

**United States Sentencing Commission Public Meeting Minutes
April 10, 2013**

Chair Patti B. Saris called the meeting to order at 2:05 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- Ketanji B. Jackson, Vice Chair
- Judge Ricardo H. Hinojosa, Commissioner
- Dabney L. Friedrich, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

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

Chair Saris called for a motion to adopt the January 11, 2013, public meeting minutes. Commissioner Hinojosa made a motion to adopt the minutes, with Vice Chair Jackson seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris 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, responds to the SAFE DOSES Act, Pub. L. No. 112–186 (enacted October 5, 2012), which created a new criminal offense at 18 U.S.C. § 670 for theft of pre-retail medical products, increased statutory penalties for certain related offenses when a pre-retail medical product is involved, and contained a directive to the Commission.

The proposed amendment first amends Appendix A (Statutory Index) to reference the new offense at section 670 to §2B1.1 (Theft, Property Destruction, and Fraud). The proposed amendment then amends §2B1.1 to address offenses involving pre-retail medical products in two ways.

First, it amends the upward departure provisions in the Commentary to §2B1.1 to provide — as an example of a case in which an upward departure would be warranted — a case "involving

conduct described in section 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product." Second, it adds a new specific offense characteristic to §2B1.1 that provides a two-pronged enhancement and an instruction to apply the greater. Prong (A) applies if the offense involved conduct described in section 670 and provides a 2-level enhancement. Prong (B) applies if the offense involved conduct described in section 670 and the defendant was employed by, or an agent of, an organization in the supply chain for the pre-retail product. It provides an enhancement of 4 levels.

Finally, the proposed amendment amends the Commentary to §2B1.1 to provide relevant definitions and make other conforming changes.

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2013 effective date, and with staff being authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Vice Chair Jackson seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with four commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit B, responds to section 3 of the Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. No. 112-269 (enacted January 14, 2013), which contains a directive to the Commission on offenses involving stolen trade secrets or economic espionage. The proposed amendment responds to the directive by revising the specific offense characteristic at §2B1.1(b)(5). The proposed amendment renumbers subsection (b)(5) and restructures it to provide 1) a 2-level enhancement when the defendant in a trade secret offense knew or intended that the trade secret would be transported or transmitted out of the United States, conduct which currently does not receive an enhancement; and 2) a 4-level enhancement and a minimum offense level of 14 when the defendant in a trade secret offense knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, conduct which currently receives a 2-level enhancement. Conforming changes to account for the renumbering are also made.

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2013 effective date, and with staff being authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Vice Chair Jackson made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with four commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit C, responds to two recent Acts that made changes to 18 U.S.C. § 2320 (Trafficking in counterfeit goods and

services). One Act provided higher penalties for offenses involving counterfeit military goods and services; the other Act provided higher penalties for offenses involving counterfeit drugs, and also included a directive to the Commission. The proposed amendment also responds to recent statutory changes to 21 U.S.C. § 333 (Penalties for violations of the Federal Food, Drug, and Cosmetics Act) that provide higher penalties for offenses involving intentionally adulterated drugs.

First, the proposed amendment responds to the directive and addresses offenses involving counterfeit drugs by amending §2B5.3 (Criminal Infringement of Copyright or Trademark) to establish a new 2-level enhancement if the offense involves a counterfeit drug.

Second, the proposed amendment addresses offenses involving counterfeit military goods and services. It amends §2B5.3 to establish a new 2-level enhancement with a minimum offense level of level 14 that applies if the offense involves a counterfeit military good or service the use, malfunction, or failure of which is likely to cause the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security.

The proposed amendment also adds Commentary to §2B5.3 to clarify that "other significant harm to a member of the Armed Forces" means significant harm other than serious bodily injury or death. In a case in which the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, subsection (b)(5)(A) (conscious or reckless risk of serious bodily injury or death) would apply.

Third, the proposed amendment amends the Commentary to §2B5.3 to add a new departure consideration for offenses sentenced under §2B5.3. The new departure provision provides that a departure may be warranted if the offense resulted in death or serious bodily injury.

Section 716 of the Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112-144 (enacted July 9, 2012), amended 21 U.S.C. § 333 to add a new penalty provision at subsection (b)(7). Subsection (b)(7) applies to any person who knowingly and intentionally adulterates a drug such that the drug is adulterated under certain provisions of 21 U.S.C. § 351 and has a reasonable probability of causing serious adverse health consequences or death to humans or animals. It provides a statutory maximum term of imprisonment of 20 years.

The proposed amendment responds to the new offense under section 333(b)(7) by amending Appendix A (Statutory Index) to reference offenses under section 333(b)(7) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury).

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2013 effective date, and with staff being authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Vice Chair Jackson seconding. The Chair

called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with four commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit D, addresses a circuit conflict over whether a sentencing court, in calculating the tax loss in a tax case, may subtract the unclaimed deductions that the defendant legitimately could have claimed if he or she had filed an accurate tax return. Circuits have disagreed over whether the tax loss in such a case may be reduced by the defendant's legitimate but unclaimed deductions.

The proposed amendment resolves the conflict by amending the Commentary to §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents) to provide a new application note stating that, "in determining the tax loss, the court should account for the standard deduction and personal and dependent exemptions to which the defendant was entitled. In addition, the court should account for any unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only to the extent that (A) the credit, deduction, or exemption was related to the tax offense and could have been claimed at the time the tax offense was committed; (B) the credit, deduction, or exemption is reasonably and practicably ascertainable; and (C) the defendant presents information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy (*see* §6A1.3 (Resolution of Disputed Factors) (Policy Statement))".

However, the application note continues, "the court shall not account for payments to third parties made in a manner that encouraged or facilitated a separate violation of law (*e.g.*, 'under the table' payments to employees or expenses incurred to obstruct justice)".

Finally, the application note explains, "the burden is on the defendant to establish any such credit, deduction, or exemption by a preponderance of the evidence."

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2013 effective date, and with staff being authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Hinojosa made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with four commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit E, responds to two circuit conflicts involving the guideline for acceptance of responsibility, §3E1.1 (Acceptance of Responsibility). The first conflict concerns whether the court has discretion to deny the third level of reduction for acceptance of responsibility when the government has filed a motion under subsection (b) and the defendant is otherwise eligible.

The proposed amendment adopts the approach of the Fifth Circuit by recognizing that the court has discretion to deny the third level of reduction. Specifically, it amends Application Note 6 to §3E1.1 by adding a statement that "If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion."

The second conflict concerns whether the government has discretion to withhold a motion under subsection (b) based on whether the defendant agrees to waive his or her right to appeal.

The proposed amendment amends Application Note 6 to §3E1.1 by adding a statement that "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2013 effective date, and with staff being authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Hinojosa made a motion to promulgate the proposed amendment, with Vice Chair Jackson seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with four commissioners voting in favor of the motion.

Mr. Cohen stated that the next proposed amendment, attached hereto as Exhibit F, responds to the recent Supreme Court case of *Setser v. United States*, 132 S. Ct. 1463 (2012). A federal court imposing a sentence on a defendant generally has discretion to order that the sentence run consecutively to (or, in the alternative, concurrently with) a term of imprisonment previously imposed but not yet discharged. *See* 18 U.S.C. § 3584(a). Recently, the Supreme Court held that federal courts also have a similar discretion, independent of section 3584, to order that the sentence run consecutively to (or concurrently with) an anticipated, but not yet imposed, state sentence. *See Setser*, 132 S. Ct. at 1468.

The proposed amendment amends the background commentary to §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) to include a statement that, in addition to the discretion provided by section 3584, federal courts also generally have discretion under *Setser* to order that the sentences they impose will run concurrently or consecutively with other state sentences that are anticipated but not yet imposed.

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2013 effective date, and with staff being authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Hinojosa made a

motion to promulgate the proposed amendment, with Vice Chair Jackson seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with four commissioners voting in favor of the motion.

