrate;*
- (~~g~~G) *providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;*
- (~~h~~H) *providing materially false information to a probation officer in respect to a presentence or other investigation for the court;*
- (~~i~~I) *other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511);*
- (~~j~~J) *failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p);*
- (~~k~~K) *threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.*

* * *

5.

* * *

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

- (αA) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;*
- (bB) making false statements, not under oath, to law enforcement officers, unless Application Note 4(g) above applies;*
- (cC) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;*
- (dD) avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight));*
- (eE) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility).*

* * *

§3E1.1. Acceptance of Responsibility

* * *

Commentary

Application Notes:

1. *In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:*
 - (αA) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;*
 - (bB) voluntary termination or withdrawal from criminal conduct or associations;*

- (~~τ~~C) *voluntary payment of restitution prior to adjudication of guilt;*
- (~~τ~~D) *voluntary surrender to authorities promptly after commission of the offense;*
- (~~ε~~E) *voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;*
- (~~f~~F) *voluntary resignation from the office or position held during the commission of the offense;*
- (~~g~~G) *post-offense rehabilitative efforts (e.g., counseling or drug treatment); and*
- (~~h~~H) *the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.*

* * *

§5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)

* * *

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A "semiautomatic firearm capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (~~A~~1) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (~~B~~2) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

* * *

EXHIBIT B

PROPOSED AMENDMENT: MISCELLANEOUS

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

Part A of the proposed amendment responds to the Fraud Enforcement and Recovery Act of 2009 (Pub. L. 111–21), which expanded the securities fraud statute, 18 U.S.C. § 1348, so that it also covers commodities fraud. Section 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) contains an enhancement at subsection (b)(17)(B) that applies when a violation of commodities law is committed by certain specified persons who have fiduciary duties. The proposed amendment adds 18 U.S.C. § 1348 to the list of offenses that qualify as "commodities law" for purposes of this enhancement.

Part B of the proposed amendment responds to the Omnibus Public Land Management Act of 2009 (Pub. L. 111–11), which established a new offense at 16 U.S.C. § 470aaa-5. The new offense makes it unlawful to excavate, remove, damage, or otherwise alter or deface any paleontological resource on federal land; to traffic in a paleontological resource taken from federal land; or to make or submit a false record relating to a paleontological resource taken from federal land. The proposed amendment adds 16 U.S.C. § 470aaa-5 to Appendix A (Statutory Index) and references it to §§2B1.1 and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources). Technical and conforming changes to §§2B1.1 and 2B1.5 are also made.

Part C of the proposed amendment responds to the Children’s Health Insurance Program Reauthorization Act of 2009 (Pub. L. 111–3), which amends the Social Security Act to establish a new offense at 42 U.S.C. § 1396w-2. This provision provides limited authority for private entities to disclose certain personal information related to eligibility determinations to appropriate State agencies, and also creates a new Class A misdemeanor for those who abuse this limited authority and communicate protected information to parties not entitled to view it. The proposed amendment adds 42 U.S.C. § 1396w-2 to Appendix A (Statutory Index) and references it to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

Part D of the proposed amendment responds to a regulatory change in the status of iodine as a listed chemical. Under that regulatory change, iodine was upgraded from a List II chemical to a List I chemical. The proposed amendment changes the Chemical Quantity Table in §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to reflect the upgrade. Because the maximum base offense level is higher for List I chemicals (level 30) than for List II chemicals (level 28), the proposed amendment also extends iodine's maximum base offense level to level 30 and specifies the amount of iodine that would be needed (1.3 kilograms) for a base offense level of 30 to apply.

Proposed Amendment:

(A) Fraud Enforcement and Recovery Act of 2009

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

Obligations of the United States

* * *

(17) If the offense involved—

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

increase by 4 levels.

* * *

Commentary

* * *

Application Notes:

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

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

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

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

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

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

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

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

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

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

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

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

(B) In General.—A conviction under a securities law or commodities law is not required in order for subsection (b)(17) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.

(C) Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(17) applies, do not apply §3B1.3.

* * *

(B) **Omnibus Public Land Management Act of 2009**

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

* * *

(c) Cross References

* * *

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

* * *

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

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

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

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

* * *

§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
- (1) If the value of the cultural heritage resource **or paleontological resource** (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
- (2) If the offense involved a cultural heritage resource **or paleontological resource** from, or that, prior to the offense, was on, in, or in the custody of (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery or veterans' memorial; (F) a museum; or (G) the World Heritage List, increase by **2** levels.
- (3) If the offense involved a cultural heritage resource **or paleontological resource** constituting (A) human remains; (B) a funerary object; (C) cultural patrimony; (D) a sacred object; (E) cultural property; (F)

designated archaeological or ethnological material; or (G) a pre-Columbian monumental or architectural sculpture or mural, increase by 2 levels.

- (4) If the offense was committed for pecuniary gain or otherwise involved a commercial purpose, increase by 2 levels.
- (5) If the defendant engaged in a pattern of misconduct involving cultural heritage resources or paleontological resources, increase by 2 levels.
- (6) If a dangerous weapon was brandished or its use was threatened, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(c) Cross Reference

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

Commentary

Statutory Provisions: 16 U.S.C. §§ 470aaa–5, 470ee, 668(a), 707(b); 18 U.S.C. §§ 541-546, 554, 641, 661-662, 666, 668, 1152-1153, 1163, 1168, 1170, 1361, 1369, 2232, 2314-2315.

Application Notes:

1. *"Cultural Heritage Resource" Defined.*—For purposes of this guideline, "cultural heritage resource" means any of the following: Definitions.—For purposes of this guideline:

(A) "Cultural heritage resource" means any of the following:

- (Ai) A historic property, as defined in 16 U.S.C. § 470w(5) (see also section 16(l) of 36 C.F.R. pt. 800).
- (Bii) A historic resource, as defined in 16 U.S.C. § 470w(5).
- (Ciii) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. pt. 7; 36 C.F.R. pt. 296; 32 C.F.R. pt. 299; 18 C.F.R. pt. 1312).
- (Div) A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3) (see also 43 C.F.R. § 10.2(d)).
- (Ev) A commemorative work. "Commemorative work" (AI) has the meaning given that term in section 2(c) of Public Law 99–652 (40 U.S.C. § 1002(c)); and (BII) includes any national monument or national memorial.
- (Fvi) An object of cultural heritage, as defined in 18 U.S.C. § 668(a)(2).

(Gvii) Designated ethnological material, as described in 19 U.S.C. §§ 2601(2)(ii), 2601(7), and 2604.

(B) *"Paleontological resource" has the meaning given such term in 16 U.S.C. § 470aaa.*

2. Value of the ~~Cultural Heritage~~ Resource Under Subsection (b)(1).—This application note applies to the determination of the value of the ~~cultural heritage~~ resource under subsection (b)(1).

(A) General Rule.—For purposes of subsection (b)(1), the value of the ~~cultural heritage~~ resource shall include, as applicable to the particular resource involved, the following:

(i) *The archaeological value. (Archaeological value shall be included in the case of any ~~cultural heritage~~ resource that is an archaeological resource.)*

(ii) *The commercial value.*

(iii) *The cost of restoration and repair.*

(B) Estimation of Value.—For purposes of subsection (b)(1), the court need only make a reasonable estimate of the value of the ~~cultural heritage~~ resource based on available information.

(C) Definitions.—For purposes of this application note:

(i) *"Archaeological value" of a ~~cultural heritage~~ resource means the cost of the retrieval of the scientific information which would have been obtainable prior to the offense, including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports, as would be necessary to realize the information potential. (See 43 C.F.R. § 7.14(a); 36 C.F.R. § 296.14(a); 32 C.F.R. § 229.14(a); 18 C.F.R. § 1312.14(a).)*

(ii) *"Commercial value" of a ~~cultural heritage~~ resource means the fair market value of the ~~cultural heritage~~ resource at the time of the offense. (See 43 C.F.R. § 7.14(b); 36 C.F.R. § 296.14(b); 32 C.F.R. § 229.14(b); 18 C.F.R. § 1312.14(b).)*

(iii) *"Cost of restoration and repair" includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the ~~cultural heritage~~ resource; and any other actual and projected costs to complete restoration and repair of the ~~cultural heritage~~ resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the construction of physical barriers and other protective devices; (V) examination and analysis of the ~~cultural heritage~~ resource as part of efforts to salvage remaining information about the resource; and (VI) preparation of reports. (See 43 C.F.R. § 7.14(c); 36 C.F.R. § 296.14(c); 32 C.F.R. § 229.14(c); 18 C.F.R. § 1312.14(c).)*

(D) Determination of Value in Cases Involving a Variety of ~~Cultural Heritage~~ Resources.—In a case involving a variety of ~~cultural heritage~~ resources, the value of the ~~cultural heritage~~

resources is the sum of all calculations made for those resources under this application note.

3. Enhancement in Subsection (b)(2).—For purposes of subsection (b)(2):

- (A) "Museum" has the meaning given that term in 18 U.S.C. § 668(a)(1) except that the museum may be situated outside the United States.
- (B) "National cemetery" and "veterans' memorial" have the meaning given those terms in Application Note 1 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).
- (C) "National Historic Landmark" means a property designated as such pursuant to 16 U.S.C. § 470a(a)(1)(B).
- (D) "National marine sanctuary" means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. § 1433.
- (E) "National monument or national memorial" means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to the Antiquities Act of 1906 (16 U.S.C. § 431).
- (F) "National park system" has the meaning given that term in 16 U.S.C. § 1c(a).
- (G) "World Heritage List" means the World Heritage List maintained by the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization in accordance with the Convention Concerning the Protection of the World Cultural and Natural Heritage.

4. Enhancement in Subsection (b)(3).—For purposes of subsection (b)(3):

- (A) "Cultural patrimony" has the meaning given that term in 25 U.S.C. § 3001(3)(D) (see also 43 C.F.R. 10.2(d)(4)).
- (B) "Cultural property" has the meaning given that term in 19 U.S.C. § 2601(6).
- (C) "Designated archaeological or ethnological material" means archaeological or ethnological material described in 19 U.S.C. § 2601(7) (see also 19 U.S.C. §§ 2601(2) and 2604).
- (D) "Funerary object" means an object that, as a part of the death rite or ceremony of a culture, was placed intentionally, at the time of death or later, with or near human remains.
- (E) "Human remains" (i) means the physical remains of the body of a human; and (ii) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the human from whose body the remains were obtained, such as hair made into ropes or nets.
- (F) "Pre-Columbian monumental or architectural sculpture or mural" has the meaning given

that term in 19 U.S.C. § 2095(3).

(G) "Sacred object" has the meaning given that term in 25 U.S.C. § 3001(3)(C) (see also 43 C.F.R. § 10.2(d)(3)).

5. Pecuniary Gain and Commercial Purpose Enhancement Under Subsection (b)(4).—

(A) "For Pecuniary Gain".—For purposes of subsection (b)(4), "for pecuniary gain" means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Therefore, offenses committed for pecuniary gain include both monetary and barter transactions, as well as activities designed to increase gross revenue.

(B) Commercial Purpose.—The acquisition of ~~cultural heritage~~ resources for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private non-profit organization, or a private for-profit organization, shall be considered to involve a "commercial purpose" for purposes of subsection (b)(4).

