

United States Sentencing Commission Public Meeting Minutes
April 7, 2010

Chair William K. Sessions III, called the meeting to order at 1:03 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

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

The following Commissioners were not present:

- Judge Ruben Castillo, Vice Chair
- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

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

Chair Sessions announced that the Commission will hold another public meeting on Tuesday, April 13, 2010, at 11:00 a.m.

Ms. Sheon thanked staff for its hard work during the current amendment cycle, and noted the Commission will hold its annual National Training Seminar on June 16-18, 2010, in New Orleans, LA. She added that there is still time to register for the program.

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

Mr. Cohen stated that the first proposed amendment, attached hereto as Exhibit A, 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 by correcting typographical errors and by addressing cases in which the Guidelines Manual provides information that has become incorrect or obsolete. Part B of the proposed amendment makes a series of changes to the Guidelines Manual to promote stylistic consistency in how subdivisions are designated. Mr. Cohen advised the commissioners that a motion to promulgate the proposed

amendment would be in order with a November 1, 2010 effective date, and with staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to promulgate the proposed amendment, with Vice Chair Jackson seconding. The Chair called for a 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 four 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, to cover commodities fraud. The proposed amendment adds section 1348 to the list of offenses that qualify as "commodities law" for purposes of the enhancement in §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) at subsection (b)(17)(B). 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 regarding paleontological resources. The proposed amendment adds section 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 it 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 section 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. 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. Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2010, effective date, and with 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

promulgate the proposed amendment, with Commissioner Howell seconding. The Chair called for a 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 four 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 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). Second, the proposed amendment amends §8C2.5 (Culpability Score) in subsection (f) to encourage organizations to adopt a structure under which individuals with operational responsibility for compliance and ethics have direct reporting obligations to the governing authority of the organization. Third, the proposed amendment amends §8D1.4 (Recommended Conditions of Probation – Organizations (Policy Statement)) to augment and simplify the recommended conditions of probation for organizations. Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2010, effective date, and with staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Vice Chair Jackson made a motion to promulgate the proposed amendment, with Commissioner Howell seconding. The Chair called for a discussion on the motion. Commissioner Howell thanked staff for their hard work on the amendment. Commissioner Howell noted that the Commission had received valuable public comment on the amendment, noting particularly the contributions of the Practitioners' Advisory Group and former Commissioner John Steer. Commissioner Howell stated that the amendment will help promote compliance by organizations, will encourage early reporting when criminal activity is detected, and will encourage the remediation of harm caused by criminal activity committed by organizations. Commissioner Howell suggested the Commission should continue its work on Chapter 8, including expanding the fine provisions to apply to all criminal conduct committed by organizations. Commissioner Ex Officio Wroblewski noted that the Commission had published in the Federal Register proposed language that is not in the proposed amendment. The published language would have authorized judges to impose as a condition of probation the unannounced examination of facilities, just as judges are currently authorized to impose unannounced examination of documents and records. Commissioner Wroblewski expressed the Department of Justice's hope that the Commission would reconsider this issue as well as others in the next amendment cycle. Hearing no further discussion, the Chair called for a vote. The motion was adopted with the Chair noting that at least four commissioners voted in favor of the motion.

Mr. Cohen stated that under the next proposed amendment, attached hereto as Exhibit D, the consideration of "recency" points in subsection (e) of §4A1.1 (Criminal History Category) is eliminated. Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2010, effective date, with staff being authorized to make technical and conforming changes if needed, and waiving the Commission's

Rule of Practice and Procedure 4.1 regarding the consideration of retroactivity at the time of promulgation.

The Chair called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to promulgate the proposed amendment, with Commissioner Howell seconding. The Chair called for a 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 four commissioners voted in favor of the motion.

Mr. Cohen stated that under the next proposed amendment, attached hereto as Exhibit E, responds to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (division E of Pub. L. 111-84) (the "Act"). The first new offense created by the Act, 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. The proposed amendment amends Appendix A to reference the new offense to §2H1.1 (Offenses Involving Individual Rights). The proposed amendment amends subsection (a) at §3A1.1 (Hate Crime Motivation or Vulnerable Victim) to include crimes motivated by actual or perceived "gender identity", and makes conforming changes to §§2H1.1 and 3A1.1. The proposed amendment also deletes the parenthetical in the Background to §3A1.1 as unnecessary. 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. The proposed amendment amends Appendix A to reference the new offense to §§2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault) and 2B1.1. Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2010, effective date, and with staff being authorized to make technical and conforming changes if needed.

The Chair called for a motion as suggested by Mr. Cohen. Commissioner Howell made a motion to promulgate the proposed amendment, with Vice Chair Carr seconding. The Chair called for a 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 four commissioners voted in favor of the motion.

