

United States Sentencing Commission Public Meeting Minutes
April 9, 2015

Chair Patti B. Saris called the meeting to order at 1:00 p.m. in the Commissioners' Conference Room.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- Dabney L. Friedrich, Commissioner
- Rachel E. Barkow, Commissioner
- William H. Pryor, Jr., Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner attended via teleconference:

- Charles R. Breyer, Vice Chair

The following Commissioner was not present:

- J. Patricia Wilson Smoot, Commissioner Ex Officio

The following staff participated in the meeting:

- Kenneth P. Cohen, Staff Director
- Kathleen Grilli, General Counsel

Chair Saris welcomed the public to the meeting, both in person and watching via the Commission's first video livestream, and expressed the Commission's appreciation for the public's interest in federal sentencing issues.

Chair Saris thanked everyone who submitted public comment and the individuals and organizations who testified at the Commission's March hearing. She thanked the members of Congress who submitted letters, especially Senators Charles Grassley and Dianne Feinstein. The Chair also thanked the Department of Justice, the Federal Public and Community Defenders, the Commission's advisory groups, and the many advocacy groups, law enforcement organizations, and of course individuals who submitted their views. Chair Saris emphasized that public participation during the amendment cycle was critical.

Chair Saris called for a motion to adopt the January 9, 2015, public meeting minutes. Commissioner Barkow made a motion to adopt the minutes, with Commissioner Pryor seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris reported that the Commission will hold its 2015 National Training Program at the

Hilton Riverside in New Orleans, LA, on September 16-18, 2015. Information about registration will be posted on the Commission's website. She also announced that the Commission's Fiscal Year 2014 Sourcebook of Federal Sentencing Statistic and Annual Report is available on the Commission's website.

Chair Saris called on the Staff Director to give his report.

Mr. Cohen reported that Ms. Pamela Montgomery, long time Director and Chief Counsel of the Commission's Office of Education and Sentencing Practices, recently retired after 30 years of distinguished public service. During her tenure, Ms. Montgomery trained thousands of judges, probation officers, and practitioners. Ms. Raquel Wilson will serve as Acting Director of the Office of Education and Sentencing Practices. Ms. Wilson has been with the Commission for six years as a Deputy General Counsel.

Mr. Cohen also reported that Noah Bookbinder, Director of the Commission's Office of Legislative and Public Affairs for two years, recently left the agency to become Executive Director of Citizens for Responsibility and Ethics in Washington. Ms. Kira Antell, a member of the Office of Legislative and Public Affairs for seven years, will serve as its Acting Director.

Chair Saris called on Ms. Grilli to inform the Commission on possible votes to promulgate proposed amendments to the Guidelines Manual. The Chair noted that four affirmative votes were needed to promulgate an amendment.

Ms. Grilli stated that the first proposed amendment, attached hereto as Exhibit A, makes certain technical changes to the Guidelines Manual. Part A of the proposed amendment sets forth technical changes to reflect the editorial reclassification of certain sections in the United States Code. To reflect the new section numbers of the reclassified provisions, changes are made to—

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

Part B of the proposed amendment makes stylistic and technical changes to the Commentary following §3D1.5 (Determining the Total Punishment). Part C of the proposed amendment makes clerical changes to—

- 1) Background Commentary to §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement));
- 2) Commentary to §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery);
- 3) Subsection (e)(7) of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy); and,
- 4) Application Note 2 of §2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act).

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2015, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor 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 at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit B, responds to a circuit conflict regarding the meaning of the “single sentence” rule and its implications for the career offender guideline and other guidelines that use predicate offenses.

When a defendant’s criminal history includes two or more prior sentences that meet certain criteria specified in subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History), those prior sentences are counted as a “single sentence” rather than separately. Generally, this rule operates to reduce the cumulative impact of the prior sentences on the criminal history score. Courts are now divided over whether this “single sentence” rule also causes certain prior sentences that ordinarily would qualify as predicates under the career offender guideline to be disqualified from serving as predicates. See §4B1.2, comment. (n.3).

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

In 2014, in United States v. Williams, 753 F.3d 626 (6th Cir. 2014), the Sixth Circuit considered and rejected King as “nonsensical” because it permitted the defendant to “evade career offender status because he committed more crimes.” Because each of the sentences subsumed within the single sentence ordinarily would receive criminal history points, the Sixth Circuit held, the sentence that ordinarily would qualify as a career offender predicate was not disqualified by the single sentence rule; it remained eligible to serve as a career offender predicate.