6. Pattern of Misconduct Enhancement Under Subsection (b)(5).—

(A) Definition.—For purposes of subsection (b)(5), "pattern of misconduct involving cultural heritage resources *or paleontological resources*" means two or more separate instances of offense conduct involving a ~~cultural heritage~~ resource that did not occur during the course of the offense (i.e., that did not occur during the course of the instant offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct)). Offense conduct involving a ~~cultural heritage~~ resource may be considered for purposes of subsection (b)(5) regardless of whether the defendant was convicted of that conduct.

(B) Computation of Criminal History Points.—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

7. Dangerous Weapons Enhancement Under Subsection (b)(6).—For purposes of subsection (b)(6), "brandished" and "dangerous weapon" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

8. Multiple Counts.—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving ~~cultural heritage~~ offenses covered by this guideline are grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts). Multiple counts involving ~~cultural heritage~~ offenses covered by this guideline and offenses covered by other guidelines are not to be grouped under §3D1.2(d).

9. Upward Departure Provision.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources *or paleontological resources*, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources *or paleontological resources* (such as an offense involving the theft from a national cemetery of lawnmowers and other

administrative property in addition to historic gravemarkers or other cultural heritage resources); or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (e.g., the Statue of Liberty or the Liberty Bell).

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APPENDIX A - STATUTORY INDEX

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16 U.S.C. § 413	2B1.1
16 U.S.C. § 470aaa-5	2B1.1, 2B1.5

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(C) Children's Health Insurance Program Reauthorization Act of 2009

APPENDIX A - STATUTORY INDEX

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42 U.S.C. § 1396h(b)(2)	2B4.1
42 U.S.C. § 1396w-2	2H3.1

* * *

(D) Iodine

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

* * *

**(e) CHEMICAL QUANTITY TABLE*
(All Other Precursor Chemicals)**

Listed Chemicals and Quantity	Base Offense Level
(1) <u>List I Chemicals</u> 890 G or more of Benzaldehyde; 20 KG or more of Benzyl Cyanide; 200 G or more of Ergonovine; 400 G or more of Ergotamine; 20 KG or more of Ethylamine; 2.2 KG or more of Hydriodic Acid; 1.3 KG or more of Iodine; 320 KG or more of Isosafrole; 200 G or more of Methylamine;	Level 30

500 KG or more of N-Methylephedrine;
500 KG or more of N-Methylpseudoephedrine;
625 G or more of Nitroethane;
10 KG or more of Norpseudoephedrine;
20 KG or more of Phenylacetic Acid;
10 KG or more of Piperidine;
320 KG or more of Piperonal;
1.6 KG or more of Propionic Anhydride;
320 KG or more of Safrole;
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;
1135.5 L or more of Gamma-butyrolactone;
714 G or more of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid.

(2) List I Chemicals

Level 28

At least 267 G but less than 890 G of Benzaldehyde;
At least 6 KG but less than 20 KG of Benzyl Cyanide;
At least 60 G but less than 200 G of Ergonovine;
At least 120 G but less than 400 G of Ergotamine;
At least 6 KG but less than 20 KG of Ethylamine;
At least 660 G but less than 2.2 KG of Hydriodic Acid;
At least 376.2 G but less than 1.3 KG of Iodine;
At least 96 KG but less than 320 KG of Isosafrole;
At least 60 G but less than 200 G of Methylamine;
At least 150 KG but less than 500 KG of N-Methylephedrine;
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;
At least 187.5 G but less than 625 G of Nitroethane;
At least 3 KG but less than 10 KG of Norpseudoephedrine;
At least 6 KG but less than 20 KG of Phenylacetic Acid;
At least 3 KG but less than 10 KG of Piperidine;
At least 96 KG but less than 320 KG of Piperonal;
At least 480 G but less than 1.6 KG of Propionic Anhydride;
At least 96 KG but less than 320 KG of Safrole;
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 340.7 L but less than 1135.5 L of Gamma-butyrolactone;
At least 214 G but less than 714 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

11 KG or more of Acetic Anhydride;
1175 KG or more of Acetone;
20 KG or more of Benzyl Chloride;
1075 KG or more of Ethyl Ether;
1200 KG or more of Methyl Ethyl Ketone;
10 KG or more of Potassium Permanganate;
1300 KG or more of Toluene;
~~376.2 G or more of Iodine.~~

(3) List I Chemicals

Level 26

At least 89 G but less than 267 G of Benzaldehyde;

At least 2 KG but less than 6 KG of Benzyl Cyanide;
At least 20 G but less than 60 G of Ergonovine;
At least 40 G but less than 120 G of Ergotamine;
At least 2 KG but less than 6 KG of Ethylamine;
At least 220 G but less than 660 G of Hydriodic Acid;
At least 125.4 G but less than 376.2 G of Iodine;
At least 32 KG but less than 96 KG of Isosafrole;
At least 20 G but less than 60 G of Methylamine;
At least 50 KG but less than 150 KG of N-Methylephedrine;
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;
At least 62.5 G but less than 187.5 G of Nitroethane;
At least 1 KG but less than 3 KG of Norpseudoephedrine;
At least 2 KG but less than 6 KG of Phenylacetic Acid;
At least 1 KG but less than 3 KG of Piperidine;
At least 32 KG but less than 96 KG of Piperonal;
At least 160 G but less than 480 G of Propionic Anhydride;
At least 32 KG but less than 96 KG of Safrole;
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 113.6 L but less than 340.7 L of Gamma-butyrolactone;
At least 71 G but less than 214 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 3.3 KG but less than 11 KG of Acetic Anhydride;
At least 352.5 KG but less than 1175 KG of Acetone;
At least 6 KG but less than 20 KG of Benzyl Chloride;
At least 322.5 KG but less than 1075 KG of Ethyl Ether;
At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone;
At least 3 KG but less than 10 KG of Potassium Permanganate;
At least 390 KG but less than 1300 KG of Toluene;
~~At least 125.4 G but less than 376.2 G of Iodine.~~

(4) List I Chemicals

Level 24

At least 62.3 G but less than 89 G of Benzaldehyde;
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;
At least 14 G but less than 20 G of Ergonovine;
At least 28 G but less than 40 G of Ergotamine;
At least 1.4 KG but less than 2 KG of Ethylamine;
At least 154 G but less than 220 G of Hydriodic Acid;
At least 87.8 G but less than 125.4 G of Iodine;
At least 22.4 KG but less than 32 KG of Isosafrole;
At least 14 G but less than 20 G of Methylamine;
At least 35 KG but less than 50 KG of N-Methylephedrine;
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;
At least 43.8 G but less than 62.5 G of Nitroethane;
At least 700 G but less than 1 KG of Norpseudoephedrine;
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;
At least 700 G but less than 1 KG of Piperidine;

At least 22.4 KG but less than 32 KG of Piperonal;
At least 112 G but less than 160 G of Propionic Anhydride;
At least 22.4 KG but less than 32 KG of Safrole;
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 79.5 L but less than 113.6 L of Gamma-butyrolactone;
At least 50 G but less than 71 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;
At least 117.5 KG but less than 352.5 KG of Acetone;
At least 2 KG but less than 6 KG of Benzyl Chloride;
At least 107.5 KG but less than 322.5 KG of Ethyl Ether;
At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;
At least 1 KG but less than 3 KG of Potassium Permanganate;
At least 130 KG but less than 390 KG of Toluene;
~~At least 87.8 G but less than 125.4 G of Iodine.~~

(5) List I Chemicals

Level 22

At least 35.6 G but less than 62.3 G of Benzaldehyde;
At least 800 G but less than 1.4 KG of Benzyl Cyanide;
At least 8 G but less than 14 G of Ergonovine;
At least 16 G but less than 28 G of Ergotamine;
At least 800 G but less than 1.4 KG of Ethylamine;
At least 88 G but less than 154 G of Hydriodic Acid;
~~At least 50.2 G but less than 87.8 G of Iodine;~~
At least 12.8 KG but less than 22.4 KG of Isosafrole;
At least 8 G but less than 14 G of Methylamine;
At least 20 KG but less than 35 KG of N-Methylephedrine;
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;
At least 25 G but less than 43.8 G of Nitroethane;
At least 400 G but less than 700 G of Norpseudoephedrine;
At least 800 G but less than 1.4 KG of Phenylacetic Acid;
At least 400 G but less than 700 G of Piperidine;
At least 12.8 KG but less than 22.4 KG of Piperonal;
At least 64 G but less than 112 G of Propionic Anhydride;
At least 12.8 KG but less than 22.4 KG of Safrole;
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 45.4 L but less than 79.5 L of Gamma-butyrolactone;
At least 29 G but less than 50 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 726 G but less than 1.1 KG of Acetic Anhydride;
At least 82.25 KG but less than 117.5 KG of Acetone;
At least 1.4 KG but less than 2 KG of Benzyl Chloride;
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;
At least 700 G but less than 1 KG of Potassium Permanganate;
At least 91 KG but less than 130 KG of Toluene;
~~At least 50.2 G but less than 87.8 G of Iodine.~~

(6)

List I Chemicals

Level 20

At least 8.9 G but less than 35.6 G of Benzaldehyde;
At least 200 G but less than 800 G of Benzyl Cyanide;
At least 2 G but less than 8 G of Ergonovine;
At least 4 G but less than 16 G of Ergotamine;
At least 200 G but less than 800 G of Ethylamine;
At least 22 G but less than 88 G of Hydriodic Acid;
At least 12.5 G but less than 50.2 G of Iodine;
At least 3.2 KG but less than 12.8 KG of Isosafrole;
At least 2 G but less than 8 G of Methylamine;
At least 5 KG but less than 20 KG of N-Methylephedrine;
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;
At least 6.3 G but less than 25 G of Nitroethane;
At least 100 G but less than 400 of Norpseudoephedrine;
At least 200 G but less than 800 G of Phenylacetic Acid;
At least 100 G but less than 400 G of Piperidine;
At least 3.2 KG but less than 12.8 KG of Piperonal;
At least 16 G but less than 64 G of Propionic Anhydride;
At least 3.2 KG but less than 12.8 KG of Safrole;
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 11.4 L but less than 45.4 L of Gamma-butyrolactone;
At least 7 G but less than 29 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 440 G but less than 726 G of Acetic Anhydride;
At least 47 KG but less than 82.25 KG of Acetone;
At least 800 G but less than 1.4 KG of Benzyl Chloride;
At least 43 KG but less than 75.25 KG of Ethyl Ether;
At least 48 KG but less than 84 KG of Methyl Ethyl Ketone;
At least 400 G but less than 700 G of Potassium Permanganate;
At least 52 KG but less than 91 KG of Toluene;
~~At least 12.5 G but less than 50.2 G of Iodine.~~

(7)

List I Chemicals

Level 18

At least 7.1 G but less than 8.9 G of Benzaldehyde;
At least 160 G but less than 200 G of Benzyl Cyanide;
At least 1.6 G but less than 2 G of Ergonovine;
At least 3.2 G but less than 4 G of Ergotamine;
At least 160 G but less than 200 G of Ethylamine;
At least 17.6 G but less than 22 G of Hydriodic Acid;
At least 10 G but less than 12.5 G of Iodine;
At least 2.56 KG but less than 3.2 KG of Isosafrole;
At least 1.6 G but less than 2 G of Methylamine;
At least 4 KG but less than 5 KG of N-Methylephedrine;
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;
At least 5 G but less than 6.3 G of Nitroethane;
At least 80 G but less than 100 G of Norpseudoephedrine;
At least 160 G but less than 200 G of Phenylacetic Acid;
At least 80 G but less than 100 G of Piperidine;