Chair Sessions recognized the presence of Vice Chair Jackson at her first public meeting, and noted that it was an honor to have her on the Commission. Vice Chair Jackson thanked the Chair.

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. Commissioner Hinojosa made a motion to adjourn, with Commissioner Friedrich seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 1:23 p.m.

EXHIBIT A

REVISED PROPOSED AMENDMENT: TECHNICAL AMENDMENT

Synopsis of Proposed Amendment: *This two-part revised 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 Notes 2 and 10, to ensure that a quotation contained in Note 2 is accurate and that a citation in Note 10 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~~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)).*

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§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)).*

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§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:

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- (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.

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§2B3.1. Robbery

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Commentary

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Application Notes:

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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).

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

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Commentary

Background:

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*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).***

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

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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.*

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§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

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Commentary

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Application Notes:

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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.

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

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Commentary

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Application Notes:

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

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

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(c) DRUG QUANTITY TABLE

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*Notes to Drug Quantity Table:

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- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(~~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.

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

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Commentary

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Application Notes:

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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).*

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

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Commentary

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Application Notes:

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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.

* * *

10. Prior Felony Convictions.—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2); ~~§4A1.2, comment. (n.3).~~

* * *

§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(f)(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. §§ ~~1129(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(bb)	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: (†A) the quantity of explosive materials significantly exceeded 1000 pounds; (‡B) the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives (e.g., plastic explosives); (‡C) the defendant knowingly distributed explosive materials to a person under twenty-one years of age; or (‡D) 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: (†A) the number of firearms substantially exceeded 200; (‡B) 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)); (‡C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (‡D) 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:

- (~~t~~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;*
- (~~t~~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;*
- (*βB*) *making false statements, not under oath, to law enforcement officers, unless Application Note 4(g) above applies;*
- (*γC*) *providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;*
- (*δD*) *avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight));*
- (*εE*) *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;*
- (*βB*) *voluntary termination or withdrawal from criminal conduct or associations;*
- (*γC*) *voluntary payment of restitution prior to adjudication of guilt;*
- (*δD*) *voluntary surrender to authorities promptly after commission of the offense;*
- (*εE*) *voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;*

- (fF) voluntary resignation from the office or position held during the commission of the offense;*
- (gG) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and*
- (hH) 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 (**A1**) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (**B2**) 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

REVISED PROPOSED AMENDMENT: MISCELLANEOUS

Synopsis of Proposed Amendment: *This revised 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:

* * *

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 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)).

- (E*v*) *A commemorative work. "Commemorative work" (A*I*) has the meaning given that term in section 2(c) of Public Law 99–652 (40 U.S.C. § 1002(c)); and (B*II*) includes any national monument or national memorial.*
- (F*vi*) *An object of cultural heritage, as defined in 18 U.S.C. § 668(a)(2).*
- (G*vii*) *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, e.g., 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, e.g., 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, e.g., 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 (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 paleontological 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

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**(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;	Level 30

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;
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

SECOND REVISED PROPOSED AMENDMENT: ORGANIZATIONAL GUIDELINES

Synopsis of Proposed Amendment: *This second revised 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 two aspects of subsection (b)(7). First, it 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 remediation step considered under current Department of Justice guidelines in determining whether to prosecute business organizations. See U.S. Attorneys' Manual, Chapter 9-28.300(A)(6) and Chapter 9-28.900(A) & (B). Second, it describes the reasonable steps to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective.

Second, the proposed amendment amends §8C2.5 (Culpability Score) in subsection (f) to encourage organizations to consider a structure under which individuals with operational responsibility for compliance and ethics have direct reporting obligations to the governing authority of the organization. Under the proposed amendment, an organization with such a structure may benefit from the three-level mitigation of the culpability score under subsection (f) even if high-level personnel (other than individuals with operational responsibility for compliance and ethics) are involved in the criminal conduct. The proposed amendment also adds a new application note to §8C2.5 to set forth the direct reporting obligations that must exist to qualify for the benefit.

Third, 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.

Finally, the proposed amendment makes technical and conforming changes.

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.
 - (2) (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~~ **subparagraph** (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~~ **subparagraph** (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~~ **subparagraph**, "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.

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).—Subsection (b)(7) has two aspects.

First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation. Other reasonable steps to respond appropriately to the criminal conduct may include self-reporting and cooperation with authorities.

Second, the organization should act appropriately to prevent further similar criminal conduct, including assessing the compliance and ethics program and making modifications necessary to ensure the program is effective. The steps taken should be consistent with subsections (b)(5) and (c) and may include the use of an outside professional advisor to ensure adequate assessment and implementation of any 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.