Mr. Cohen stated that the last proposed amendment, attached hereto as Exhibit G, responds to recently enacted legislation and miscellaneous and technical guideline issues. Regarding recently enacted legislation, Part A of the proposed amendment amends Appendix A (Statutory Index) to provide guideline references for four offenses not currently referenced in Appendix A that were established or revised by recently enacted legislation. They are as follows:

1. Section 311 of the Federal Aviation Administration Modernization and Reform Act of 2012, Pub. L. No. 112–95 (enacted February 14, 2012), established a new criminal offense at 18 U.S.C. § 39A (Aiming a laser pointer at an aircraft). The offense applies to whoever knowingly aims the beam of a laser pointer at an aircraft in the special aircraft jurisdiction of the United States or at the flight path of such an aircraft and carries a statutory maximum term of imprisonment of five years. The proposed amendment amends Appendix A to reference section 39A offenses to §2A5.2 (Interference with Flight Crew or Flight Attendant).
2. Section 3(a) of the Child Protection Act of 2012, Pub. L. No. 112–206 (enacted December 7, 2012), established a new offense at 18 U.S.C. § 1514(c) that makes it a criminal offense to knowingly and intentionally violate or attempt to violate an order issued under section 1514 (Civil action to restrain harassment of a victim or witness). The new offense has a statutory maximum term of imprisonment of five years. The proposed amendment amends Appendix A to reference the new offense at section 1514(c) to §2J1.2 (Obstruction of Justice).
3. The Federal Restricted Buildings and Grounds Improvement Act of 2011, Pub. L. No. 112–98 (enacted March 8, 2012), amended the definition of “restricted buildings or grounds” in the criminal offense at 18 U.S.C. § 1752 (Restricted building or grounds). The Act did not change the statutory maximum term of imprisonment, which is ten years if the person used or carried a deadly or dangerous weapon or firearm or if the offense results in significant bodily injury, and one year in any other case. The proposed amendment amends Appendix A to reference section 1752 offenses to §2A2.4 (Obstructing or Impeding Officers) and §2B2.3 (Trespass). The proposed amendment amends Appendix A (Statutory Index) to reference section 1752 offenses to §2A2.4 (Obstructing or Impeding Officers) and §2B2.3 (Trespass). The proposed amendment also amends §2B2.3 to apply the greater of the 2-level enhancement at subsection (b)(1) if a trespass occurred at a restricted building or grounds, or a new 4-level enhancement at subsection (b)(2) if a trespass occurred at the White House or its grounds, or the Vice President's official residence or its grounds.
4. The Ultralight Aircraft Smuggling Prevention Act of 2012, Pub. L. No. 112–93 (enacted February 10, 2012), amended the criminal offense at 19 U.S.C. § 1590

(Aviation smuggling) to provide a more specific definition of the term “aircraft” (*i.e.*, to include ultralight aircraft) and to cover attempts and conspiracies. The Act did not change the statutory maximum terms of imprisonment, which are 20 years if any of the merchandise involved was a controlled substance and five years otherwise. The proposed amendment amends Appendix A to reference section 1590 offenses to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property).

Part B responds to an application issue that arises in cases in which the defendant is sentenced under an offense guideline in Chapter Two, Part J (Offenses Involving the Administration of Justice) and the defendant may also be subject to an adjustment under Chapter Three, Part C (Obstruction and Related Adjustments). The proposed amendment clarifies the scope of Application Note 2 in §2J1.2 (Obstruction of Justice) by striking the general reference to Chapter Three, Part C, and replacing it with a specific reference to §3C1.1 (Obstructing or Impeding the Administration of Justice).

Part C of the proposed amendment amends Appendix A to broaden the range of guidelines to which offenses under 18 U.S.C. § 554 (Smuggling goods from the United States) are referenced by adding a reference to §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism).

Part D makes certain technical and stylistic changes to the *Guidelines Manual*. First, it amends the Commentary to §2B1.1 to provide updated references to the definitions contained in 7 U.S.C. § 1a (Definitions), which were renumbered by Pub. L. No. 111–203 (enacted July 21, 2010). Second, it amends the Notes to the Drug Quantity Table in §2D1.1 (Drug Trafficking) to provide updated references to the definition of tetrahydrocannabinols contained in 21 C.F.R. § 1308.11(d), which were renumbered by 75 FR 79296 (December 20, 2010). Third, it makes several stylistic revisions in the *Guidelines Manual* to change “court martial” to “court-martial”.

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2013 effective date, and with staff being authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Vice Chair Jackson seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with four commissioners voting in favor of the motion.

Mr. Cohen asked pursuant to Rule 2.2 of the Commission’s Rules of Practice and Procedure whether there was a motion to instruct staff to prepare a retroactivity impact analysis for any amendment that may have the effect of lowering the guideline range for a category of offense or offenders.

Chair Saris called for a motion as suggested by Mr. Cohen. No commissioner made such motion. The Chair stated that the matter failed for lack of a motion.

Chair Saris thanked the public for its helpful comment and noted the valuable witness testimony the Commission received at its public hearings. Chair Saris especially thanked the members of Congress who submitted letters to the Commission, including Senators Sheldon Whitehouse and Charles Schumer, and Representative James Sensenbrenner. Chair Saris also expressed her appreciation to the parties of the criminal justice system that submitted comment, including the Federal Public Defendant's Sentencing Resource Counsel and the Department of Justice.

Chair Saris announced that Staff Director Judy Sheon will be retiring after 17 years with the Commission, eight of which were as Staff Director under three Chairs. Chair Saris stated that Ms. Sheon had been a great help to her during her time as Chair and has served the Commission very well, especially during the current budgetary climate. Chair Saris praised Ms. Sheon's humanity and thanked her for her service.

Commissioner Hinojosa agreed with the Chair's comments. He noted that during his ten years on the Commission, Ms. Sheon was a loyal and dedicated member of the staff and an excellent Staff Director with a tireless work ethic and strong sense and dedication to the goals of the Sentencing Reform Act of 1984. Commissioner Hinojosa expressed his appreciation for Ms. Sheon's dedication, stating that she was instrumental in the accomplishments achieved during his five years as Chair.

Vice Chair Jackson thanked Ms. Sheon for her service to the Commission, noting she has known her since she was an Assistant Special Counsel at the Commission, and thanked Ms. Sheon for her mentorship. Vice Chair Jackson wished Ms. Sheon well in retirement and stated that the Commission greatly benefitted from her stewardship.

Commissioner Friedrich thanked Ms. Sheon for her valuable service to the Commission. She stated that during her six years as a commissioner, Ms. Sheon has ably led the agency through challenging times. Commissioner Friedrich described Ms. Sheon as one of the hardest working, most dedicated people she has met and thanked her for her guidance and leadership.

Commissioner Wroblewski agreed with the sentiments already expressed by the other commissioners. Commissioner Wroblewski noted that Ms. Sheon performed many functions at the Commission not readily apparent, such as her role in dealing with human resource issues and the agency's finances, in addition to her role with the sentencing guidelines. He observed that the Commission works in a controversial area and on matters of great importance to the country and he praised Ms. Sheon's professionalism and dedication as she advised the commissioners. Commissioner Wroblewski closed by wishing Ms. Sheon well in retirement.

Ms. Sheon thanked the commissioner's for their remarks. She stated that it had been an honor, a privilege, and a pleasure to serve the Commission and that her service to it has been very important to her. She noted that she, along with the commissioners and staff, are passionate about the goals of the Sentencing Reform Act and those goals made her service at the

Commission very worthwhile. Ms. Sheon thanked the Commission and staff, past and present, and expressed her joy at having had the chance to serve with so many wonderful people through the years.

Chair Saris announced that Vice Chair Jackson has been confirmed as a federal district judge for the District of Columbia and will be sworn into office shortly. She also welcomed Noah Bookbinder as Director of the Commission's Office of Legislative and Public Affairs. Mr. Bookbinder joined the Commission staff after working for Senator Patrick Leahy on the Senate Judiciary Committee.

Chair Saris announced that the Commission plans to hold a multi-day symposium on economic fraud in September and probably in New York City. The symposium is part of the Commission's multi-year review of the fraud guidelines. Chair Saris also announced the start of a major project on the issue of recidivism that will involve holding a roundtable or symposium in October. Details on both events will be made available on the Commission's webpage.

Chair Saris 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. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 2:33 p.m.

EXHIBIT A

PROPOSED AMENDMENT: PRE-RETAIL MEDICAL PRODUCTS

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

New Offense at 18 U.S.C. § 670

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

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

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

- (1) the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product; or*
- (2) the violation—*
 - (A) involves the use of violence, force, or a threat of violence or force;*
 - (B) involves the use of a deadly weapon;*
 - (C) results in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved; or*
 - (D) is subsequent to a prior conviction for an offense under section 670.*

Specifically, the higher statutory maximum terms of imprisonment are:

- (1) Five years, if—*

- (A) *the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product; or*
 - (B) *the violation (i) involves the use of violence, force, or a threat of violence or force, (ii) involves the use of a deadly weapon, or (iii) is subsequent to a prior conviction for an offense under section 670.*
- (2) *15 years, if the value of the medical products involved in the offense is \$5,000 or greater.*
 - (3) *20 years, if both (1) and (2) apply.*
 - (4) *30 years, if the offense results in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved.*

The proposed amendment amends Appendix A (Statutory Index) to reference the new offense at 18 U.S.C. § 670 to §2B1.1 (Theft, Property Destruction, and Fraud).