At least 2.56 KG but less than 3.2 KG of Piperonal;
At least 12.8 G but less than 16 G of Propionic Anhydride;
At least 2.56 KG but less than 3.2 KG of Safrole;
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 9.1 L but less than 11.4 L of Gamma-butyrolactone;
At least 6 G but less than 7 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 110 G but less than 440 G of Acetic Anhydride;
At least 11.75 KG but less than 47 KG of Acetone;
At least 200 G but less than 800 G of Benzyl Chloride;
At least 10.75 KG but less than 43 KG of Ethyl Ether;
At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;
At least 100 G but less than 400 G of Potassium Permanganate;
At least 13 KG but less than 52 KG of Toluene;
~~At least 10 G but less than 12.5 G of Iodine.~~

(8) List I Chemicals

Level 16

3.6 KG or more of Anthranilic Acid;
At least 5.3 G but less than 7.1 G of Benzaldehyde;
At least 120 G but less than 160 G of Benzyl Cyanide;
At least 1.2 G but less than 1.6 G of Ergonovine;
At least 2.4 G but less than 3.2 G of Ergotamine;
At least 120 G but less than 160 G of Ethylamine;
At least 13.2 G but less than 17.6 G of Hydriodic Acid;
At least 7.5 G but less than 10 G of Iodine;
At least 1.92 KG but less than 2.56 KG of Isosafrole;
At least 1.2 G but less than 1.6 G of Methylamine;
4.8 KG or more of N-Acetylanthranilic Acid;
At least 3 KG but less than 4 KG of N-Methylephedrine;
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;
At least 3.8 G but less than 5 G of Nitroethane;
At least 60 G but less than 80 G of Norpseudoephedrine;
At least 120 G but less than 160 G of Phenylacetic Acid;
At least 60 G but less than 80 G of Piperidine;
At least 1.92 KG but less than 2.56 KG of Piperonal;
At least 9.6 G but less than 12.8 G of Propionic Anhydride;
At least 1.92 KG but less than 2.56 KG of Safrole;
At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 6.8 L but less than 9.1 L of Gamma-butyrolactone;
At least 4 G but less than 6 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 88 G but less than 110 G of Acetic Anhydride;
At least 9.4 KG but less than 11.75 KG of Acetone;
At least 160 G but less than 200 G of Benzyl Chloride;
At least 8.6 KG but less than 10.75 KG of Ethyl Ether;
At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone;
At least 80 G but less than 100 G of Potassium Permanganate;

At least 10.4 KG but less than 13 KG of Toluene;
~~At least 7.5 G but less than 10 G of Iodine.~~

(9) List I Chemicals

Level 14

At least 2.7 KG but less than 3.6 KG of Anthranilic Acid;
At least 3.6 G but less than 5.3 G of Benzaldehyde;
At least 80 G but less than 120 G of Benzyl Cyanide;
At least 800 MG but less than 1.2 G of Ergonovine;
At least 1.6 G but less than 2.4 G of Ergotamine;
At least 80 G but less than 120 G of Ethylamine;
At least 8.8 G but less than 13.2 G of Hydriodic Acid;
At least 5 G but less than 7.5 G of Iodine;
At least 1.44 KG but less than 1.92 KG of Isosafrole;
At least 800 MG but less than 1.2 G of Methylamine;
At least 3.6 KG but less than 4.8 KG of N-Acetylanthranilic Acid;
At least 2.25 KG but less than 3 KG of N-Methylephedrine;
At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine;
At least 2.5 G but less than 3.8 G of Nitroethane;
At least 40 G but less than 60 G of Norpseudoephedrine;
At least 80 G but less than 120 G of Phenylacetic Acid;
At least 40 G but less than 60 G of Piperidine;
At least 1.44 KG but less than 1.92 KG of Piperonal;
At least 7.2 G but less than 9.6 G of Propionic Anhydride;
At least 1.44 KG but less than 1.92 KG of Safrole;
At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
At least 4.5 L but less than 6.8 L of Gamma-butyrolactone;
At least 3 G but less than 4 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

At least 66 G but less than 88 G of Acetic Anhydride;
At least 7.05 KG but less than 9.4 KG of Acetone;
At least 120 G but less than 160 G of Benzyl Chloride;
At least 6.45 KG but less than 8.6 KG of Ethyl Ether;
At least 7.2 KG but less than 9.6 KG of Methyl Ethyl Ketone;
At least 60 G but less than 80 G of Potassium Permanganate;
At least 7.8 KG but less than 10.4 KG of Toluene;
~~At least 5 G but less than 7.5 G of Iodine.~~

(10) List I Chemicals

Level 12

Less than 2.7 KG of Anthranilic Acid;
Less than 3.6 G of Benzaldehyde;
Less than 80 G of Benzyl Cyanide;
Less than 800 MG of Ergonovine;
Less than 1.6 G of Ergotamine;
Less than 80 G of Ethylamine;
Less than 8.8 G of Hydriodic Acid;
Less than 5 G of Iodine;
Less than 1.44 KG of Isosafrole;
Less than 800 MG of Methylamine;

Less than 3.6 KG of N-Acetylanthranilic Acid;
Less than 2.25 KG of N-Methylephedrine;
Less than 2.25 KG of N-Methylpseudoephedrine;
Less than 2.5 G of Nitroethane;
Less than 40 G of Norpseudoephedrine;
Less than 80 G of Phenylacetic Acid;
Less than 40 G of Piperidine;
Less than 1.44 KG of Piperonal;
Less than 7.2 G of Propionic Anhydride;
Less than 1.44 KG of Safrole;
Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;
Less than 4.5 L of Gamma-butyrolactone;
Less than 3 G of Red Phosphorus, White Phosphorus, or Hypophosphorous Acid;

List II Chemicals

Less than 66 G of Acetic Anhydride;
Less than 7.05 KG of Acetone;
Less than 120 G of Benzyl Chloride;
Less than 6.45 KG of Ethyl Ether;
Less than 7.2 KG of Methyl Ethyl Ketone;
Less than 60 G of Potassium Permanganate;
Less than 7.8 KG of Toluene;
~~Less than 5 G of Iodine.~~

*Notes:

- (A) Except as provided in Note (B), to calculate the base offense level in an offense that involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (i.e., list I or list II) under subsection (d) or (e) of this guideline, as appropriate.
- (B) To calculate the base offense level in an offense that involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.
- (C) In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

Commentary

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

Application Notes:

1. "Firearm" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions). The adjustment in subsection (b)(1) should be applied if the weapon was present, unless it is improbable that the weapon was connected with the offense.

2. "Offense involved unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully," as used in subsection (c)(1), means that the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant

Conduct), completed the actions sufficient to constitute the offense of unlawfully manufacturing a controlled substance or attempting to manufacture a controlled substance unlawfully.

3. *In certain cases, the defendant will be convicted of an offense involving a listed chemical covered under this guideline, and a related offense involving an immediate precursor or other controlled substance covered under §2D1.1 (Unlawfully Manufacturing, Importing, Exporting, or Trafficking). For example, P2P (an immediate precursor) and methylamine (a listed chemical) are used together to produce methamphetamine. Determine the offense level under each guideline separately. The offense level for methylamine is determined by using §2D1.11. The offense level for P2P is determined by using §2D1.1 (P2P is listed in the Drug Equivalency Table under Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)). Under the grouping rules of §3D1.2(b), the counts will be grouped together. Note that in determining the scale of the offense under §2D1.1, the quantity of both the controlled substance and listed chemical should be considered (see Application Note 12 in the Commentary to §2D1.1).*

4. Cases Involving Multiple Chemicals.—

- (A) Determining the Base Offense Level for Two or More Chemicals.—Except as provided in subdivision (B), if the offense involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (i.e., list I or list II) under this guideline.

Example: The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. The base offense level for each chemical is calculated separately and the chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of level 38; 300 grams of hydriodic acid result in a base offense level of level 26. In this case, the base offense level would be level 38.

- (B) Determining the Base Offense Level for Offenses involving Ephedrine, Pseudoephedrine, or Phenylpropanolamine.—If the offense involves two or more chemicals each of which is set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) aggregate the quantities of all such chemicals, and (ii) determine the base offense level corresponding to the aggregate quantity.

Example: The defendant was in possession of 80 grams of ephedrine and 50 grams of phenylpropanolamine, an aggregate quantity of 130 grams of such chemicals. The base offense level corresponding to that aggregate quantity is level 32.

- (C) Upward Departure.—In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.

5. *Convictions under 21 U.S.C. §§ 841(c)(2) and (f)(1), and 960(d)(2), (d)(3), and (d)(4) do not require that the defendant have knowledge or an actual belief that the listed chemical was to be used to manufacture a controlled substance unlawfully. In a case in which the defendant possessed or distributed the listed chemical without such knowledge or belief, a 3-level reduction is provided to reflect that the defendant is less culpable than one who possessed or distributed listed chemicals knowing or believing that they would be used to manufacture a controlled substance unlawfully.*
6. *Subsection (b)(3) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b). In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).*
7. *Application of Subsection (b)(4).—For purposes of subsection (b)(4), "mass-marketing by means of an interactive computer service" means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(4) would apply to a defendant who operated a web site to promote the sale of Gamma-butyrolactone (GBL) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. "Interactive computer service", for purposes of subsection (b)(4) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).*
8. *Imposition of Consecutive Sentence for 21 U.S.C. § 865.—Section 865 of title 21, United States Code, requires the imposition of a mandatory consecutive term of imprisonment of not more than 15 years. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and, on the judgment form, divide the sentence between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 865. For example, if the applicable adjusted guideline range is 151-188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.*

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

EXHIBIT C

PROPOSED AMENDMENT: ORGANIZATIONAL GUIDELINES

Synopsis of Proposed Amendment: *This proposed amendment makes several changes to Chapter Eight of the Guidelines Manual regarding the sentencing of organizations.*

First, the proposed amendment amends the Commentary to §8B2.1 (Effective Compliance and Ethics Program) to clarify the remediation efforts required to satisfy subsection (b)(7) (the seventh requirement for an effective compliance and ethics program). The proposed amendment adds a new application note that describes the reasonable steps to respond appropriately after criminal conduct is detected, including remedying the harm caused to identifiable victims and payment of restitution. Notably, restitution is already a significant remediation step considered under current Department of Justice guidelines in determining whether to prosecute business organizations. See U.S. Attorney's Manual, Chapter 9-28.300(A)(6) and Chapter 9-28.900(A) & (B).

Second, the proposed amendment amends §8D1.4 (Recommended Conditions of Probation – Organizations) (Policy Statement) to augment and simplify the recommended conditions of probation for organizations. The policy statement currently distinguishes between conditions of probation imposed solely to enforce a monetary penalty (addressed in subsection (b)) and conditions of probation imposed for any other reason (addressed in subsection (c)). Under the proposed amendment, subsections (b) and (c) are consolidated; accordingly, when a court determines there is a need for organizational probation, all conditional probation terms are available for consideration by the court. The proposed amendment also inserts specific language regarding the engagement of an independent, properly qualified, corporate monitor. This language reflects current governmental policy and best practices with regard to the appointment of such independent corporate monitors. Finally, the proposed amendment inserts specific language requiring the organization to submit to a reasonable number of regular or unannounced examinations of facilities subject to probation supervision.