The proposed amendment generally follows the Sixth Circuit's approach in Williams by amending the commentary to §4A1.2 to provide that, for purposes of determining predicate offenses, a prior sentence included in a single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points.

Finally, §§4A1.1 (Criminal History Category) and 4A1.2 are revised stylistically so that sentences "counted" as a single sentence are referred to instead as sentences "treated" as a single sentence.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2015, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Commissioner Pryor seconding. The Chair called for discussion on the vote.

Chair Saris stated that she had some reservations about the single sentence rule which resolves a highly technical circuit conflict. At the Commission's March hearing, however, stakeholders agreed that the issue comes up very rarely and the logic of the Sixth Circuit in Williams was compelling.

Nevertheless, Chair Saris continued, this circuit conflict highlights the bigger problem that the career offender guideline is only followed in 25.0 percent of cases, as a result of departures and variances: 43.0 percent involve government-sponsored departures and 29.0 percent are non-government sponsored variances. As part of the Commission's overall crime of violence report, she noted, it will look at career offender cases to see if there is a better way to define predicates so that the higher sentences are triggered by appropriate predicate offenses.

Hearing no further discussion, Chair Saris called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit C, would revise §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) to provide more guidance on the use of "jointly undertaken criminal activity" in determining relevant conduct under the guidelines. See §1B1.3(a)(1)(B). Specifically, it restructures the guideline and its commentary to set out more clearly the three-step analysis the court applies to hold the defendant accountable for acts of others in the jointly undertaken criminal activity. The three-step test requires that the court to (1) identify the scope of the jointly undertaken criminal activity; (2) determine whether the conduct of others in the jointly undertaken criminal activity was in furtherance of that criminal activity; and (3) determine whether the conduct of others was reasonably foreseeable in connection with that criminal activity.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2015, and with staff authorized to make technical and

conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor 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 at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit D, adjusts monetary tables in the guidelines to account for inflation. Specifically, the proposed amendment sets forth an approach for amending the seven monetary tables in the guidelines to adjust for inflation, based on changes to the Bureau of Labor Statistics' Consumer Price Index and on different time frames (taking into consideration the year each monetary table was last amended). For each of the seven tables, the proposed amendment adjusts the amounts in the monetary tables using a specific multiplier derived from the Consumer Price Index, and following a specific rounding methodology that is listed in the amendment.

For the loss table in §2B1.1 (Theft, Property, Destruction, and Fraud) and the tax table in §2T4.1 (Tax Table), the proposed amendment adjusts for inflation since 2001, the year both tables were last amended. For the loss tables in §§2B2.1 (Burglary) and 2B3.1 (Robbery), and the fine table for individual defendants at subsection (c)(3) in §5E1.2 (Fines for Individual Defendants), the proposed amendment adjusts for inflation since 1989, the year these tables were last amended. For the antitrust table in §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), the proposed amendment adjusts for inflation since 2005, the year the table was last amended. And, finally, for the fine table for organizational defendants at §8C2.4 (Base Fine), the proposed amendment adjusts for inflation since 1991, as the table has not been substantially amended since it was promulgated.

Each of the tables shows the initial multiplier used to make the adjustments for inflation taken from the Consumer Price Index. Also, as an aid to the reader, the proposed amendment is set forth in a manner that indicates, at each level of the monetary tables, the effective amount of the multiplier that results from the rounding methodology used. In addition, the proposed amendment includes conforming changes to other Chapter Two guidelines that refer to the monetary tables.

The proposed amendment also includes a special instruction to both §§5E1.2 and 8C2.4 providing that for offenses committed prior to November 1, 2015, the court should use the fine table that was set forth in the version of the corresponding guideline that was in effect on November 1, 2014, rather than the fine table as amended for inflation.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2015, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The

Chair called for discussion on the vote.

Chair Saris stated that the amendment was a key example of the Commission's good-government focus to ensure the guidelines and federal sentencing work well. She noted that Congress has generally mandated that agencies in the executive branch regularly adjust the civil monetary penalties they impose to account for inflation. However, the monetary values in the Chapter Two guidelines have never been revised specifically to account for inflation. Chair Saris stated that the vast majority of public comment supported adjusting the tables for inflation and the Commission believes the amendment received widespread support because everyone knows that a dollar today is worth less than it was in the past. Thus, she continued, the Commission has adopted changes to all monetary tables, including fines, which will result in increased fines, and it has used the year each table was last substantively amended as the baseline from which to determine the inflationary rate.