The proposed amendment then amends §2B1.1 to address offenses involving pre-retail medical products in two ways.

First, it amends the upward departure provisions in the Commentary to §2B1.1 (currently at Application Note 19(A)) to provide — as an example of a case in which an upward departure would be warranted — a case "involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product."

Second, it adds a new specific offense characteristic to §2B1.1(b)(9) that provides a two-prong enhancement and an instruction to apply the greater. Prong (A) applies if the offense involved conduct described in 18 U.S.C. § 670 and provides a 2-level enhancement. Prong (B) applies if the offense involved conduct described in 18 U.S.C. § 670 and the defendant was employed by, or an agent of, an organization in the supply chain for the pre-retail product. It provides an enhancement of 4 levels. Accompanying this new specific offense characteristic is new Commentary providing that, if prong (B) of this new specific offense characteristic applies, "do not apply an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill)."

Finally, the proposed amendment amends the Commentary to §2B1.1 to provide relevant definitions and make other conforming changes.

Proposed Amendment:

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

- (a) Base Offense Level:
 - (1) **7**, if (A) the defendant was convicted of an offense referenced to this

guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) **6**, otherwise.

(b) **Specific Offense Characteristics**

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

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

(2) (Apply the greatest) If the offense—

- (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;
- (B) involved 50 or more victims, increase by **4** levels; or
- (C) involved 250 or more victims, increase by **6** levels.

(3) If the offense involved a theft from the person of another, increase by **2** levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.

(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.

- (6) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.
- (7) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.
- (8) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than \$1,000,000, increase by **2** levels; (ii) more than \$7,000,000, increase by **3** levels; or (iii) more than \$20,000,000, increase by **4** levels.
- (9) (Apply the greater) If—
 - (A) the offense involved conduct described in 18 U.S.C. § 670, increase by **2** levels; or
 - (B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by **4** levels.

[renumber the SOCs that follow, and make conforming changes as needed to reflect renumbering]

- (~~9~~10) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.
- (~~10~~11) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (~~11~~12) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of

identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(~~12~~**13**) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(~~13~~**14**) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(~~14~~**15**) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(~~15~~**16**) (Apply the greater) If—

(A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by **4** levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(~~15~~**16**)(B) shall not exceed **8** levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

(~~16~~**17**) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

(~~17~~**18**) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in

furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

- (ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.
- (iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

(+819) If the offense involved—

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

increase by **4** levels.

(c) Cross References

- (1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.
- (2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.
- (3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C.

§ 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

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

Commentary

* * *

1. Definitions.—For purposes of this guideline:

"Cultural heritage 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).

"Equity securities" has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).

"Federal health care offense" has the meaning given that term in 18 U.S.C. § 24.

"Financial institution" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," primarily include large pension funds that serve many persons (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

"Firearm" and "destructive device" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

"Foreign instrumentality" and "foreign agent" have the meaning given those terms in 18 U.S.C. § 1839(1) and (2), respectively.

"Government health care program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part,

by federal or state government. Examples of such programs are the Medicare program, the Medicaid program, and the CHIP program.

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (*i.e.*, not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

"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.

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

"Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).

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

"Theft from the person of another" means theft, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

"Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).

"Veterans' memorial" means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).

"Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

2. Application of Subsection (a)(1).—

(A) "Referenced to this Guideline".—For purposes of subsection (a)(1), an offense is "referenced to this guideline" if (i) this guideline is the applicable Chapter Two guideline determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of

conviction; or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

(B) Definition of "Statutory Maximum Term of Imprisonment".—For purposes of this guideline, "statutory maximum term of imprisonment" means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.

(C) Base Offense Level Determination for Cases Involving Multiple Counts.—In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.

3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) Rules of Construction in Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

- (II) Procurement Fraud Cases.—*In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.*
- (III) Offenses Under 18 U.S.C. § 1030.—*In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.*
- (B) Gain.—*The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.*
- (C) Estimation of Loss.—*The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).*

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

- (i) *The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.*
- (ii) *In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.*
- (iii) *The cost of repairs to damaged property.*
- (iv) *The approximate number of victims multiplied by the average loss to each victim.*
- (v) *The reduction that resulted from the offense in the value of equity securities or other corporate assets.*
- (vi) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*
- (D) Exclusions from Loss.—*Loss shall not include the following:*
 - (i) *Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.*

- (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.*

(E) Credits Against Loss.—Loss shall be reduced by the following:

- (i) *The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.*
- (ii) *In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.*
- (iii) *Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.*

In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.

(F) Special Rules.—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:

- (i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—*In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 9(A).*
- (ii) Government Benefits.—*In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to*

unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, loss is \$50.

- (iii) Davis-Bacon Act Violations.—In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 3142, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.
- (iv) Ponzi and Other Fraudulent Investment Schemes.—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).
- (v) Certain Other Unlawful Misrepresentation Schemes.—In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.
- (vi) Value of Controlled Substances.—In a case involving controlled substances, loss is the estimated street value of the controlled substances.
- (vii) Value of Cultural Heritage Resources or Paleontological Resources.—In a case involving a cultural heritage resource or paleontological resource, loss attributable to that resource shall be determined in accordance with the rules for determining the "value of the resource" set forth in Application Note 2 of the Commentary to §2B1.5.
- (viii) Federal Health Care Offenses Involving Government Health Care Programs.—In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, i.e., is evidence sufficient to establish the amount of the intended loss, if not rebutted.
- (ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities.—In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—
 - (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the

fraud was disclosed to the market, and

- (II) *multiplying the difference in average price by the number of shares outstanding.*

In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events).

4. Application of Subsection (b)(2).—

- (A) Definition.—*For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.*
- (B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages.—*For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.*
- (C) Undelivered United States Mail.—
 - (i) In General.—*In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.*
 - (ii) Special Rule.—*A case described in subdivision (C)(i) of this note that involved—*
 - (I) *a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.*
 - (II) *a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.*

- (iii) Definition.—"Undelivered United States mail" means mail that has not actually been received by the addressee or the addressee's agent (e.g., mail taken from the addressee's mail box).
 - (D) Vulnerable Victims.—If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.
 - (E) Cases Involving Means of Identification.—For purposes of subsection (b)(2), in a case involving means of identification "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.
5. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).—For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:
- (A) The regularity and sophistication of the defendant's activities.
 - (B) The value and size of the inventory of stolen property maintained by the defendant.
 - (C) The extent to which the defendant's activities encouraged or facilitated other crimes.
 - (D) The defendant's past activities involving stolen property.
6. Application of Subsection (b)(7).—For purposes of subsection (b)(7), "improper means" includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.
7. Application of Subsection (b)(9)(B).—If subsection (b)(9)(B) applies, do not apply an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
- [renumber the notes that follow and make conforming changes as needed to reflect renumbering]**
7. Application of Subsection (b)(9).—
- (A) In General.—The adjustments in subsection (b)(9) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.
 - (B) Misrepresentations Regarding Charitable and Other Institutions.—Subsection (b)(9)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable, educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(9)(A) applies, for example, to the following:
 - (i) A defendant who solicited contributions for a non-existent famine relief organization.

- (ii) *A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.*
 - (iii) *A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.*
- (C) *Fraud in Contravention of Prior Judicial Order.*—*Subsection (b)(9)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).*
- (D) *College Scholarship Fraud.*—*For purposes of subsection (b)(9)(D):*
- "Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.*
- "Institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).*
- (E) *Non-Applicability of Chapter Three Adjustments.*—
- (i) *Subsection (b)(9)(A).*—*If the conduct that forms the basis for an enhancement under subsection (b)(9)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under §3B1.3.*
 - (ii) *Subsection (b)(9)(B) and (C).*—*If the conduct that forms the basis for an enhancement under subsection (b)(9)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under §3C1.1.*
8. *Sophisticated Means Enhancement under Subsection (b)(10).*—
- (A) *Definition of United States.*—*For purposes of subsection (b)(10)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American*

Samoa.

- (B) Sophisticated Means Enhancement.—For purposes of subsection (b)(10)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a tele-marketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.
- (C) Non-Applicability of Chapter Three Adjustment.—If the conduct that forms the basis for an enhancement under subsection (b)(10) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.

9. Application of Subsection (b)(11).—

- (A) Definitions.—For purposes of subsection (b)(11):

"Authentication feature" has the meaning given that term in 18 U.S.C. § 1028(d)(1).