In addition, the proposed amendment contains, in brackets, two proposed additions to the Commentary of §8B2.1. The first bracketed addition amends Application Note 3 to include a new paragraph which clarifies what is expected of high-level personnel and substantial authority personnel. Such personnel "should be aware of the organization's document retention policies and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to avoid any liability under the law".

The second bracketed addition amends Application Note 6 to clarify that when an organization periodically assesses the risk that criminal conduct will occur, the "nature and operations of the organization with regard to particular ethics and compliance functions" should be included among the other matters assessed. This bracketed addition also states, as an example, that "all employees should be aware of the organization's document retention policy or policies and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to avoid any liability under the law".

Finally, the proposed amendment makes technical and conforming changes.

An issue for comment is also included on whether to encourage direct reporting to the board by responsible compliance personnel by allowing an organization with such a structure to benefit from a three level mitigation of the culpability score, even if high-level personnel are involved in the criminal conduct.

Proposed Amendment:

§8B2.1. Effective Compliance and Ethics Program

(a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

- (1) exercise due diligence to prevent and detect criminal conduct; and
- (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

- (1) The organization shall establish standards and procedures to prevent and detect criminal conduct.
 - (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.
 - (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.
 - (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

- (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.
 - (4)
 - (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.
 - (B) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.
 - (5) The organization shall take reasonable steps—
 - (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
 - (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and
 - (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.
 - (6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.
 - (7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.
- (c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct

identified through this process.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

"Compliance and ethics program" means a program designed to prevent and detect criminal conduct.

"Governing authority" means the (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

"High-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations).

"Standards and procedures" means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.

2. Factors to Consider in Meeting Requirements of this Guideline.—

(A) In General.—Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include: (i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct.

(B) Applicable Governmental Regulation and Industry Practice.—An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.

(C) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization.

(ii) Large Organizations.—A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization. As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.

(iii) Small Organizations.—In meeting the requirements of this guideline, small organizations shall demonstrate the same degree of commitment to ethical conduct

and compliance with the law as large organizations. However, a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.

Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include the following: (I) the governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization's compliance and ethics efforts; (II) training employees through informal staff meetings, and monitoring through regular "walk-arounds" or continuous observation while managing the organization; (III) using available personnel, rather than employing separate staff, to carry out the compliance and ethics program; and (IV) modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.

(D) Recurrence of Similar Misconduct.—Recurrence of similar misconduct creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes of this subdivision, "similar misconduct" has the meaning given that term in the Commentary to §8A1.2 (Application Instructions - Organizations).

3. Application of Subsection (b)(2).—High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

If the specific individual(s) assigned overall responsibility for the compliance and ethics program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no less than annually, give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program.

[Both high-level personnel and substantial authority personnel should be aware of the organization's document retention policies and conform any such policy to meet the goals of an effective compliance program under the guidelines and to reduce the risk of liability under the law (e.g. 18 U.S.C. § 1519; 18 U.S.C. § 1512(c)).]

4. Application of Subsection (b)(3).—

(A) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(B) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals so as to ensure that all individuals within the high-level personnel and

substantial authority personnel of the organization will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law under subsection (a). With respect to the hiring or promotion of such individuals, an organization shall consider the relatedness of the individual's illegal activities and other misconduct (i.e., other conduct inconsistent with an effective compliance and ethics program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual's illegal activities and other misconduct; and (ii) whether the individual has engaged in other such illegal activities and other such misconduct.

5. *Application of Subsection (b)(6).*—*Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.*

6. *Application of Subsection (b)(7).*—*The seventh minimal requirement for an effective compliance and ethics program provides guidance on the reasonable steps that an organization should take after detection of criminal conduct. First, the organization should respond appropriately to the criminal conduct. In the event the criminal conduct has an identifiable victim or victims the organization should take reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct. Other appropriate responses may include self-reporting, cooperation with authorities, and other forms of remediation. Second, to prevent further similar criminal conduct, the organization should assess the compliance and ethics program and make modifications necessary to ensure the program is more effective. The organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications.*

67. *Application of Subsection (c).*—*To meet the requirements of subsection (c), an organization shall:*
 - (A) *Assess periodically the risk that criminal conduct will occur, including assessing the following:*
 - (i) *The nature and seriousness of such criminal conduct.*
 - (ii) *The likelihood that certain criminal conduct may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish standards and procedures designed to prevent and detect fraud.*
 - (iii) *The prior history of the organization. The prior history of an organization may indicate types of criminal conduct that it shall take actions to prevent and detect.*
 - [(iv) *The nature and operations of the organization with regard to particular ethics and compliance functions. For example, all employees should be aware of the*

organization's document retention policies and conform any such policy to meet the goals of an effective compliance program under the guidelines and to reduce the risk of liability under the law (e.g. 18 U.S.C. § 1519; 18 U.S.C. § 1512(c)).]

- (B) *Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the criminal conduct identified under subdivision (A) of this note as most serious, and most likely, to occur.*
- (C) *Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of criminal conduct identified under subdivision (A) of this note as most serious, and most likely, to occur.*

Background: This section sets forth the requirements for an effective compliance and ethics program. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107-204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable. The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

* * *

§8D1.4. Recommended Conditions of Probation - Organizations (Policy Statement)

- (a) The court may order the organization, at its expense and in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.
- (b) If probation is imposed under §8D1.1(a)(2), the following conditions may be appropriate to the extent they appear necessary to safeguard the organization's ability to pay any deferred portion of an order of restitution, fine, or assessment:
 - (1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.
 - (2) Upon approval by the court of a program referred to in subdivision (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in subdivision (1). Such notice shall be in a form prescribed by the court.
 - (3) The organization shall be required to retain an independent corporate monitor agreed on by the parties or, in the absence of such an agreement,

selected by the court. The independent corporate monitor must have appropriate qualifications and no conflict of interest in the case. The scope of the independent corporate monitor's role shall be approved by the court. Compensation to and costs of any independent corporate monitor shall be paid by the organization.

(+4) The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, (A) reporting on the organization's financial condition and results of business operations, and accounting for the disposition of all funds received, and (B) reporting on the organization's progress in implementing the program referred to in subdivision (1). Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.

(5) The organization shall be required to notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(26) The organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer, or experts engaged by the court, or independent corporate monitor; (B) a reasonable number of regular or unannounced examinations of facilities subject to probation supervision; and (BC) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court or independent corporate monitors shall be paid by the organization.

~~(3) The organization shall be required to notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.~~

(47) The organization shall be required to make periodic payments, as specified by the court, in the following priority: (A) restitution; (B) fine; and (C) any other monetary sanction.

~~(c) If probation is ordered under §8D1.1(a)(3), (4), (5), or (6), the following conditions may be appropriate:~~

~~(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective~~

~~Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.~~

- ~~(2) Upon approval by the court of a program referred to in subdivision (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in subdivision (1). Such notice shall be in a form prescribed by the court.~~
- ~~(3) The organization shall make periodic reports to the court or probation officer, at intervals and in a form specified by the court, regarding the organization's progress in implementing the program referred to in subdivision (1). Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.~~
- ~~(4) In order to monitor whether the organization is following the program referred to in subdivision (1), the organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.~~

Commentary

Application Note:

- In determining the conditions to be imposed when probation is ordered under §8D1.1(a)(3) through (6), the court should consider the views of any governmental regulatory body that oversees conduct of the organization relating to the instant offense. To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts **or require retention of an independent corporate monitor** who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program. The court should approve any program that appears reasonably calculated to prevent and detect criminal conduct, as long as it is consistent with §8B2.1 (Effective Compliance and Ethics Program), and any applicable statutory and regulatory requirements.*

Periodic reports submitted in accordance with subsection ~~(c)(3)~~(b)(4) should be provided to any governmental regulatory body that oversees conduct of the organization relating to the instant offense.

Issue for Comment:

- Should the Commission amend §8C2.5(f)(3) (Culpability Score) to allow an organization to receive the three level mitigation for an effective compliance program even when high-level personnel are involved in*

the offense if (A) the individual(s) with operational responsibility for compliance in the organization have direct reporting authority to the board level (e.g. an audit committee of the board); (B) the compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization; and (C) the organization promptly reported the violation to the appropriate authorities?

EXHIBIT D

PROPOSED AMENDMENT: HATE CRIMES

Synopsis of Proposed Amendment: *This proposed amendment responds to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (division E of Pub. L. 111–84) (the "Act"). With regard to hate crimes, the Act created a new offense and amended a 1994 congressional directive to the Commission. The Act also created a second new offense, relating to attacking a United States serviceman on account of his or her service.*

The new hate crimes offense, 18 U.S.C. § 249 (Hate crime acts), makes it unlawful, whether or not acting under color of law, to willfully cause bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt to cause bodily injury to any person, because of the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person. A person who violates section 249 is subject to imprisonment for not more than 10 years (or, if the offense includes kidnapping, aggravated sexual abuse, or an attempt to kill, or if death results from the offense, for any term of years or for life). The proposed amendment amends Appendix A (Statutory Index) to reference the new offense to §2H1.1 (Offenses Involving Individual Rights).

The Act also amended section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103–322; 28 U.S.C. § 994 note), which contains a congressional directive to the Commission regarding hate crimes that the Commission implemented in subsection (a) of §3A1.1 (Hate Crime Motivation or Vulnerable Victim). The Act expanded the definition of "hate crime" in section 280003(a) to include crimes motivated by actual or perceived "gender identity", which has the effect of expanding the scope of the congressional directive in section 280003(b) to require the Commission to provide an enhancement for crimes motivated by actual or perceived "gender identity". To reflect that congressional action, the proposed amendment amends §3A1.1(a) to include crimes motivated by actual or perceived "gender identity", and makes conforming changes to §§2H1.1 and 3A1.1.

In addition, the proposed amendment contains a bracketed proposal to strike the special instruction in §3A1.1(c), which states that the 3-level enhancement in §3A1.1(a) shall not apply if the 6-level enhancement in §2H1.1(b) applies. Currently, the 3-level enhancement in §3A1.1(a) applies if the offense was a hate crime, i.e., was motivated by the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person; the 6-level enhancement in §2H1.1(b) applies if (A) the defendant was a public official at the time of the offense, or (B) the offense was committed under color of law. By striking the special instruction in §3A1.1(c), the proposed amendment would allow both enhancements to operate, if applicable, in a particular case to address the distinct harms addressed by these enhancements. Conforming changes to §§2H1.1 and 3A1.1 are also bracketed.

The second new offense, 18 U.S.C. § 1389 (Prohibition on attacks on United States servicemen on account of service), makes it unlawful to knowingly assault or batter a United States serviceman or an immediate family member of a United States serviceman, or to knowingly destroy or injure the property of such serviceman or immediate family member, on the account of the military service of that serviceman or status of that individual as a United States serviceman. A person who violates section 1389 is subject to imprisonment for not more than 2 years (in the case of a simple assault, or damage of not more than \$500), for not more than 5 years (in the case of damage of more than \$500), or for not less than 6 months nor more than 10 years (in the case of a battery, or an assault resulting in bodily injury). The proposed amendment amends Appendix A (Statutory Index) to reference the new offense to §§2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault) and 2B1.1 (Theft, Property Destruction, and Fraud). The Commission anticipates that the

official victim adjustment in §3A1.2 (Official Victim) would apply in such a case.