Hearing no further discussion, Chair Saris called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit E, is a result of the Commission's study of the operation of §3B1.2 (Mitigating Role) and related provisions in the Guidelines Manual.

First, the proposed amendment addresses differences among the circuits about what determining the "average participant" requires. The Seventh and Ninth Circuits have concluded that the "average participant" means only those persons who actually participated in the criminal activity at issue in the defendant's case, so that the defendant's relative culpability is determined only by reference to his or her co-participants. The First and Second Circuits have concluded that the "average participant" also includes typical offenders who commit similar crimes. Under this latter approach, courts will ordinarily consider the defendant's culpability relative both to his co-participants and to the typical offender. The proposed amendment generally adopts the approach of the Seventh and Ninth Circuits.

Second, the proposed amendment provides a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment. It provides as an example that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for a mitigating role adjustment.

Third, the proposed amendment provides that the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive a mitigating role adjustment, if he or she is substantially less culpable than the average participant in the criminal activity.

Fourth, the Commentary to §3B1.2 provides that certain individuals who perform limited functions in criminal activity are "not precluded" from consideration for a mitigating role adjustment. The proposed amendment revises this language to state that such an individual "may

receive” a mitigating role adjustment.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2015, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Commissioner Pryor seconding. The Chair called for discussion on the vote.

Chair Saris explained that the amendment was intended to provide additional guidance to judges when considering whether an offender should receive a mitigating role reduction to their sentence. Review of Commission data found that mitigating role was applied in only 7.6 percent of federal cases and three quarters of those were drug offenses. The Chair stated that the Commission never intended for mitigating role to apply so rarely outside of drug offenses and believed that this change will assist judges to make appropriate determinations in other offenses including some fraud offenses.

Chair Saris noted that the amendment adds a non-exhaustive list of factors that judges should consider in determining whether an offender is a minor or minimal participant and it makes clear that the focus should rest on crucial questions that go to the offender’s culpability. These questions include whether the offender was aware of the scope of the offense, had a proprietary interest in the outcome of the offense, or was involved in the planning or organizing of the offense.

Chair Saris expressed the Commission’s hope that the amendment will encourage courts to consider mitigating role in appropriate cases and that judges will find the factors helpful in their sentencing determinations, particularly in fraud cases where a minor participant with no proprietary stake in the criminal activity can sometimes face a harsh sentence disproportionate with his or her individual role.

Hearing no further discussion, Chair Saris called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit F, addresses the new statutory penalty structure for offenses involving hydrocodone and hydrocodone combination products in light of two recent administrative actions. As a result of those actions, all hydrocodone products are now Schedule II controlled substances rather than Schedule III controlled substances.

First, in October 2013 the Food and Drug Administration (FDA) approved a single-entity hydrocodone product, the first such product to be approved for the United States market. Other single-entity hydrocodone products are also being considered for the U.S. market. Second, the Drug Enforcement Administration (DEA) published a final rule that moved all hydrocodone combination products from Schedule III to Schedule II. See Drug Enforcement Administration,

“Schedules of Controlled Substances: Rescheduling of Hydrocodone Combination Products From Schedule III to Schedule II,” 79 FR 49661 (August 22, 2014). This action imposes stronger regulatory controls and administrative and civil sanctions on persons who handle hydrocodone combination products. It also changes the statutory and guideline penalty structure for offenses involving hydrocodone combination products.

The proposed amendment responds to the administrative actions in two ways. First, the proposed amendment deletes references in the guidelines to “Schedule III Hydrocodone” as obsolete. Second, the proposed amendment provides a single marijuana equivalency for hydrocodone offenses, whether single-entity or in combination, that is based on the actual weight of the hydrocodone involved rather than the number of pills involved or the weight of an entire pill. Specifically, a marijuana equivalency under which 1 gram of “hydrocodone (actual)” equates to 6,700 grams of marijuana is proposed.

The rescheduling of hydrocodone combination products also raises severity issues, and the proposed amendment addresses the severity issues by assigning hydrocodone (actual) the same marijuana equivalency as oxycodone (actual). This severity level is based on a 1:1 ratio of hydrocodone to oxycodone in marijuana equivalency, which reflects a view that equivalent amounts of hydrocodone and oxycodone cause the same pharmacological effects on the body.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2015, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Commissioner Pryor seconding. The Chair called for discussion on the vote.