"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.

"Device-making equipment" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).

"Produce" includes manufacture, design, alter, authenticate, duplicate, or assemble. "Production" includes manufacture, design, alteration, authentication, duplication, or assembly.

"Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).

"Unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3).

- (B) Authentication Features and Identification Documents.—Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.
- (C) Application of Subsection (b)(11)(C)(i).—

- (i) *In General.*—Subsection (b)(11)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.
- (ii) *Examples.*—Examples of conduct to which subsection (b)(11)(C)(i) applies are as follows:
 - (I) A defendant obtains an individual's name and social security number from a source (*e.g.*, from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.
 - (II) A defendant obtains an individual's name and address from a source (*e.g.*, from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.
- (iii) *Non-Applicability of Subsection (b)(11)(C)(i).*—Examples of conduct to which subsection (b)(11)(C)(i) does not apply are as follows:
 - (I) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.
 - (II) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.
- (D) *Application of Subsection (b)(11)(C)(ii).*—Subsection (b)(11)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.

10. *Application of Subsection (b)(13).*—Subsection (b)(13) provides a minimum offense level in the case of an ongoing, sophisticated operation (*e.g.*, an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft. A "cargo shipment" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.

11. *Gross Receipts Enhancement under Subsection (b)(15)(A).*—

- (A) *In General.*—For purposes of subsection (b)(15)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.

- (B) Definition.—“Gross receipts from the offense” includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

12. Application of Subsection (b)(15)(B).—

- (A) Application of Subsection (b)(15)(B)(i).—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:

- (i) The financial institution became insolvent.
- (ii) The financial institution substantially reduced benefits to pensioners or insureds.
- (iii) The financial institution was unable on demand to refund fully any deposit, payment, or investment.
- (iv) The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.
- (v) One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a “bailout”.

(B) Application of Subsection (b)(15)(B)(ii).—

- (i) Definition.—For purposes of this subsection, “organization” has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).
- (ii) In General.—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:
 - (I) The organization became insolvent or suffered a substantial reduction in the value of its assets.
 - (II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).
 - (III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.
 - (IV) The organization substantially reduced its workforce.
 - (V) The organization substantially reduced its employee pension benefits.
 - (VI) The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company’s securities was

halted for more than one full trading day.

- (VII) *One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".*

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

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

"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).

- (B) Subsection (b)(17)(A)(iii).—*If the same conduct that forms the basis for an enhancement under subsection (b)(17)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(15)(B), do not apply the enhancement under subsection (b)(15)(B).*

14. Application of Subsection (b)(18).—

- (A) Definitions.—*For purposes of subsection (b)(18):*

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

"Commodity pool operator" has the meaning given that term in section 1a(5) 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)(18) 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)(18) applies, do not apply §3B1.3.*
15. *Cross Reference in Subsection (c)(3).—Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to §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).*
16. *Continuing Financial Crimes Enterprise.—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise".*
17. *Partially Completed Offenses.—In the case of a partially completed offense (e.g., an offense*

involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 of the Commentary to §2X1.1.

18. *Multiple-Count Indictments.*—*Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).*

19. *Departure Considerations.*—

(A) *Upward Departure Considerations.*—*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. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:*

- (i) *A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.*
- (ii) *The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed. Similarly, an upward departure would be warranted in a case involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.*
- (iii) *The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).*
- (iv) *The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.*
- (v) *In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.*
- (vi) *In a case involving access devices or unlawfully produced or unlawfully obtained*

means of identification:

- (I) *The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.*
 - (II) *An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.*
 - (III) *The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.*
- (B) *Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(17)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.*
- (C) *Downward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.*

For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.

- (D) *Downward Departure for Major Disaster or Emergency Victims.—If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.*

Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes.

Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under §2B3.1 (Robbery).

A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.

Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101 and the directive to the Commission in section 3 of Public Law 110–384.

Subsection (b)(8) implements the directive to the Commission in section 10606 of Public Law 111–148.

Subsection (b)(9) implements the directive to the Commission in section 7 of Public Law 112–186.

Subsection (b)(9)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106–420.

Subsection (b)(10) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.

Subsections (b)(11)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

Subsection (b)(11)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding", in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (i.e., produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification", the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (i.e., produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

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

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

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

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

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

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

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 669 2B1.1

18 U.S.C. § 670 2B1.1

* * *

EXHIBIT B

PROPOSED AMENDMENT: TRADE SECRETS

Synopsis of Proposed Amendment: *This proposed amendment responds to section 3 of the Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. 112–269 (enacted January 14, 2013), which contains a directive to the Commission on offenses involving stolen trade secrets or economic espionage.*

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

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

- "(1) consider the extent to which the Federal sentencing guidelines and policy statements appropriately account for the simple misappropriation of a trade secret, including the sufficiency of the existing enhancement for these offenses to address the seriousness of this conduct;*
- "(2) consider whether additional enhancements in the Federal sentencing guidelines and policy statements are appropriate to account for—*
 - "(A) the transmission or attempted transmission of a stolen trade secret outside of the United States; and*
 - "(B) the transmission or attempted transmission of a stolen trade secret outside of the United States that is committed or attempted to be committed for the benefit of a foreign government, foreign instrumentality, or foreign agent;*
- "(3) ensure the Federal sentencing guidelines and policy statements reflect the seriousness of these offenses and the need to deter such conduct;*
- "(4) ensure reasonable consistency with other relevant directives, Federal sentencing guidelines and policy statements, and related Federal statutes;*
- "(5) make any necessary conforming changes to the Federal sentencing guidelines and policy statements; and*
- "(6) ensure that the Federal sentencing guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code."*

Offenses described in the directive — the transmission or attempted transmission of a stolen trade secret outside the United States, and economic espionage — may be punished under 18 U.S.C. § 1831 (Economic espionage), which requires as an element of the offense that the defendant specifically intend or know that the offense "will benefit any foreign government, foreign instrumentality, or foreign agent". Offenses described in the directive may also be punished under 18 U.S.C. § 1832 (Trade secrets), which

does not require such specific intent or knowledge, but does require that the trade secret relate to a product in interstate or foreign commerce. The statutory maximum terms of imprisonment are 15 years for a section 1831 offense and 10 years for a section 1832 offense. Offenses under sections 1831 and 1832 are referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud).

The proposed amendment responds to the directive by revising the specific offense characteristic at §2B1.1(b)(5), which currently provides an enhancement of 2 levels "[i]f the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent".

The proposed amendment moves subsection (b)(5) to (b)(12) and restructures it so that—

- (A) trade secret offenses in which the defendant knew or intended that the trade secret would be transported or transmitted out of the United States — which currently do not receive an enhancement — receive a 2-level enhancement; and
- (B) trade secret offenses in which the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent — which currently receive a 2-level enhancement — receive a 4-level enhancement and a minimum offense level of 14.

Conforming changes to account for the renumbering are also made.

Proposed Amendment:

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

- (a) Base Offense Level:
 - (1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
 - (2) **6**, otherwise.
- (b) Specific Offense Characteristics
 - (1) If the loss exceeded \$5,000, increase the offense level as follows:

<u>Loss</u> (Apply the Greatest)	<u>Increase in Level</u>
(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$30,000	add 6
(E) More than \$70,000	add 8
(F) More than \$120,000	add 10

(G)	More than \$200,000	add 12
(H)	More than \$400,000	add 14
(I)	More than \$1,000,000	add 16
(J)	More than \$2,500,000	add 18
(K)	More than \$7,000,000	add 20
(L)	More than \$20,000,000	add 22
(M)	More than \$50,000,000	add 24
(N)	More than \$100,000,000	add 26
(O)	More than \$200,000,000	add 28
(P)	More than \$400,000,000	add 30 .

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;
 - (B) involved 50 or more victims, increase by **4** levels; or
 - (C) involved 250 or more victims, increase by **6** levels.
- (3) If the offense involved a theft from the person of another, increase by **2** levels.
- (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.
- ~~(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.~~
- ~~(6)~~(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.
- ~~(7)~~(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.
- ~~(8)~~(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than \$1,000,000, increase by **2** levels; (ii) more than \$7,000,000, increase by **3** levels; or (iii) more than \$20,000,000, increase by **4** levels.
- ~~(9)~~(8) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other

fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

~~(10)~~(9) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

~~(11)~~(10) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

~~(12)~~(11) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(12) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended—

(A) that the trade secret would be transported or transmitted out of the United States, increase by **2** levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **4** levels.

If subparagraph (B) applies and the resulting offense level is less than level **14**, increase to level **14**.