Proposed Amendment:

§2H1.1. Offenses Involving Individual Rights

- (a) Base Offense Level (Apply the Greatest):
 - (1) the offense level from the offense guideline applicable to any underlying offense;
 - (2) **12**, if the offense involved two or more participants;
 - (3) **10**, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or
 - (4) **6**, otherwise.
- (b) Specific Offense Characteristic
 - (1) If (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by **6** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 242, 245(b), 246, 247, 248, **249**, 1091; 42 U.S.C. § 3631.

Application Notes:

1. *"Offense guideline applicable to any underlying offense" means the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 1).*

In certain cases, conduct set forth in the count of conviction may constitute more than one underlying offense (e.g., two instances of assault, or one instance of assault and one instance of arson). In such cases, use the following comparative procedure to determine the applicable base offense level: (i) determine the underlying offenses encompassed within the count of conviction as if the defendant had been charged with a conspiracy to commit multiple offenses. See Application Note 4 of §1B1.2 (Applicable Guidelines); (ii) determine the Chapter Two offense level (i.e., the base offense level, specific offense characteristics, cross references, and special instructions) for each such underlying offense; and (iii) compare each of the Chapter Two offense levels determined above with the alternative base offense level under subsection (a)(2), (3), or (4). The determination of the applicable alternative base offense level is to be based on the entire conduct underlying the count of conviction (i.e., the conduct taken as a whole). Use the alternative base offense level only if it is greater than each of the Chapter Two offense levels determined above. Otherwise, use the Chapter Two offense levels for each of the underlying offenses (with each underlying offense treated as if contained in a separate count of conviction). Then apply subsection (b) to the alternative base offense level, or to the Chapter Two offense levels for each of the underlying offenses, as

appropriate.

2. "Participant" is defined in the Commentary to §3B1.1 (Aggravating Role).
3. The burning or defacement of a religious symbol with an intent to intimidate shall be deemed to involve the threat of force against a person for the purposes of subsection (a)(3)(A).
4. If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, **gender identity**, disability, or sexual orientation of any person, an additional 3-level enhancement from §3A1.1(a) will apply. ~~[An adjustment from §3A1.1(a) will not apply, however, if a 6-level adjustment from §2H1.1(b) applies. See §3A1.1(c).]~~
5. If subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

* * *

§3A1.1. Hate Crime Motivation or Vulnerable Victim

- (a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, **gender identity**, disability, or sexual orientation of any person, increase by **3** levels.
- (b)
 - (1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by **2** levels.
 - (2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by **2** additional levels.

~~[(c) — Special Instruction~~

~~(1) — Subsection (a) shall not apply if an adjustment from §2H1.1(b)(1) applies.]~~

Commentary

Application Notes:

1. Subsection (a) applies to offenses that are hate crimes. Note that special evidentiary requirements govern the application of this subsection.

Do not apply subsection (a) on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level of the Chapter Two offense guideline. ~~Moreover, do not apply subsection (a) if an adjustment from §2H1.1(b)(1) applies.]~~

2. *For purposes of subsection (b), "vulnerable victim" means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.*

Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case in which the defendant marketed an ineffective cancer cure or in a robbery in which the defendant selected a handicapped victim. But it would not apply in a case in which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

Do not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

3. *The adjustments from subsections (a) and (b) are to be applied cumulatively. Do not, however, apply subsection (b) in a case in which subsection (a) applies unless a victim of the offense was unusually vulnerable for reasons unrelated to race, color, religion, national origin, ethnicity, gender, **gender identity**, disability, or sexual orientation.*
4. *If an enhancement from subsection (b) applies and the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.*
5. *For purposes of this guideline, "gender identity" means actual or perceived gender-related characteristics. See 18 U.S.C. § 249(c)(4).*

*Background: Subsection (a) reflects the directive to the Commission, contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation (i.e., a primary motivation for the offense was the race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of the victim). To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or nolo contendere, the court at sentencing determines are hate crimes. **In section 4703(a) of Public Law 111-84, Congress broadened the scope of that directive to include gender identity; to reflect that congressional action, the Commission has broadened the scope of this enhancement to include gender identity.***

Subsection (b)(2) implements, in a broader form, the instruction to the Commission in section 6(c)(3) of Public Law 105-184.

* * *

APPENDIX A - STATUTORY INDEX

18 U.S.C. § 247 2H1.1

18 U.S.C. § 249	2H1.1
18 U.S.C. § 1369	2B1.1, 2B1.5
18 U.S.C. § 1389	2A2.2, 2A2.3, 2B1.1

EXHIBIT E

PROPOSED AMENDMENT: RECENCY

Synopsis of Proposed Amendment: *In September 2009, the Commission indicated that one of its policy priorities would be consideration of miscellaneous guideline application issues, including "examination of, and possible guideline amendments relating to, the computation of criminal history points under §4A1.1(e)". See 74 FR 46478, 46479 (September 9, 2009). Subsection (e) of §4A1.1 (Criminal History Category) is known as the "recency" provision. The Commission is examining how the "recency" provision interacts with the "status" provision in subsection (d) of §4A1.1 and also how the "recency" provision interacts with other provisions regarding criminal history in various Chapter Two offense guidelines.*

Section 4A1.1 currently provides that if the instant offense was committed while under another criminal justice sentence, 2 criminal history points are added under subsection (d) for "status"; if the instant offense was committed less than two years after release from imprisonment, or while in imprisonment or escape status, 2 points are added under subsection (e) for "recency". If 2 points are added for "status" under (d), however, only 1 point is added for "recency" under (e). See §4A1.1 comment. (backg'd.) ("Because of the potential overlap of (d) and (e), their combined impact is limited to three points.").

Under §4A1.1, a sentence for a single prior conviction may count up to three times in the calculation of the Criminal History Category (e.g., such a sentence could count under §§4A1.1(a) or (b), 4A1.1(d), and 4A1.1(e)). Additionally, the prior conviction can increase the offense level determined under certain Chapter Two guidelines (e.g., §2L1.2 (Unlawfully Entering or Remaining in the United States)). Therefore, in a case in which the prior conviction increases the Chapter Two offense level, the single prior conviction may be counted four times in the determination of the applicable guideline range.

The proposed amendment presents two options for amending §4A1.1 that would reduce the cumulative impact of "recency". Under Option 1, "recency" points are eliminated for all offenders in all cases; conforming changes to §4A1.2 (Definitions and Instructions for Computing Criminal History) are also made. Under Option 2, "recency" points are retained but are not cumulative with "status" points; thus, in the case of an offender eligible for both "status" points and "recency" points, the combined impact is limited to 2 points rather than 3.

The proposed amendment also makes stylistic changes to §4A1.1 so that its subdivisions are referred to as "subsections" rather than as "items".

Issues for comment are also provided that, in part, request comment on whether the Commission should instead address the cumulative impact of "recency" more narrowly, i.e., only for cases sentenced under Chapter Two offense guidelines that increase the offense level based on criminal history.

Proposed Amendment:

[Option 1:

§4A1.1. Criminal History Category

The total points from ~~items~~subsections (a) through ~~(f)~~(e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

- (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one

month.

- (b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this ~~item~~ **subsection**.
- (d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
- ~~(e) Add **2** points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If **2** points are added for item (d), add only **1** point for this item.~~
- ~~(fe)~~ Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of **3** points for this ~~item~~ **subsection**.

Commentary

The total criminal history points from §4A1.1 determine the criminal history category (I-VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in §4A1.2 govern the computation of the criminal history points. Therefore, §§4A1.1 and 4A1.2 must be read together. The following notes highlight the interaction of §§4A1.1 and 4A1.2.

Application Notes:

1. *§4A1.1(a). Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this ~~item~~ **subsection**. The term "prior sentence" is defined at §4A1.2(a). The term "sentence of imprisonment" is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).*

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

A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense is not counted unless the defendant's incarceration extended into this fifteen-year period. See §4A1.2(e).

*A sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted under this ~~item~~ **subsection** only if it resulted from an adult conviction. See §4A1.2(d).*

A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. See §4A1.2(h) and (j) and the Commentary to §4A1.2.

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

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

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. See §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant's commencement of the instant offense. See §4A1.2(d).

Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).

A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. See §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

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

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

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

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. See §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's commencement of the current offense. See §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. See §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. See §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. See §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

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

4. *§4A1.1(d). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). For the purposes of this ~~item~~ subsection, a "criminal justice sentence" means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History) having a custodial or supervisory component, although active supervision is not required for this ~~item~~ subsection to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. See §4A1.2(m).*
- ~~5. §4A1.1(e). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) less than two years following release from confinement on a sentence counted under §4A1.1(a) or (b). This also applies if the defendant committed the instant offense while in imprisonment or escape status on such a sentence. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). However, if two points are added under §4A1.1(d), only one point is added under §4A1.1(e).~~
65. *§4A1.1(fe). In a case in which the defendant received two or more prior sentences as a result of convictions for crimes of violence that are counted as a single sentence (see §4A1.2(a)(2)), one point is added under §4A1.1(fe) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(fe). For purposes of this guideline, "crime of violence" has the meaning given that term in §4B1.2(a). See §4A1.2(p).*

For example, a defendant's criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are counted as a single prior sentence. See §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(fe) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(fe) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

Background: Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum

term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure however, §4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.

~~Subdivisions~~**Subsections** (a), (b), and (c) of §4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house.

Section 4A1.1(d) ~~implements one measure of recency by adding~~ **adds** two points if the defendant was under a criminal justice sentence during any part of the instant offense.

~~Section 4A1.1(e) implements another measure of recency by adding two points if the defendant committed any part of the instant offense less than two years immediately following his release from confinement on a sentence counted under §4A1.1(a) or (b). Because of the potential overlap of (d) and (e), their combined impact is limited to three points. However, a defendant who falls within both (d) and (e) is more likely to commit additional crimes; thus, (d) and (e) are not completely combined.~~

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

(a) Prior Sentence

- (1) The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.
- (2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also §4A1.1~~(f)~~**(e)**.

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

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

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

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

(b) Sentence of Imprisonment Defined

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

(c) Sentences Counted and Excluded

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

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

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

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

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

Public intoxication
Vagrancy.

(d) Offenses Committed Prior to Age Eighteen

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

(e) Applicable Time Period

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

(f) Diversionsary Dispositions

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

(g) Military Sentences

Sentences resulting from military offenses are counted if imposed by a general or special court martial. Sentences imposed by a summary court martial or Article 15

proceeding are not counted.

(h) Foreign Sentences

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

(i) Tribal Court Sentences

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

(j) Expunged Convictions

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

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

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

(2) ~~(A) — Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the points for §4A1.1(e) in respect to the recency of last release from confinement.~~

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

(l) Sentences on Appeal

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

(m) Effect of a Violation Warrant

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

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

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

(o) Felony Offense

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

(p) Crime of Violence Defined

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

Commentary

Application Notes:

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

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

2. *Sentence of Imprisonment.—To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time). See §4A1.2(a)(3) and (b)(2). For the purposes of applying §4A1.1(a), (b), or (c), the length of a sentence of imprisonment is the stated maximum (e.g., in the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of*

one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant's twenty-first birthday, the stated maximum is the amount of time in pre-trial detention plus the amount of time between the date of sentence and the defendant's twenty-first birthday). That is, criminal history points are based on the sentence pronounced, not the length of time actually served. See §4A1.2(b)(1) and (2). A sentence of probation is to be treated as a sentence under §4A1.1(c) unless a condition of probation requiring imprisonment of at least sixty days was imposed.