(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~~ **subparagraph** (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~~ **subparagraph** (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.

* * *

§8C2.5. Culpability Score

(a) Start with **5** points and apply subsections (b) through (g) below.

(b) Involvement in or Tolerance of Criminal Activity

If more than one applies, use the greatest:

(1) If --

(A) the organization had 5,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 5,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **5** points; or

(2) If --

(A) the organization had 1,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully

ignorant of the offense; or

- (ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 1,000 or more employees and

- (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

- (ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **4** points; or

(3) If --

(A) the organization had 200 or more employees and

- (i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

- (ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 200 or more employees and

- (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

- (ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **3** points; or

(4) If the organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **2** points; or

(5) If the organization had 10 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **1** point.

(c) Prior History

If more than one applies, use the greater:

- (1) If the organization (or separately managed line of business) committed any part of the instant offense less than 10 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **1** point; or
- (2) If the organization (or separately managed line of business) committed any part of the instant offense less than 5 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **2** points.

(d) Violation of an Order

If more than one applies, use the greater:

- (1) (A) If the commission of the instant offense violated a judicial order or injunction, other than a violation of a condition of probation; or (B) if the organization (or separately managed line of business) violated a condition of probation by engaging in similar misconduct, i.e., misconduct similar to that for which it was placed on probation, add **2** points; or
- (2) If the commission of the instant offense violated a condition of probation, add **1** point.

(e) Obstruction of Justice

If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, add **3** points.

(f) Effective Compliance and Ethics Program

- (1) If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in §8B2.1 (Effective Compliance and Ethics Program), subtract **3** points.
- (2) Subsection (f)(1) shall not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.
- (3) (A) Except as provided in ~~subdivision (B)~~ **subparagraphs (B) and (C)**, subsection (f)(1) shall not apply if an individual within high-level personnel of the organization, a person within high-level personnel

of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual described in §8B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the offense.

(B) There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—

- (i) within high-level personnel of a small organization; or
- (ii) within substantial authority personnel, but not within high-level personnel, of any organization,

participated in, condoned, or was willfully ignorant of, the offense.

(C) Subparagraphs (A) and (B) shall not apply if—

- (i) the individual or individuals with operational responsibility for the compliance and ethics program (see §8B2.1(b)(2)(C)) have direct reporting obligations to the governing authority or an appropriate subgroup thereof (e.g., an audit committee of the board of directors);
- (ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;
- (iii) the organization promptly reported the offense to appropriate governmental authorities; and
- (iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

(g) Self-Reporting, Cooperation, and Acceptance of Responsibility

If more than one applies, use the greatest:

- (1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **5** points; or
- (2) If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for

its criminal conduct, subtract **2** points; or

- (3) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **1** point.

Commentary

Application Notes:

1. *Definitions.—For purposes of this guideline, "condoned", "prior criminal adjudication", "similar misconduct", "substantial authority personnel", and "willfully ignorant of the offense" have the meaning given those terms in Application Note 3 of the Commentary to §8A1.2 (Application Instructions - Organizations).*

"Small Organization", for purposes of subsection (f)(3), means an organization that, at the time of the instant offense, had fewer than 200 employees.
2. *For purposes of subsection (b), "unit of the organization" means any reasonably distinct operational component of the organization. For example, a large organization may have several large units such as divisions or subsidiaries, as well as many smaller units such as specialized manufacturing, marketing, or accounting operations within these larger units. For purposes of this definition, all of these types of units are encompassed within the term "unit of the organization."*
3. *"High-level personnel of the organization" is defined in the Commentary to §8A1.2 (Application Instructions - Organizations). With respect to a unit with 200 or more employees, "high-level personnel of a unit of the organization" means agents within the unit who set the policy for or control that unit. For example, if the managing agent of a unit with 200 employees participated in an offense, three points would be added under subsection (b)(3); if that organization had 1,000 employees and the managing agent of the unit with 200 employees were also within high-level personnel of the organization in its entirety, four points (rather than three) would be added under subsection (b)(2).*
4. *Pervasiveness under subsection (b) will be case specific and depend on the number, and degree of responsibility, of individuals within substantial authority personnel who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. For example, if an offense were committed in an organization with 1,000 employees but the tolerance of the offense was pervasive only within a unit of the organization with 200 employees (and no high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense), three points would be added under subsection (b)(3). If, in the same organization, tolerance of the offense was pervasive throughout the organization as a whole, or an individual within high-level personnel of the organization participated in the offense, four points (rather than three) would be added under subsection (b)(2).*
5. *A "separately managed line of business," as used in subsections (c) and (d), is a subpart of a for-profit organization that has its own management, has a high degree of autonomy from higher*

managerial authority, and maintains its own separate books of account. Corporate subsidiaries and divisions frequently are separately managed lines of business. Under subsection (c), in determining the prior history of an organization with separately managed lines of business, only the prior conduct or criminal record of the separately managed line of business involved in the instant offense is to be used. Under subsection (d), in the context of an organization with separately managed lines of business, in making the determination whether a violation of a condition of probation involved engaging in similar misconduct, only the prior misconduct of the separately managed line of business involved in the instant offense is to be considered.