[and make conforming changes as needed to reflect the renumbering of subsections]

(13) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(14) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

- (15) (Apply the greater) If—
- (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or
 - (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by **4** levels.
 - (C) The cumulative adjustments from application of both subsections (b)(2) and (b)(15)(B) shall not exceed **8** levels, except as provided in subdivision (D).
 - (D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.
- (16) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.
- (17) (A) (Apply the greatest) If the defendant was convicted of an offense under:
- (i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.
 - (ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.
 - (iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.
- (B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.
- (18) If the offense involved—
- (A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser,

or a person associated with an investment adviser; or

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

increase by **4** levels.

(c) Cross References

- (1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.
- (2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.
- (3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.
- (4) If the offense involved a cultural heritage resource or a paleontological resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1037, 1040,

1341-1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312-2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Cultural heritage 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).

"Equity securities" has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).

"Federal health care offense" has the meaning given that term in 18 U.S.C. § 24.

"Financial institution" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," primarily include large pension funds that serve many persons (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

"Firearm" and "destructive device" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

"Foreign instrumentality" and "foreign agent" have the meaning given those terms in 18 U.S.C. § 1839(1) and (2), respectively.

"Government health care program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. Examples of such programs are the Medicare program, the Medicaid program, and the CHIP program.

"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).

"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.

"Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).

"Theft from the person of another" means theft, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing and non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

"Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).

"Veterans' memorial" means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).

"Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

2. Application of Subsection (a)(1).—

(A) "Referenced to this Guideline".—For purposes of subsection (a)(1), an offense is "referenced to this guideline" if (i) this guideline is the applicable Chapter Two guideline determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of conviction; or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

(B) Definition of "Statutory Maximum Term of Imprisonment".—For purposes of this guideline, "statutory maximum term of imprisonment" means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.

(C) Base Offense Level Determination for Cases Involving Multiple Counts.—In a case involving multiple counts sentenced under this guideline, the applicable base offense

level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.

3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) Rules of Construction in Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(II) Procurement Fraud Cases.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an

offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

- (B) Gain.—*The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.*
- (C) Estimation of Loss.—*The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).*

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

- (i) *The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.*
 - (ii) *In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.*
 - (iii) *The cost of repairs to damaged property.*
 - (iv) *The approximate number of victims multiplied by the average loss to each victim.*
 - (v) *The reduction that resulted from the offense in the value of equity securities or other corporate assets.*
 - (vi) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*
- (D) Exclusions from Loss.—*Loss shall not include the following:*
- (i) *Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.*
 - (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.*
- (E) Credits Against Loss.—*Loss shall be reduced by the following:*
- (i) *The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or*

government agency.

- (ii) *In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.*
- (iii) *Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.*

In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.

(F) Special Rules.—*Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:*

- (i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—*In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 9(A).*
- (ii) Government Benefits.—*In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, loss is \$50.*
- (iii) Davis-Bacon Act Violations.—*In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 3142, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.*
- (iv) Ponzi and Other Fraudulent Investment Schemes.—*In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced*

by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (*i.e.*, the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).

- (v) Certain Other Unlawful Misrepresentation Schemes.—In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.
- (vi) Value of Controlled Substances.—In a case involving controlled substances, loss is the estimated street value of the controlled substances.
- (vii) Value of Cultural Heritage Resources or Paleontological Resources.—In a case involving a cultural heritage resource or paleontological resource, loss attributable to that resource shall be determined in accordance with the rules for determining the "value of the resource" set forth in Application Note 2 of the Commentary to §2B1.5.
- (viii) Federal Health Care Offenses Involving Government Health Care Programs.—In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute *prima facie* evidence of the amount of the intended loss, *i.e.*, is evidence sufficient to establish the amount of the intended loss, if not rebutted.
- (ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities.—In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—
 - (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and
 - (II) multiplying the difference in average price by the number of shares outstanding.

In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (*e.g.*, changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-

specific facts, conditions, or events).

4. Application of Subsection (b)(2).—

- (A) Definition.—For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.
- (B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages.—For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.
- (C) Undelivered United States Mail.—
- (i) In General.—In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.
- (ii) Special Rule.—A case described in subdivision (C)(i) of this note that involved—
- (I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.
- (II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.
- (iii) Definition.—"Undelivered United States mail" means mail that has not actually been received by the addressee or the addressee's agent (e.g., mail taken from the addressee's mail box).
- (D) Vulnerable Victims.—If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.
- (E) Cases Involving Means of Identification.—For purposes of subsection (b)(2), in a case involving means of identification "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.

5. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).—For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:
- (A) *The regularity and sophistication of the defendant’s activities.*
 - (B) *The value and size of the inventory of stolen property maintained by the defendant.*
 - (C) *The extent to which the defendant’s activities encouraged or facilitated other crimes.*
 - (D) *The defendant’s past activities involving stolen property.*
6. Application of Subsection (b)(7).—For purposes of subsection (b)(7), "improper means" includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.
7. Application of Subsection (b)(9).—
- (A) In General.—The adjustments in subsection (b)(9) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.
 - (B) Misrepresentations Regarding Charitable and Other Institutions.—Subsection (b)(9)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable, educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (*e.g.*, for the defendant’s personal gain). Subsection (b)(9)(A) applies, for example, to the following:
 - (i) *A defendant who solicited contributions for a non-existent famine relief organization.*
 - (ii) *A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.*
 - (iii) *A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant’s personal benefit.*
 - (C) Fraud in Contravention of Prior Judicial Order.—Subsection (b)(9)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree

or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).

(D) College Scholarship Fraud.—For purposes of subsection (b)(9)(D):

"Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.

"Institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).

(E) Non-Applicability of Chapter Three Adjustments.—

(i) Subsection (b)(9)(A).—If the conduct that forms the basis for an enhancement under subsection (b)(9)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under §3B1.3.

(ii) Subsection (b)(9)(B) and (C).—If the conduct that forms the basis for an enhancement under subsection (b)(9)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under §3C1.1.

8. Sophisticated Means Enhancement under Subsection (b)(10).—

(A) Definition of United States.—For purposes of subsection (b)(10)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(B) Sophisticated Means Enhancement.—For purposes of subsection (b)(10)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.

(C) Non-Applicability of Chapter Three Adjustment.—If the conduct that forms the basis for an enhancement under subsection (b)(10) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.

9. Application of Subsection (b)(11).—

(A) Definitions.—For purposes of subsection (b)(11):

"Authentication feature" has the meaning given that term in 18 U.S.C. § 1028(d)(1).

"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.

"Device-making equipment" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).

"Produce" includes manufacture, design, alter, authenticate, duplicate, or assemble. "Production" includes manufacture, design, alteration, authentication, duplication, or assembly.

"Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).

"Unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3).

(B) Authentication Features and Identification Documents.—Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.

(C) Application of Subsection (b)(11)(C)(i).—

(i) In General.—Subsection (b)(11)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

(ii) Examples.—Examples of conduct to which subsection (b)(11)(C)(i) applies are as follows:

(I) A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.

(II) A defendant obtains an individual's name and address from a source

(e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.

(iii) Non-Applicability of Subsection (b)(11)(C)(i).—*Examples of conduct to which subsection (b)(11)(C)(i) does not apply are as follows:*

(I) *A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.*

(II) *A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.*

(D) Application of Subsection (b)(11)(C)(ii).—*Subsection (b)(11)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.*

10. Application of Subsection (b)(13).—*Subsection (b)(13) provides a minimum offense level in the case of an ongoing, sophisticated operation (e.g., an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft. A "cargo shipment" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.*

11. Gross Receipts Enhancement under Subsection (b)(15)(A).—

(A) In General.—*For purposes of subsection (b)(15)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.*

(B) Definition.—*"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*

12. Application of Subsection (b)(15)(B).—

(A) Application of Subsection (b)(15)(B)(i).—*The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:*

(i) *The financial institution became insolvent.*

(ii) *The financial institution substantially reduced benefits to pensioners or insureds.*

(iii) *The financial institution was unable on demand to refund fully any deposit,*

payment, or investment.

- (iv) *The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.*
- (v) *One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".*

(B) Application of Subsection (b)(15)(B)(ii).—

- (i) Definition.—*For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).*
- (ii) In General.—*The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:*
 - (I) *The organization became insolvent or suffered a substantial reduction in the value of its assets.*
 - (II) *The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).*
 - (III) *The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.*
 - (IV) *The organization substantially reduced its workforce.*
 - (V) *The organization substantially reduced its employee pension benefits.*
 - (VI) *The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.*
 - (VII) *One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".*

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

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

"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems,

financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).