3. Upward Departure Provision.—Counting multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were counted as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes.
4. Sentences Imposed in the Alternative.—A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (e.g., \$1,000 fine or ninety days' imprisonment) is treated as a non-imprisonment sentence.
5. Sentences for Driving While Intoxicated or Under the Influence.—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are counted. Such offenses are not minor traffic infractions within the meaning of §4A1.2(c).
6. Reversed, Vacated, or Invalidated Convictions.—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (e.g., 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Adequacy of Criminal History Category).

7. Offenses Committed Prior to Age Eighteen.—Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a "juvenile," this provision applies to all offenses committed prior to age eighteen.
8. Applicable Time Period.—Section 4A1.2(d)(2) and (e) establishes the time period within which prior

sentences are counted. As used in §4A1.2(d)(2) and (e), the term "commencement of the instant offense" includes any relevant conduct. See §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category).

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

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

12. *Application of Subsection (c).—*

(A) *In General.—In determining whether an unlisted offense is similar to an offense listed in ~~subdivision~~ **subsection** (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood*

of recurring criminal conduct.

- (B) Local Ordinance Violations.— A number of local jurisdictions have enacted ordinances covering certain offenses (e.g., larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (e.g., a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.
- (C) Insufficient Funds Check.—"Insufficient funds check," as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.

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

[Option 2:

§4A1.1. Criminal History Category

* * *

- (e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If ~~2 points are added for~~ ~~item~~ subsection (d) applies, add only 1 point for ~~do not apply~~ this ~~item~~ subsection.

* * *

Commentary

* * *

Application Notes:

* * *

5. §4A1.1(e). Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) less than two years following release from confinement on a sentence counted under §4A1.1(a) or (b). This also applies if the defendant committed the instant offense while in imprisonment or escape status on such a sentence. Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n). However, if ~~two points are added under §4A1.1(d)~~ ~~applies~~, only one point is added under ~~do not apply~~ §4A1.1(e).

Background:

* * *

Section 4A1.1(e) implements another measure of recency by adding two points if the defendant committed any part of the instant offense less than two years immediately following his release from confinement on a sentence counted under §4A1.1(a) or (b). Because of the potential overlap of (d) and (e), their combined impact is limited to ~~three~~two points. However, a defendant who falls within both (d) and (e)

~~is more likely to commit additional crimes, thus, (d) and (e) are not completely combined.~~

* * *

Issues for Comment:

1. The Commission seeks comment on whether the Commission should reduce the cumulative impact of "recency" points in §4A1.1(e), when they apply in combination with "status" points in §4A1.1(d) or in combination with provisions regarding criminal history in Chapter Two.

An example of such a provision is the specific offense characteristic in subsection (b)(1) of §2L1.2 (Unlawfully Entering or Remaining in the United States), which provides an enhancement of 4 to 16 levels if the defendant previously was deported, or unlawfully remained in the United States, after a conviction for a certain type of offense. Other examples can be found in the alternative base offense levels in §§2K2.1(a) and 2D1.1(a), which provide a heightened base offense level if the defendant had one or more prior convictions for certain types of offenses; the "pattern of activity" enhancement in §2S1.3(b)(2), which provides an enhancement based on a pattern of criminal activity; and the enhancements in §§2N2.1(b)(1) and 2K2.6(b)(1), which provide an enhancement based on a past conviction.

If the Commission were to retain "recency" in subsection (e) of §4A1.1, should the Commission amend the guidelines to specify that, in a case in which a conviction is used to increase the Chapter Two offense level, "recency" points shall not apply?

A. Should the Commission Reduce the Impact in Cases Sentenced Under §2L1.2 Only?

With regard to the specific offense characteristic in §2L1.2(b)(1), should the Commission insert an application note in the commentary to §4A1.1 and a corresponding, parallel application note in the commentary to §2L1.2? One approach for such an application note, which would apply only if the Chapter Two provision and the "recency" provision were both derived from the same conviction, would be the following:

Interaction with §2L1.2(b)(1).—If a conviction is used as a basis for an enhancement under §2L1.2(b)(1), do not use the sentence resulting from that conviction as a basis for adding points for "recency" under subsection (e).

Another approach for such an application note, which would apply even if the Chapter Two provision and the "recency" provision were derived from different convictions, would be the following:

Interaction with §2L1.2(b)(1).—If §2L1.2(b)(1) applies, do not apply subsection (e).

Should the Commission follow one of these approaches? Is there a different approach the Commission should follow?

B. Should the Commission Reduce the Impact in Cases Under Other Specific Guidelines?

Should such an application note also be provided for a case in which (1) a conviction is used as a basis for an alternative base offense level, such as in §§2K2.1(a) and 2D1.1(a); or (2) a conviction is used as a basis for a pattern of activity enhancement, such as in §2S1.3(b)(2); or (3) a conviction is otherwise used as a basis for an enhancement, such as in §§2N2.1(b)(1) and 2K2.6(b)(1)? Are there other provisions in Chapter

Two for which such an application note should be provided?

EXHIBIT F

PROPOSED AMENDMENT: APPLICATION INSTRUCTIONS

Synopsis of Proposed Amendment: *This proposed amendment amends §1B1.1 (Application Instructions) in light of United States v. Booker, 543 U.S. 220 (2005).*

As explained more fully in Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines) of the Guidelines Manual, a district court is required to properly calculate and consider the guidelines when sentencing. See 18 U.S.C. § 3553(a)(4); Booker, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); Rita v. United States, 551 U.S. 338, 351 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); Gall v. United States, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

*After determining the guideline range, the district court should refer to the Guidelines Manual and consider whether the case warrants a departure. "'Departure' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." See Irizarry v. United States, 128 S.Ct. 2198, 2202 (2008). A "variance" – *i.e.*, a sentence outside the guideline range other than as provided for in the Guidelines Manual – is considered only after departures have been considered.*

As the Fifth Circuit has explained: "Post-Booker case law recognizes three types of sentences under the new advisory sentencing regime: (1) a sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence." United States v. Tzep-Mejia, 462 F.3d 522 (5th Cir. 2006) (internal footnote and citation omitted). On this point most other circuits agree. See, e.g., United States v. Dixon, 449 F.3d 194, 203-4 (1st Cir. 2006) (court must consider "any applicable departures"); United States v. Selioutsky, 409 F.3d 114 (2d Cir. 2005) (court must consider "available departure authority"); United States v. Jackson, 467 F.3d 834, 838 (3d Cir. 2006) (same); United States v. Morehead, 437 F.3d 424, 433 (4th Cir. 2006) (departures "remain an important part of sentencing even after Booker"); United States v. McBride, 434 F.3d 470 (6th Cir. 2006) (same); United States v. Hawk Wing, 433 F.3d 622, 631 (8th Cir. 2006) ("the district court must decide if a traditional departure is appropriate", and after that must consider a variance); United States v. Robertson, 568 F.3d 1203, 1210 (10th Cir. 2009) (district courts must continue to apply departures); United States v. Jordi, 418 F.3d 1212 (11th Cir. 2005) (stating that "the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered"). But see United States v. Johnson, 427 F.3d 423 (7th Cir. 2006) (departures "obsolete").

In short, the district court, in determining the appropriate sentence in a particular case, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). See Rita, 551 U.S. at 351. This has been described as a "3-step process":

First, because the Booker decision requires that courts consult the sentencing guidelines, a sentencing court must calculate the applicable guideline range in the customary fashion. Second, the court should determine whether a departure from the guideline range is consistent with the guidelines' policy statements and commentary. Third, the court should

evaluate whether a variance, i.e., a sentence outside the advisory guideline range is warranted under the authority of 18 U.S.C. § 3553(a).

See United States Sentencing Commission, "Final Report on the Impact of United States v. Booker on Federal Sentencing" (2006) at 42.

The proposed amendment follows the approach adopted by a majority of circuits and structures §1B1.1 to reflect the three-step process. As amended, subsection (a) addresses how to apply the provisions in this manual to properly determine the kinds of sentence and the guideline range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted. Subsection (c) addresses the need to consider the applicable factors under 18 U.S.C. § 3553(a) in determining the appropriate sentence. In addition, the proposed amendment amends the Commentary to §1B1.1 to define the term "variance".

Proposed Amendment:

§1B1.1. Application Instructions

- (a) **The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (see 18 U.S.C. § 3553(a)(4)) by applying** ~~Except as specifically directed, the provisions of this manual are to be applied in the following order,~~ **except as specifically directed:**
- (a1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.
 - (b2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.
 - (c3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
 - (d4) If there are multiple counts of conviction, repeat steps (a)(1) through (c)(3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
 - (e5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
 - (f6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.
 - (g7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
 - (h8) For the particular guideline range, determine from Parts B through G of

Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

- (fb) **The court shall then consider** ~~Refer to~~ Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and ~~to~~ any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. See 18 U.S.C. § 3553(a)(5).
- (c) **The court shall then determine the sentence (i.e., a sentence within the guideline range, a departure, or a variance), considering the applicable factors in 18 U.S.C. § 3553(a) taken as a whole.**

Commentary

Application Notes:

1. *The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):*
 - (A) *"Abducted" means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.*
 - (B) *"Bodily injury" means any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.*
 - (C) *"Brandished" with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.*
 - (D) *"Dangerous weapon" means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).*
 - (E) *"Departure" means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence **as provided for in Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, or any other policy statements or commentary in the guidelines;** and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "Depart" means grant a departure.*

"Downward departure" means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. "Depart downward" means grant a downward departure.

"Upward departure" means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. "Depart upward" means grant an upward departure.

- (F) *"Destructive device" means any article described in 26 U.S.C. § 5845(f) (including an explosive, incendiary, or poison gas - (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses).*
- (G) *"Firearm" means (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. A weapon, commonly known as a "BB" or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.*
- (H) *"Offense" means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term "instant" is used in connection with "offense," "federal offense," or "offense of conviction," as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).*
- (I) *"Otherwise used" with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.*
- (J) *"Permanent or life-threatening bodily injury" means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. In the case of a kidnapping, for example, maltreatment to a life-threatening degree (e.g., by denial of food or medical care) would constitute life-threatening bodily injury.*
- (K) *"Physically restrained" means the forcible restraint of the victim such as by being tied, bound, or locked up.*
- (L) *"Serious bodily injury" means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.*
- (M) *"Variance" means imposition of a sentence other than as provided in the guidelines, policy*

statements, and commentary of the Guidelines Manual.

2. *Definitions of terms also may appear in other sections. Such definitions are not designed for general applicability; therefore, their applicability to sections other than those expressly referenced must be determined on a case by case basis.*

The term "includes" is not exhaustive; the term "e.g." is merely illustrative.

3. *The list of "Statutory Provisions" in the Commentary to each offense guideline does not necessarily include every statute covered by that guideline. In addition, some statutes may be covered by more than one guideline.*

4. (A) *Cumulative Application of Multiple Adjustments within One Guideline.—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.*

(B) *Cumulative Application of Multiple Adjustments from Multiple Guidelines.—Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may be triggered by the same conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under §2B3.1(b)(3) and an official victim adjustment under §3A1.2, even though the enhancement and the adjustment both are triggered by the shooting of the officer.*

5. *Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level. E.g., in §2A2.2(b)(2), if a firearm is both discharged and brandished, the provision applicable to the discharge of the firearm would be used.*

6. *Use of Abbreviated Guideline Titles.—Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline's heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) may be abbreviated as follows: §2B1.1 (Theft, Property Destruction, and Fraud).*

EXHIBIT G

ISSUES FOR COMMENT: SPECIFIC OFFENDER CHARACTERISTICS

1. In September 2009, the Commission indicated that one of its policy priorities would be a "review of departures within the guidelines, including (A) a review of the extent to which pertinent statutory provisions prohibit, discourage, or encourage certain factors as forming the basis for departure from the guideline sentence; and (B) possible revisions to the departure provisions in the Guidelines Manual." See 74 FR 46478, 46479 (September 9, 2009).