6. *Under subsection (c), in determining the prior history of an organization or separately managed line of business, the conduct of the underlying economic entity shall be considered without regard to its legal structure or ownership. For example, if two companies merged and became separate divisions and separately managed lines of business within the merged company, each division would retain the prior history of its predecessor company. If a company reorganized and became a new legal entity, the new company would retain the prior history of the predecessor company. In contrast, if one company purchased the physical assets but not the ongoing business of another company, the prior history of the company selling the physical assets would not be transferred to the company purchasing the assets. However, if an organization is acquired by another organization in response to solicitations by appropriate federal government officials, the prior history of the acquired organization shall not be attributed to the acquiring organization.*
7. *Under subsections (c)(1)(B) and (c)(2)(B), the civil or administrative adjudication(s) must have occurred within the specified period (ten or five years) of the instant offense.*
8. *Adjust the culpability score for the factors listed in subsection (e) whether or not the offense guideline incorporates that factor, or that factor is inherent in the offense.*
9. *Subsection (e) applies where the obstruction is committed on behalf of the organization; it does not apply where an individual or individuals have attempted to conceal their misconduct from the organization. The Commentary to §3C1.1 (Obstructing or Impeding the Administration of Justice) provides guidance regarding the types of conduct that constitute obstruction.*
10. *Subsection (f)(2) contemplates that the organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by subsection (f)(2) or (f)(3)(C)(iii) if the organization reasonably concluded, based on the information then available, that no offense had been committed.*
11. *For purposes of subsection (f)(3)(C)(i), an individual has "direct reporting obligations" to the governing authority or an appropriate subgroup thereof if the individual has express authority to communicate personally to the governing authority or appropriate subgroup thereof (A) promptly on any matter involving criminal conduct or potential criminal conduct, and (B) no less than annually on the implementation and effectiveness of the compliance and ethics program.*
- †12. *"Appropriate governmental authorities," as used in subsections (f) and (g)(1), means the federal or state law enforcement, regulatory, or program officials having jurisdiction over such matter. To qualify for a reduction under subsection (g)(1), the report to appropriate governmental authorities must be made under the direction of the organization.*

- ~~12~~13. *To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation.*
- ~~13~~14. *Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct ordinarily will constitute significant evidence of affirmative acceptance of responsibility under subsection (g), unless outweighed by conduct of the organization that is inconsistent with such acceptance of responsibility. This adjustment is not intended to apply to an organization that puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude an organization from consideration for such a reduction. In rare situations, an organization may clearly demonstrate an acceptance of responsibility for its criminal conduct even though it exercises its constitutional right to a trial. This may occur, for example, where an organization goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to its conduct). In each such instance, however, a determination that an organization has accepted responsibility will be based primarily upon pretrial statements and conduct.*
- ~~14~~15. *In making a determination with respect to subsection (g), the court may determine that the chief executive officer or highest ranking employee of an organization should appear at sentencing in order to signify that the organization has clearly demonstrated recognition and affirmative acceptance of responsibility.*

Background: The increased culpability scores under subsection (b) are based on three interrelated principles. First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of criminal conduct. Second, as organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management's tolerance of that offense is pervasive. Because of the continuum of sizes of organizations and professionalization of management, subsection (b) gradually increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement.

* * *

§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 paragraph (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in paragraph (1). Such notice shall be in a form prescribed by the court.

(3) 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 paragraph (1). Among other things, reports under subparagraph (B) 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) The organization shall 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.

(5) 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.

~~(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.~~

- ~~(46)~~ 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:

1. *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 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)(3) should be provided to any governmental regulatory body that oversees conduct of the organization relating to the instant offense.

EXHIBIT D

REVISED 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.

Under this revised proposed amendment, "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.

The revised proposed amendment also makes stylistic changes to §§4A1.1 and 4A1.2 so that subdivisions are referred to as "subsections" (rather than as "items" or "subdivisions").

Proposed Amendment:

§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~~sub~~section~~.

- (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 **itemsubsection**.

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 **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 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 **itemsubsection** 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 ~~item~~ subsection. The term "prior sentence" is defined at §4A1.2(a).

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

A 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.

EXHIBIT E

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. The proposed amendment also deletes the parenthetical in the Background to §3A1.1 as unnecessary.

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