- (B) *Subsection (b)(17)(A)(iii).—If the same conduct that forms the basis for an enhancement under subsection (b)(17)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(15)(B), do not apply the enhancement under subsection (b)(15)(B).*

14. *Application of Subsection (b)(18).—*

- (A) *Definitions.—For purposes of subsection (b)(18):*

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

"Commodity pool operator" has the meaning given that term in section 1a(5) 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)(18) 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)(18) applies, do not apply §3B1.3.

15. Cross Reference in Subsection (c)(3).—Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense involves fraudulent conduct that is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 (Structuring Transactions to Evade Reporting Requirements) likely would be more apt, and false statements to a customs officer, for which §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to §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).
16. Continuing Financial Crimes Enterprise.—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise".
17. Partially Completed Offenses.—In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 of the Commentary to §2X1.1.
18. Multiple-Count Indictments.—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).
19. Departure Considerations.—
 - (A) Upward Departure Considerations.—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. The following is a non-

exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

- (i) *A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.*
 - (ii) *The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.*
 - (iii) *The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).*
 - (iv) *The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.*
 - (v) *In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.*
 - (vi) *In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:*
 - (I) *The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.*
 - (II) *An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.*
 - (III) *The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.*
- (B) *Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(17)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.*

- (C) Downward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.

- (D) Downward Departure for Major Disaster or Emergency Victims.—If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.

Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics and cross references contained in this guideline are designed with these considerations in mind.

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under §2B3.1 (Robbery).

A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable

impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Offenses that involve the use of financial transactions or financial accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum offense level of level 12 is provided for these offenses.

Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101 and the directive to the Commission in section 3 of Public Law 110–384.

Subsection (b)(8) implements the directive to the Commission in section 10606 of Public Law 111–148.

Subsection (b)(9)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106–420.

Subsection (b)(10) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.

Subsections (b)(11)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

*Subsection (b)(11)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding", in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (*i.e.*, produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification", the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (*i.e.*, produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (*e.g.*, a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (*e.g.*, harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.*

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

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

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

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

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

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

EXHIBIT C

PROPOSED AMENDMENT: COUNTERFEIT AND ADULTERATED DRUGS; COUNTERFEIT MILITARY PARTS

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

Offenses Under Section 2320

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

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

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

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

- (A) *ensure that the sentencing guidelines and policy statements reflect*

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

- (B) consider the extent to which the guidelines may or may not appropriately account for the potential and actual harm to the public resulting from the offense;*
- (C) assure reasonable consistency with other relevant directives and with other sentencing guidelines;*
- (D) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;*
- (E) make any necessary conforming changes to the sentencing guidelines; and*
- (F) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.*

Section 2320 and Counterfeit Drugs

First, the proposed amendment responds to the directive and addresses offenses involving counterfeit drugs. It amends §2B5.3 to establish a new enhancement at subsection (b)(5) that provides an enhancement of 2 levels if the offense involves a counterfeit drug.

Section 2320 and Counterfeit Military Goods and Services

Second, the proposed amendment addresses offenses involving counterfeit military goods and services. It amends §2B5.3 to establish a new specific offense characteristic at subsection (b)(7) that applies if the offense involves a counterfeit military good or service the use, malfunction, or failure of which is likely to cause the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security. The new subsection (b)(7) provides an enhancement of 2 levels and a minimum offense level of level 14.

The proposed amendment also adds Commentary to §2B5.3 to clarify that "other significant harm to a member of the Armed Forces" means significant harm other than serious bodily injury or death. In a case in which the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, subsection (b)(5)(A) (conscious or reckless risk of serious bodily injury or death) would apply.

Section 2320 and Offenses Resulting in Death or Serious Bodily Injury

Third, the proposed amendment amends the Commentary to §2B5.3 to add a new departure consideration for any offense sentenced under §2B5.3. The new departure provision provides that a departure may be warranted if the offense resulted in death or serious bodily injury.

Section 333 and Offenses Involving Intentionally Adulterated Drugs

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

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

The proposed amendment responds to the new offense under section 333(b)(7) by amending Appendix A (Statutory Index) to reference offenses under section 333(b)(7) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury).

Proposed Amendment:

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
 - (1) If the infringement amount (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
 - (2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.
 - (3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
 - (4) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but the resulting offense level shall be not less than level **8**.

Counterfeit Drugs:

- (5) If the offense involved a counterfeit drug, increase by **2** levels.
- ~~(5)~~(6) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon

(including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

Counterfeit Military Parts:

- (7) If the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause (A) the disclosure of classified information; (B) impairment of combat operations; or (C) other significant harm to (i) a combat operation, (ii) a member of the Armed Forces, or (iii) national security, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

"Counterfeit military good or service" has the meaning given that term in 18 U.S.C. § 2320(f)(4).

"Infringed item" means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

"Infringing item" means the item that violates the copyright or trademark laws.

"Uploading" means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item as an openly shared file. "Uploading" does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is an openly shared file.

"Work being prepared for commercial distribution" has the meaning given that term in 17 U.S.C. § 506(a)(3).

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

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

the following:

- (i) *The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.*
 - (ii) *The retail price of the infringing item is not less than 75% of the retail price of the infringed item.*
 - (iii) *The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.*
 - (iv) *The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the "retail value of the infringed item" is the price the user of the transmission would have paid to lawfully receive that transmission, and the "infringed item" is the satellite transmission rather than the intercepting device.)*
 - (v) *The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.*
 - (vi) *The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the "retail value of the infringed item" is the value of that item upon its initial commercial distribution.*
 - (vii) *A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.*
 - (viii) *A case under 17 U.S.C. §§ 1201 and 1204 in which the defendant used a circumvention device. In such an offense, the "retail value of the infringed item" is the price the user would have paid to access lawfully the copyrighted work, and the "infringed item" is the accessed work.*
- (B) *Use of Retail Value of Infringing Item.—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A.*
- (C) *Retail Value Defined.—For purposes of this Application Note, the "retail value" of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.*
- (D) *Determination of Infringement Amount in Cases Involving a Variety of Infringing*

Items.—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B) of this Application Note. For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (*i.e.*, the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (*i.e.*, the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).

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

Counterfeit Military Parts:

3. *Application of Subsection (b)(7).*—In subsection (b)(7), "other significant harm to a member of the Armed Forces" means significant harm other than serious bodily injury or death. In a case in which the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, subsection (b)(5)(A) (conscious or reckless risk of serious bodily injury or death) would apply.

[and renumber the notes that follow accordingly and make conforming changes as needed]

3. *Application of §3B1.3.*—If the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.
4. *Departure Considerations.*—If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:
- (A) The offense involved substantial harm to the reputation of the copyright or trademark owner.
 - (B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.
 - (C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.
 - (D) The offense resulted in death or serious bodily injury.

Background: This guideline treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guideline, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property

offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147, by using the retail value of the infringed item, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.

Subsection (b)(5) implements the directive to the Commission in section 717 of Public Law 112–144.

Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

* * *

APPENDIX A - STATUTORY INDEX

* * *

21 U.S.C. § 333(b)(1)–(6) 2N2.1

21 U.S.C. § 333(b)(7) 2N1.1

EXHIBIT D

PROPOSED AMENDMENT: TAX DEDUCTIONS

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

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

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

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

potentially complex exercise of speculating about unclaimed deductions.

The proposed amendment resolves the conflict by amending the Commentary to §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents) to provide a new application note stating that, "in determining the tax loss, the court should account for the standard deduction and personal and dependent exemptions to which the defendant was entitled. In addition, the court should account for any unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only to the extent that (A) the credit, deduction, or exemption was related to the tax offense and could have been claimed at the time the tax offense was committed; (B) the credit, deduction, or exemption is reasonably and practicably ascertainable; and (C) the defendant presents information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy (see §6A1.3 (Resolution of Disputed Factors) (Policy Statement))".

However, the application note continues, "the court shall not account for payments to third parties made in a manner that encouraged or facilitated a separate violation of law (e.g., 'under the table' payments to employees or expenses incurred to obstruct justice)."

Finally, the application note explains, "the burden is on the defendant to establish any such credit, deduction, or exemption by a preponderance of the evidence."

Proposed Amendment:

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

- (a) Base Offense Level:
 - (1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or
 - (2) **6**, if there is no tax loss.
- (b) Specific Offense Characteristics
 - (1) If the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
 - (2) If the offense involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (c) Special Instructions
 - For the purposes of this guideline --
 - (1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had

the offense been successfully completed).