The Sentencing Reform Act (the "Act") contained several provisions regarding the relevance of specific offender characteristics to sentencing:

First, the Act directs the Commission to consider whether eleven specific offender characteristics, "among others", have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. See 28 U.S.C. § 994(d).

Second, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the "general inappropriateness" of considering five of those characteristics – education; vocational skills; employment record; family ties and responsibilities; and community ties. See 28 U.S.C. § 994(e).

Third, the Act directs the Commission to ensure that the guidelines and policy statements "are entirely neutral" as to five other characteristics – race, sex, national origin, creed, and socioeconomic status. See 28 U.S.C. § 994(d).

Fourth, the Act also directs the sentencing court, in determining the particular sentence to be imposed, to consider, among other factors, "the history and characteristics of the defendant". See 18 U.S.C. § 3553(a)(1).

As part of its review of departures, the Commission is reviewing the relevance of specific offender characteristics to sentencing. The Commission contemplates that work on this priority will continue beyond the amendment cycle ending May 1, 2010. During the amendment cycle ending May 1, 2010, the Commission is focusing on specific offender characteristics addressed in Chapter Five, Part H, of the Guidelines Manual that are not listed in 28 U.S.C. § 994(e).

The Commission requests comment on the extent to which specific offender characteristics should be considered at sentencing generally and in the Guidelines Manual in particular. The Commission has received some public comment suggesting that, in light of United States v. Booker, 543 U.S. 220 (2005), the Commission amend the Guidelines Manual to eliminate provisions regarding specific offender characteristics, which are addressed in the Guidelines Manual primarily through the policy statements in Chapter Five, Part H. Eliminating Chapter Five, Part H, however, would contravene the mandates to the Commission in the Act.

Are specific offender characteristics already adequately addressed in the Guidelines Manual? If not, how should the Commission amend the Guidelines Manual to more adequately address specific offender characteristics?

2. The Commission requests comment regarding five specific offender characteristics in particular. Those characteristics, and the statutes and policy statements currently addressing those characteristics, are as follows:

- (1) Age (28 U.S.C. § 994(d)(1)), see §5H1.1 (Age).
- (2) Mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant (28 U.S.C. § 994(d)(4)), see §5H1.3 (Mental and Emotional Conditions).
- (3) Physical condition, including drug dependence (28 U.S.C. § 994(d)(5)), see §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).
- (4) Military, civic, charitable, or public service, employment-related contributions, record of prior good works, see §5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works).
- (5) Lack of guidance as a youth, see §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances).

A. In General

Are the guidelines adequate as they apply to these five specific offender characteristics? If not, what amendments to the guidelines should be made to address these specific offender characteristics?

B. Relevance to Decisions Regarding Prison and Probation

For each of these five specific offender characteristics, the Commission requests comment regarding whether, and to what extent, the characteristic is relevant to decisions regarding prison and probation. In particular:

- (1) *Is the characteristic relevant in making the "in/out" decision, i.e., the decision whether to sentence the defendant to prison or probation?*
- (2) *Assuming the defendant is to be sentenced to prison, is the characteristic relevant in deciding the length of imprisonment?*
- (3) *Assuming the defendant is to be sentenced to probation, is the characteristic relevant in deciding the length of probation, or the conditions of probation?*

For each of the decisions identified in (1), (2), and (3) above, if the characteristic is relevant in making the decision, when is it relevant, why is it relevant, what effect should it have, and how much effect should it have? Are there categories of offenses, or categories of offenders, for which the characteristic should be more relevant, or less relevant? What criteria should be used to establish such categories?

C. Use as Proxy for Forbidden Factors

As stated above, the Act specified that the guidelines and policy statements must be "entirely neutral" as to

race, sex, national origin, creed, and socioeconomic status; these characteristics are known as the "forbidden" factors. See 28 U.S.C. § 994(d).

For each of these five specific offender characteristics, could the characteristic be used as a proxy for one or more of the "forbidden" factors? If so, how should the Commission address that possibility, while at the same time providing for consideration of the characteristic when relevant?

3. The Commission also has separate requests for comment for each of these five specific offender characteristics. The separate requests are as follows:

A. Age

Section 5H1.1 (Age) generally provides that age (including youth) is not ordinarily relevant in determining whether a departure is warranted. Should the Commission revise this policy statement? If so, how?

For example, should an offender's youth be a reason to decrease the sentence to reflect a view that younger offenders are less accountable for their actions, or a reason to increase the sentence to reflect a view that younger offenders are more likely to recidivate? Should an offender's advanced age be a reason to increase the sentence to reflect a view that older offenders should be more mature and responsible, or a reason to decrease the sentence to reflect a view that older offenders are less likely to recidivate?

B. Mental and Emotional Conditions

Section 5H1.3 (Mental and Emotional Conditions) generally provides that mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted. Should the Commission revise this policy statement? If so, how?

For example, should a mental or emotional condition be a reason to increase the sentence (e.g., if the mental or emotional condition, such as an antisocial personality disorder, makes the defendant a particular danger to the community)? On the other hand, should a mental or emotional condition be a reason to decrease the sentence (e.g., if the mental or emotional condition could more effectively be treated outside of prison)?

In a case in which the defendant's mental or emotional condition was a factor in the commission of the offense, how should mental or emotional condition interact with the policy statements regarding diminished capacity, see §5K2.13 (Diminished Capacity), and coercion and duress, see §5K2.12 (Coercion and Duress)? In particular, in a case in which the defendant's mental or emotional condition was a factor in the commission of the offense, but does not meet the requirements of §5K2.13 and §5K2.12, when, if at all, should the mental or emotional condition be a reason for a departure?

The Commission has heard testimony that service members have been returning from combat with traumatic brain injuries that cause them to act out violently toward family members and others, or have been returning with other mental or emotional conditions (such as post-traumatic stress disorder). If such a service member commits a crime, when, and to what extent, would a departure be warranted?

C. Physical Condition (Including Drug or Alcohol Dependence or Abuse; Gambling Addiction)

Section 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction) generally provides that physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted. Should the Commission revise this policy statement?

If so, how?

For example, should a physical condition or addiction be a reason to decrease the sentence (e.g., if the physical condition or addiction could more effectively be treated outside of prison or if the physical condition renders the offender so infirm that home confinement may be sufficient)? Conversely, should a physical condition or addiction be a reason to increase the sentence (e.g., if the addiction increases the risk of recidivism)?

D. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works

Section 5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works) provides that military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted. Should the Commission revise this policy statement? If so, how?

For example, should military service be a reason to decrease the sentence (e.g., to reflect a view that an exemplary military record reflects courage, loyalty, and personal sacrifice that a sentencing court should take into account)? Conversely, should military service be a reason to increase the sentence (e.g., to reflect a view that the offender is a role model who "should have known better")?

Similarly, should civic or charitable contributions be a reason to decrease the sentence to reflect the view that credit should be given for past good deeds or that past good deeds predict that the defendant will continue to add value to the community when not in prison? If so, what level of contributions should be demonstrated before a decrease in sentence is warranted?

E. Lack of Guidance as a Youth and Similar Circumstances

Section 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances) provides that lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted. Should the Commission revise this policy statement? If so, how?

For example, should lack of guidance as a youth not be a reason to decrease the sentence (e.g., to reflect a view that many or most offenders may be able to demonstrate some lack of guidance or disadvantaged upbringing)? Should physical abuse, emotional abuse, or sexual abuse suffered as a child be a reason to decrease the sentence under this policy statement or elsewhere in Chapter Five, Part H?

3. The Commission requests comment regarding what, if any, conforming changes should be made to Chapter Five, Part K, of the Guidelines Manual, or elsewhere in the Guidelines Manual, if the Commission were to amend the policy statements applicable to the five specific offender characteristics discussed above.

4. The Commission requests comment on when, if at all, the collateral consequences of a defendant's status as a non-citizen may warrant a downward departure. There are differences among the circuits on this issue. Compare, e.g., United States v. Restrepo, 999 F.2d 640, 644 (2d Cir. 1993) (holding that none of the following collateral consequences are a basis for departure: (1) the fact that an alien is not eligible to be imprisoned in a lower-security facility or to participate in certain prison programs; (2) the fact that an alien will face deportation upon release from prison; and (3) the fact that an alien, upon release from prison, will be civilly detained until deportation), with United States v. Smith, 27 F.3d 649, 655 (D.C. Cir. 1994) ("[A]

downward departure may be appropriate where the defendant's status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence.").

The circuits appear to be in agreement, however, that the defendant's status as a non-citizen is never a proper basis for departure when the defendant is sentenced under the illegal reentry guideline, §2L1.2 (Unlawfully Entering or Remaining in the United States). See, e.g., United States v. Martinez-Carillo, 250 F.3d 1101, 1107 (7th Cir. 2001); United States v. Garay, 235 F.3d 230, 234 (5th Cir. 2000).

Should the Commission amend the guidelines to address when, if at all, a downward departure may be warranted on the basis of such collateral consequences? If so, how?

5. The Commission requests comment on when, if at all, a downward departure may be appropriate in an illegal reentry case sentenced under §2L1.2 on the basis of "cultural assimilation", that is, the defendant's cultural ties to the United States. Several circuits have held that such a departure may be warranted. See, e.g., United States v. Lipman, 133 F.3d 726, 730 (9th Cir. 1998); United States v. Rodriguez-Montelongo, 263 F.3d 429, 433 (5th Cir. 2001); United States v. Sanchez-Valencia, 148 F.3d 1273, 1274 (11th Cir. 1998). Other circuits, such as the First and Tenth Circuits, have declined to rule on whether such a departure may be warranted. See, e.g., United States v. Melendez-Torres, 420 F.3d 45, 51 (1st Cir. 2005); United States v. Galarza-Payan, 441 F.3d 885, 889 (10th Cir. 2006).

Should the Commission amend the guidelines to address when, if at all, a downward departure may be warranted in an illegal reentry case on the basis of "cultural assimilation"? If so, how?

EXHIBIT H

PROPOSED AMENDMENT: ALTERNATIVES TO INCARCERATION

Synopsis of Proposed Amendment: *In September 2009, the Commission indicated that one of its policy priorities would be continued study of alternatives to incarceration, including consideration of any potential changes to the zones incorporated in the Sentencing Table in Chapter Five and/or other changes to the guidelines that might be appropriate in light of the information obtained from that study. See 74 FR 46478, 46479 (September 9, 2009). The Commission is publishing this proposed amendment to inform the Commission's consideration of alternatives to incarceration.*

The proposed amendment contains two parts (A and B). The Commission is considering whether to promulgate either or both of these parts, as they are not necessarily mutually exclusive.

Part A expands the authority of the court to impose an alternative to incarceration for drug offenders who need treatment for drug addiction and who meet certain criteria. This part does so by creating a new guideline, §5C1.3, that provides the court with authority under the guidelines to impose a sentence of probation (with a requirement that the offender participate in a [residential] treatment program) rather than a sentence of imprisonment, without regard to the applicable Zone of the Sentencing Table. To use this authority, the court must find that the drug offender has demonstrated a willingness to participate in a substance abuse treatment program and [will likely benefit from such a program] [that participation in such a program will likely address the defendant's need for substance abuse treatment], and the court must impose a condition of probation that requires the defendant to participate in a [residential] substance abuse treatment program. To be eligible for this alternative to incarceration, a drug offender must have committed the offense while addicted to a controlled substance[, and the controlled substance addiction must have contributed substantially to the commission of the offense]. Also, the drug offender's total offense level must be not greater than [11]-[16]. Finally, the drug offender must meet the "safety valve" criteria set forth in §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

Part A also makes conforming changes to §5B1.1 (Imposition of a Term of Probation) and §5C1.1 (Imposition of a Term of Imprisonment).

Part B expands Zones B and C in the Sentencing Table in Chapter Five. Specifically, it expands Zone B by one level in each of Criminal History Categories I through VI (taking this area from Zone C), and expands Zone C by one level in each of Criminal History Categories I through VI (taking this area from Zone D). Part B also provides guidance on the effectiveness of residential treatment programs. Finally, Part B makes conforming changes to §§5B1.1 and 5C1.1.

Issues for comment are also included.

Proposed Amendment:

Part A:

§5C1.3. Substance Abuse Treatment Program as Alternative to Incarceration for Certain Drug Offenders

- (a) Subject to subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844,

§ 846, § 960, or § 963, the court may sentence the defendant to a term of probation without regard to the applicable Zone of the Sentencing Table, if the court finds that the defendant meets the criteria set forth below:

- (1) the defendant committed the offense while addicted to a controlled substance[, and the controlled substance addiction contributed substantially to the commission of the offense];
 - (2) the defendant has demonstrated a willingness to participate in a substance abuse treatment program, and [will likely benefit from such a program][participation in such a program will likely address the defendant's need for substance abuse treatment];
 - (3) the total offense level for purposes of the Sentencing Table in Chapter Five, Part A, is not greater than **[11]-[16]**;
 - (4) each of the criteria set forth in §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).
- (b) If the court imposes probation under subsection (a), the court must include a condition that requires the defendant to participate in a [residential] substance abuse treatment program.

* * *

§5B1.1. Imposition of a Term of Probation

- (a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:
- (1) the applicable guideline range is in Zone A of the Sentencing Table; or
 - (2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment); **or**
 - (3) **§5C1.3 applies.**
- (b) A sentence of probation may not be imposed in the event:
- (1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);
 - (2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);
 - (3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

Commentary

Application Notes:

1. *Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:*
 - (a) *Where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.*
 - (b) *Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months). In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.*
 - (c) *Where §5C1.3 applies. See §5C1.3.*
2. *Where the applicable guideline range is in Zone C or D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more), the guidelines do not authorize a sentence of probation, **except as provided in §5C1.3.** See §5C1.1 (Imposition of a Term of Imprisonment).*

Background: This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of "split sentences" imposable pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a "straight" probationary term is authorized and those where probation is prohibited.

* * *

§5C1.1. Imposition of a Term of Imprisonment

- (a) A sentence conforms with the guidelines for imprisonment if it is within the

minimum and maximum terms of the applicable guideline range.

- (b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.
- (c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --
 - (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or
 - (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).
- (d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --
 - (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.
- (e) Schedule of Substitute Punishments:
 - (1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);
 - (2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;
 - (3) One day of home detention for one day of imprisonment.
- (f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.
- (g) Notwithstanding subsections (a)-(f), a sentence of imprisonment is not required if

§5C1.3 applies.

Commentary

Application Notes:

1. *Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33-41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.*
2. *Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.*
3. *Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months), the court has three options:*
 - (A) *It may impose a sentence of imprisonment.*
 - (B) *It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4-10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.*
 - (C) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.*

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the

applicable guideline range. For example, where the guideline range is 4-10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4. *Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months), the court has two options:*
 - (A) *It may impose a sentence of imprisonment.*
 - (B) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.*

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 8-14 months, both a sentence of four months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of five months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

5. *Subsection (e) sets forth a schedule of imprisonment substitutes.*
6. *There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.*
7. *The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives.*
8. *Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).*

9. *Subsection (g) provides that, notwithstanding subsections (a) through (f), a sentence of imprisonment is not required if §5C1.3 applies.*

Part B:

The Sentencing Table in Chapter Five, Part A, is amended—

- (1) by increasing Zone B by one level in each of Criminal History Categories I through VI (so that Zone B contains offense levels 9-11 in Criminal History Category I; 6-10 in Criminal History Category II; 5-9 in Criminal History Category III; 4-7 in Criminal History Category IV; 3-6 in Criminal History Category V; and 2-5 in Criminal History Category VI), and, correspondingly, by removing each such offense level from Zone C; and
- (2) by increasing Zone C by one level in each of Criminal History Categories I through VI (so that Zone C contains offense levels 12-13 in Criminal History Category I; 11-12 in Criminal History Category II; 10-11 in Criminal History Category III; 8-9 in Criminal History Category IV; 7 in Criminal History Category V; and 6 in Criminal History Category VI).

The proposed amendment to the Sentencing Table, as executed, is as follows (with the existing boundaries of Zones B and C marked with straight lines; the new proposed lower boundary of Zone B **shaded**; and the new proposed lower boundary of Zone C marked with a wavy line):

SENTENCING TABLE (in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
Zone B	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

§5B1.1. Imposition of a Term of Probation

- (a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:
 - (1) the applicable guideline range is in Zone A of the Sentencing Table; or
 - (2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

- (b) A sentence of probation may not be imposed in the event:
 - (1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);
 - (2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);
 - (3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

Commentary

Application Notes:

- 1. *Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:*
 - (a) Where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

 - (b) Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than ~~six~~nine months). In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the

offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.

2. *Where the applicable guideline range is in Zone C or D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is ~~eight~~ten months or more), the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).*

Background: This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of "split sentences" impossible pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a "straight" probationary term is authorized and those where probation is prohibited.

* * *

§5C1.1. Imposition of a Term of Imprisonment

- (a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.
- (b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.
- (c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by --
 - (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or
 - (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community

confinement, or home detention for imprisonment according to the schedule in subsection (e).

- (d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by --
- (1) a sentence of imprisonment; or
 - (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.
- (e) Schedule of Substitute Punishments:
- (1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);
 - (2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;
 - (3) One day of home detention for one day of imprisonment.
- (f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

1. *Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33-41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.*
2. *Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation.*

In some cases, a fine appropriately may be imposed as the sole sanction.

3. *Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than ~~six~~nine months), the court has three options:*
 - (A) *It may impose a sentence of imprisonment.*
 - (B) *It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4-10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.*
 - (C) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.*

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4-10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4. *Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is ~~eight, nine, or ten~~months~~ten or twelve months~~), the court has two options:*
 - (A) *It may impose a sentence of imprisonment.*
 - (B) *Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community*

confinement or home detention. For example, where the guideline range is ~~8-~~
~~14~~**10-16** months, a sentence of ~~four~~**five** months imprisonment followed by a term
of supervised release with a condition requiring ~~four~~**five** months community
confinement or home detention would satisfy the minimum term of imprisonment
required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment
required by the guideline range. The court, of course, may impose a sentence at a higher point
within the guideline range. For example, where the guideline range is ~~8-~~
~~14~~**10-16** months, both a sentence of ~~four~~**five** months imprisonment followed by a term of supervised release with a
condition requiring six months of community confinement or home detention (under subsection
(d)), and a sentence of ~~five~~**ten** months imprisonment followed by a term of supervised release
with a condition requiring four months of community confinement or home detention (also under
subsection (d)) would be within the guideline range.

5. Subsection (e) sets forth a schedule of imprisonment substitutes.
6. *There may be cases in which community confinement in a residential treatment program is warranted to accomplish a specific treatment purpose. In such a case, the court should consider the effectiveness of the residential treatment program.*

An effective program should possess, at a minimum, the following features:

- (A) *The program is licensed, certified, accredited, or otherwise approved by the relevant state regulatory agency.*
- (B) *The program is operated by professionals who are well trained, qualified, and experienced in the evaluation and treatment of participants and who follow established ethical and professional standards.*
- (C) *The evaluation and treatment of participants is based on the best available scientific knowledge.*
7. *There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.*
78. *The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives.*
89. *Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is*

~~twelve~~ 15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

Issues for Comment:

1. The Commission requests comment on how Part A of the proposed amendment should interact with other provisions in the Guidelines Manual. In particular, if the Commission were to promulgate Part A, what other amendments to Chapter Five of the Guidelines Manual would be appropriate?

For example, §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction) currently provides, among other things, that physical condition "is not ordinarily relevant in determining whether a departure is warranted" and that "drug or alcohol dependence or abuse is not a reason for a downward departure". If the Commission were to promulgate Part A, what changes, if any, should the Commission make to §5H1.4?

2. The Commission requests comment on whether defendants with a condition other than drug addiction, such as a mental or emotional condition, should be eligible for treatment programs as an alternative to incarceration.

3. The Commission requests comment on whether the proposed amendment should include standards for effective treatment programs. The Commission has provided standards for other types of programs; for example, §8B2.1 (Effective Compliance and Ethics Program) provides minimum requirements for corporate compliance and ethics programs. Should the Commission similarly provide standards for effective treatment programs? If so, what standards should the Commission provide?

4. The Commission requests comment on whether the Zone changes contemplated by Part B of the proposed amendment should apply to all offenses, or only to certain categories of offenses. The Zone changes would increase the number of offenders who are eligible under the guidelines to receive a non-incarceration sentence. Should the Commission provide a mechanism to exempt certain offenses from these zone changes? For example, should the Commission provide a mechanism to exempt public corruption, tax, and other white-collar offenses from these zone changes (e.g., to reflect a view that it would not be appropriate to increase the number of public corruption, tax, and other white-collar offenders who are eligible to receive a non-incarceration sentence)? If so, what mechanism should the Commission provide, and what offenses should be covered by it?

5. The Commission requests comment on what revisions to Chapter Five, Part B (Probation), and Chapter Five, Part F (Sentencing Options), may be appropriate to provide more guidance on the use of alternatives to incarceration.

As explained in the Introductory Commentary to Chapter Five, Part B, "probation is a sentence in and of itself", and may be used as an alternative to incarceration, "provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant".

Are there changes the Commission should make to the guidelines to guide courts in fashioning sentences that meet the statutory purposes of sentencing, see 18 U.S.C. § 3553(a)(2), and to better implement the

requirements of 28 U.S.C. § 994(j) (requiring the Commission to ensure that "the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense")?

In particular, should the Commission make changes to Chapter Five, Parts B and F, to more broadly encourage the use of alternatives to incarceration, such as community confinement, home detention, and intermittent confinement (see §§5F1.1 (Community Confinement), 5F1.2 (Home Detention), and 5F1.8 (Intermittent Confinement))? If so, what changes should the Commission make?

Should the Commission make changes to Chapter Five, Parts B and F, to provide more guidance to the court in deciding whether to impose an alternative to incarceration in a particular case and, if so, in deciding what specific alternative to incarceration should be imposed? For example, what guidance should the Commission provide with regard to how the court should decide among sentencing a particular defendant to imprisonment, intermittent confinement, community confinement, or home detention?