Notes:

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

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

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

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

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

Notes:

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

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

- (3) If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.
- (4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.
- (5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

Commentary

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

Application Notes:

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

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

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

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

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

In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

2. *In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The*

following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: (a) there is a continuing pattern of violations of the tax laws by the defendant; (b) the defendant uses a consistent method to evade or camouflage income, *e.g.*, backdating documents or using off-shore accounts; (c) the violations involve the same or a related series of transactions; (d) the violation in each instance involves a false or inflated claim of a similar deduction or credit; and (e) the violation in each instance involves a failure to report or an understatement of a specific source of income, *e.g.*, interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive.

3. Unclaimed Credits, Deductions, and Exemptions.—In determining the tax loss, the court should account for the standard deduction and personal and dependent exemptions to which the defendant was entitled. In addition, the court should account for any unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only to the extent that (A) the credit, deduction, or exemption was related to the tax offense and could have been claimed at the time the tax offense was committed; (B) the credit, deduction, or exemption is reasonably and practicably ascertainable; and (C) the defendant presents information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy (*see* §6A1.3 (Resolution of Disputed Factors) (Policy Statement)).

However, the court shall not account for payments to third parties made in a manner that encouraged or facilitated a separate violation of law (*e.g.*, "under the table" payments to employees or expenses incurred to obstruct justice).

The burden is on the defendant to establish any such credit, deduction, or exemption by a preponderance of the evidence. *See* §6A1.3, comment.

34. "Criminal activity" means any conduct constituting a criminal offense under federal, state, local, or foreign law.
45. Sophisticated Means Enhancement.— For purposes of subsection (b)(2), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.
56. A "credit claimed against tax" is an item that reduces the amount of tax directly. In contrast, a "deduction" is an item that reduces the amount of taxable income.
67. "Gross income," for the purposes of this section, has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61.
78. If the offense involved both individual and corporate tax returns, the tax loss is the aggregate tax loss from the individual tax offense and the corporate tax offense added together. Accordingly, in a case in which a defendant fails to report income derived from a corporation on both the defendant's individual tax return and the defendant's corporate tax return, the tax loss is the sum of (A) the unreported or diverted amount multiplied by (i) 28%; or (ii) the tax rate for the individual tax offense, if sufficient information is available to make a more accurate assessment of that tax rate; and (B) the unreported or diverted amount multiplied by (i) 34%; or (ii) the tax rate for the corporate tax offense, if sufficient information is available to make a more accurate

assessment of that tax rate. For example, the defendant, the sole owner of a Subchapter C corporation, fraudulently understates the corporation's income in the amount of \$100,000 on the corporation's tax return, diverts the funds to the defendant's own use, and does not report these funds on the defendant's individual tax return. For purposes of this example, assume the use of 34% with respect to the corporate tax loss and the use of 28% with respect to the individual tax loss. The tax loss attributable to the defendant's corporate tax return is \$34,000 (\$100,000 multiplied by 34%). The tax loss attributable to the defendant's individual tax return is \$28,000 (\$100,000 multiplied by 28%). The tax loss for the offenses are added together to equal \$62,000 (\$34,000 + \$28,000).

Background: This guideline relies most heavily on the amount of loss that was the object of the offense. Tax offenses, in and of themselves, are serious offenses; however, a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from the offense increases, the sanction necessary to deter also increases.

Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax offenses are inconsequential in relation to the potential increase in revenue. According to estimates current at the time this guideline was originally developed (1987), income taxes are underpaid by approximately \$90 billion annually. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than \$100,000 in tax loss. The increase is expected to be somewhat larger for cases involving more taxes.

Failure to report criminally derived income is included as a factor for deterrence purposes. Criminally derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. § 994(i)(2).

Although tax offenses always involve some planning, unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes.

The guideline does not make a distinction for an employee who prepares fraudulent returns on behalf of his employer. The adjustments in Chapter Three, Part B (Role in the Offense) should be used to make appropriate distinctions.

EXHIBIT E

PROPOSED AMENDMENT: ACCEPTANCE OF RESPONSIBILITY

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

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

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

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

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

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

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

The proposed amendment adopts the approach of the Fifth Circuit by recognizing that the court has discretion to deny the third level of reduction. Specifically, it amends Application Note 6 to §3E1.1 by adding a statement that "If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion."

Whether the Government Has Discretion to Withhold a Motion Based on Whether the Defendant Agrees to Waive His or Her Right to Appeal

Circuits also have disagreed over whether the government has discretion to withhold a motion under subsection (b) based on whether the defendant agrees to waive his or her right to appeal.

The Fourth Circuit has held that a defendant's failure to sign an appellate waiver was not a legitimate reason for the government to withhold a §3E1.1(b) motion. See *United States v. Divens*, 650 F.3d 343 (4th Cir. 2011). See also *United States v. Davis*, ___ F.3d ___ (7th Cir., April 9, 2013) (Rovner, J., concurring) ("insisting that [the defendant] waive his right to appeal before he may receive the maximum credit under the Guidelines for accepting responsibility serves none of the interests identified in section 3E1.1. ").

In contrast, other circuits have held that a defendant's failure to sign an appellate waiver was a legitimate reason for the government to withhold a §3E1.1(b) motion. See, e.g., *United States v. Johnson*, 581 F.3d 994 (9th Cir. 2009); *United States v. Deberry*, 576 F.3d 708 (7th Cir. 2009); *United States v. Newson*, 515 F.3d 374 (5th Cir. 2008).

The proposed amendment amends Application Note 6 to §3E1.1 by adding a statement that "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."

Proposed Amendment:

§3E1.1. Acceptance of Responsibility

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

Commentary

Application Notes:

- 1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:
 - (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in

respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;

- (B) voluntary termination or withdrawal from criminal conduct or associations;*
 - (C) voluntary payment of restitution prior to adjudication of guilt;*
 - (D) voluntary surrender to authorities promptly after commission of the offense;*
 - (E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;*
 - (F) voluntary resignation from the office or position held during the commission of the offense;*
 - (G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and*
 - (H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.*
- 2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.*
 - 3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.*
 - 4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.*
 - 5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.*
 - 6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional*

1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Public Law 108–21. The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.

If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

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

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

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

EXHIBIT F

PROPOSED AMENDMENT: SETSER

Synopsis of Proposed Amendment: *A federal court imposing a sentence on a defendant generally has discretion to order that the sentence run consecutively to (or, in the alternative, concurrently with) a term of imprisonment previously imposed but not yet discharged. See 18 U.S.C. § 3584(a). Recently, the Supreme Court held that federal courts also have a similar discretion, independent of section 3584, to order that the sentence run consecutively to (or concurrently with) an anticipated, but not yet imposed, state sentence. See Setser v. United States, 132 S. Ct. 1463, 1468 (2012).*

The guideline that applies to the court's exercise of discretion under section 3584 is §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment). That guideline provides guidance to the court in determining whether the sentence for the instant offense should run consecutively to (or, in the alternative, concurrently with) the prior undischarged term of imprisonment.

The proposed amendment amends the background commentary to §5G1.3 to include a statement that, in addition to the discretion provided by section 3584, federal courts also generally have discretion under Setser to order that the sentences they impose will run concurrently or consecutively with other state sentences that are anticipated but not yet imposed.

Proposed Amendment:

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

- (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- (b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:
 - (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
 - (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.
- (c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged

term of imprisonment to achieve a reasonable punishment for the instant offense.

Commentary

Application Notes:

1. Consecutive Sentence - Subsection (a) Cases. Under subsection (a), the court shall impose a consecutive sentence when the instant offense was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.
2. Application of Subsection (b).—
 - (A) In General.—Subsection (b) applies in cases in which all of the prior offense (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct); and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).
 - (B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Three offense level for the instant offense but was not relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3) (e.g., the prior offense is an aggravated felony for which the defendant received an increase under §2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level under §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).
 - (C) Imposition of Sentence.—If subsection (b) applies, and the court adjusts the sentence for a period of time already served, the court should note on the Judgment in a Criminal Case Order (i) the applicable subsection (e.g., §5G1.3(b)); (ii) the amount of time by which the sentence is being adjusted; (iii) the undischarged term of imprisonment for which the adjustment is being given; and (iv) that the sentence imposed is a sentence reduction pursuant to §5G1.3(b) for a period of imprisonment that will not be credited by the Bureau of Prisons.
 - (D) Example.—The following is an example in which subsection (b) applies and an adjustment to the sentence is appropriate:

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

state charge as of the date of sentencing on the instant federal offense, a sentence of seven months, imposed to run concurrently with the three months remaining on the defendant's state sentence, achieves this result.

3. Application of Subsection (c).—

- (A) In General.—Under subsection (c), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:
- (i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));
 - (ii) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;
 - (iii) the time served on the undischarged sentence and the time likely to be served before release;
 - (iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and
 - (v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.
- (B) Partially Concurrent Sentence.—In some cases under subsection (c), a partially concurrent sentence may achieve most appropriately the desired result. To impose a partially concurrent sentence, the court may provide in the Judgment in a Criminal Case Order that the sentence for the instant offense shall commence on the earlier of (i) when the defendant is released from the prior undischarged sentence; or (ii) on a specified date. This order provides for a fully consecutive sentence if the defendant is released on the undischarged term of imprisonment on or before the date specified in the order, and a partially concurrent sentence if the defendant is not released on the undischarged term of imprisonment by that date.
- (C) Undischarged Terms of Imprisonment Resulting from Revocations of Probation, Parole or Supervised Release.—Subsection (c) applies in cases in which the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense and has had such probation, parole, or supervised release revoked. Consistent with the policy set forth in Application Note 4 and subsection (f) of §7B1.3 (Revocation of Probation or Supervised Release), the Commission recommends that the sentence for the instant offense be imposed consecutively to the sentence imposed for the revocation.
- (D) Complex Situations.—Occasionally, the court may be faced with a complex case in which a defendant may be subject to multiple undischarged terms of imprisonment that seemingly call for the application of different rules. In such a case, the court may exercise its discretion in accordance with subsection (c) to fashion a sentence of appropriate length and structure it to run in any appropriate manner to achieve a reasonable punishment for the instant offense.

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

To avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(c), rather than as a credit for time served.

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

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

EXHIBIT G

PROPOSED AMENDMENT: MISCELLANEOUS AND TECHNICAL

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

A. Recently Enacted Legislation

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

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

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

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

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

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

The proposed amendment amends Appendix A (Statutory Index) to reference section 1752 offenses to §2A2.4 (Obstructing or Impeding Officers) and §2B2.3 (Trespass). The proposed amendment also amends §2B2.3 to apply the greater of the 2-level enhancement at subsection (b)(1) if a trespass occurred at a restricted building or grounds, or a new 4-level enhancement at

subsection (b)(2) if a trespass occurred at the White House or its grounds, or the Vice President's official residence or its grounds.

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

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

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

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

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

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

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

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

Section 554 of title 18, United States Code (Smuggling goods from the United States), makes it unlawful to export or send from the United States (or attempt to do so) any merchandise, article, or object contrary to any law or regulation of the United States. It also makes it unlawful to receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise, article, or object, prior to exportation, knowing the same to be intended for exportation contrary to any law or regulation of the United States. Offenses under section 554 have a statutory maximum term of imprisonment of ten years, and they are referenced in Appendix A (Statutory Index) to three guidelines: §§2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), and 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants).

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

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

Part C of the proposed amendment amends Appendix A (Statutory Index) to broaden the range of guidelines to which offenses under 18 U.S.C. § 554 are referenced by adding a reference to §2M5.1.

D. Technical and Stylistic Changes

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

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

Second, it amends the Notes to the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide updated references to the definition of tetrahydrocannabinols contained in 21 C.F.R. § 1308.11(d), which were renumbered by 75 FR 79296 (December 20, 2010).

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

Proposed Amendment:

(A) Recently Enacted Legislation

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 38 2B1.1

18 U.S.C. § 39A 2A5.2

* * *

18 U.S.C. § 1513 2A1.1, 2A1.2, 2A1.3,
2A2.1, 2A2.2, 2A2.3,
2B1.1, 2J1.2

18 U.S.C. § 1514(c) 2J1.2

* * *

18 U.S.C. § 1751(e) 2A2.2, 2A2.3

18 U.S.C. § 1752 2A2.4, 2B2.3

* * *

19 U.S.C. § 1586(e) 2T3.1

19 U.S.C. § 1590(d)(1) 2T3.1

19 U.S.C. § 1590(d)(2) 2D1.1

* * *

§2B2.3. Trespass

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) (Apply the greater) If—

(A) If the trespass occurred (i) ~~(A)~~ at a secure government facility; (ii) ~~(B)~~ at a nuclear energy facility; (iii) ~~(C)~~ on a vessel or aircraft of the United States; (iv) ~~(D)~~ in a secure area of an airport or a seaport; ~~(E)~~ at a residence; (v) ~~(F)~~ at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration; (vi) at any restricted building

or grounds; or (vii) ~~(G)~~ on a computer system used (I) ~~(i)~~ to maintain or operate a critical infrastructure; or (II) ~~(ii)~~ by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels; or:

(B) the trespass occurred at the White House or its grounds, or the Vice President's official residence or its grounds, increase by 4 levels.

- (2) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.
 - (3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
- (c) Cross Reference
- (1) If the offense was committed with the intent to commit a felony offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1030(a)(3), 1036, 2199; 38 U.S.C. § 2413; 42 U.S.C. § 7270b. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Airport" has the meaning given that term in section 47102 of title 49, United States Code.

"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

"Felony offense" means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought or a conviction was obtained.

"Firearm" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).

"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).

"Protected computer" means a computer described in 18 U.S.C. § 1030(e)(2)(A) or (B).

"Restricted building or grounds" has the meaning given that term in 18 U.S.C. § 1752.

"Seaport" has the meaning given that term in 18 U.S.C. § 26.

2. Valuation of loss is discussed in the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

Background: Most trespasses punishable under federal law involve federal lands or property. The trespass section provides an enhancement for offenses involving trespass on secure government installations (such as nuclear facilities) and other locations (such as airports and seaports) to protect a significant federal interest. Additionally, an enhancement is provided for trespass at a residence.

(B) Interaction Between 2J and 3C

§2J1.2. Obstruction of Justice

* * *

Commentary

* * *

Application Notes:

* * *

2. Chapter Three Adjustments.—

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

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

* * *

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

* * *

Commentary

* * *

Application Notes:

* * *

2. For offenses covered under this section, ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~ §3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply, unless the defendant obstructed the investigation or trial of the perjury count.
3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which he committed perjury, subornation of perjury, or witness bribery), see the Commentary to Chapter Three, Part C (Obstruction and Related Adjustments) §3C1.1, and to §3D1.2(c) (Groups of Closely Related Counts).

* * *

§2J1.6. Failure to Appear by Defendant

* * *

Commentary

* * *

Application Notes:

* * *

2. For offenses covered under this section, ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~ §3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply, unless the defendant obstructed the investigation or trial of the failure to appear count.
3. In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. See §5G1.3(a). The guideline range for the failure to appear count is to be determined independently and the grouping rules of §§3D1.1-3D1.5 do not apply.

However, in the case of a conviction on both the underlying offense and the failure to appear, other than a case of failure to appear for service of sentence, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense, and the failure to appear count and the count or counts for the underlying offense are grouped together under §3D1.2(c). (Note that 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b)(1), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30-37 months and the court determines that a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the failure to

appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. § 3146(b)(2).)

4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (e.g., perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice) is made because of the operation of the rules set out in Application Note 3.

* * *

§2J1.9. Payment to Witness

* * *

Commentary

* * *

Application Notes:

1. For offenses covered under this section, ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply unless the defendant obstructed the investigation or trial of the payment to witness count.
2. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which the payment was made), see the Commentary to ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1, and to §3D1.2(c) (Groups of Closely Related Counts).

* * *

(C) 18 U.S.C. § 554

APPENDIX A - STATUTORY INDEX

* * *

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

* * *

(D) Technical and Stylistic Changes

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

Obligations of the United States

* * *

Commentary

* * *

Application Notes:

* * *

14. Application of Subsection (b)(18).—

(A) Definitions.—For purposes of subsection (b)(18):

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

"Commodity pool operator" has the meaning given that term in section 1a(511) of the Commodity Exchange Act (7 U.S.C. § 1a(511)).

"Commodity trading advisor" has the meaning given that term in section 1a(612) of the Commodity Exchange Act (7 U.S.C. § 1a(612)).

"Futures commission merchant" has the meaning given that term in section 1a(2028) of the Commodity Exchange Act (7 U.S.C. § 1a(2028)).

"Introducing broker" has the meaning given that term in section 1a(2331) of the Commodity Exchange Act (7 U.S.C. § 1a(2331)).

"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.

* * *

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

* * *

***Notes to Drug Quantity Table:**

* * *

- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(3031)), (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)(3031)), (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.

* * *

§4A1.1. Criminal History Category

* * *

Commentary

* * *

Application Notes:

* * *

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

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

* * *

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

* * *

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

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

* * *

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

* * *

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

* * *

(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.

* * *