Chair Saris noted that the amendment responded to changes by the DEA and the FDA on hydrocodone and that these changes required the Commission to act. She explained that if the Commission took no action at all, or simply deleted the entry for Schedule III hydrocodone in the Drug Equivalency Table, all hydrocodone pills would be punished based on the weight of the mixture which would create serious proportionality issues where offenders with less actual hydrocodone could receive much longer sentences.

In order to prevent this disparate outcome, Chair Saris continued, the Commission elected to base the defendant’s drug quantity on the weight only of the hydrocodone in the pills. Additionally, the decision to use hydrocodone (actual) instead of the weight of the whole mixture was supported by public comment from the Department of Justice, the Federal Public Defenders, the Probation Officers Advisory Group, line prosecutors, and practitioners. Chair Saris stated that the Commission was persuaded by testimony and comment that it was appropriate for this pharmaceutical because of the serious proportionality issues otherwise implicated.

Chair Saris stated that the proposed amendment adopts a marijuana equivalency for hydrocodone that is equal to the existing equivalency for oxycodone (i.e., 1 gram of hydrocodone (actual) is

equal to 6,700 grams of marijuana). Based on the expert evidence regarding the potency of hydrocodone, its medical uses, and the patterns of abuse and trafficking, the Commission was persuaded this was the appropriate equivalency.

Chair Saris explained that the Commission's review of scientific literature and testimony from abuse specialists demonstrated that the potency of hydrocodone among drug abusing individuals is virtually identical to that of oxycodone. Further, the DEA and others expressed the view that hydrocodone and oxycodone are very similar to each other with respect to the methods and frequency of their trafficking and the users of both drugs share similar characteristics. This, Chair Saris concluded, along with the enhanced abuse potential for new and powerful hydrocodone pharmaceuticals, convinced the Commission that the drug equivalency selected was the right policy decision.

Hearing no further discussion, Chair Saris called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the last proposed amendment, attached hereto as Exhibit G, was a result of the Commission's multi-year study of §2B1.1 and makes several changes to that guideline. First, the proposed amendment revises the definition of "intended loss" at §2B1.1, comment. (n.3(A)(ii)) to mean the pecuniary harm "that the defendant purposely sought to inflict." This reflects certain principles discussed in the Tenth Circuit's decision in United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011), which held that "intended loss" contemplates "a loss the defendant purposely sought to inflict," and that the appropriate standard was one of "subjective intent to cause the loss." Such an intent, the Tenth Circuit held, may be based on making "reasonable inferences about the defendant's mental state from the available facts."

Second, the proposed amendment revises the victims table at §2B1.1(b)(2) to incorporate substantial financial hardship as a factor. Specifically, it amends the victims table so that the 2-level enhancement applies if the offense involved ten or more victims or mass-marketing, or if the offense resulted in substantial financial hardship to one or more victims. The 4-level enhancement applies if the offense resulted in substantial financial hardship to five or more victims, and the 6-level enhancement applies if the offense resulted in substantial financial hardship to 25 or more victims. As a conforming change, the "mailbox rule" in §2B1.1, comment. (n.4(C)(ii)) is revised to refer to ten victims rather than 50 victims.

The proposed amendment provides factors for the court to consider in determining whether substantial financial hardship resulted. Because one of these factors, substantial harm to a victim's credit record, is also reflected in the departure provision at §2B1.1, comment. (n.20(A)(vi)), the proposed amendment deletes that factor from the departure provision. The proposed amendment also deletes prong (iii) of §2B1.1(b)(16)(B), relating to an offense that substantially endangered the solvency or financial security of 100 or more victims.

Third, the proposed amendment revises the specific offense characteristic for sophisticated means at §2B1.1(b)(10)(C). The proposed amendment narrows the scope of the specific offense characteristic at §2B1.1(b)(10)(C) to cases in which the defendant intentionally engaged in or

caused sophisticated means.

Fourth, the proposed amendment addresses offenses involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. The proposed amendment revises the special rule at §2B1.1, comment. (n.3(F)(ix)), which sets forth a method for calculating loss in cases involving the fraudulent inflation in the value of a publicly traded security or commodity and establishes the formula as a rebuttable presumption of the actual loss. Under the proposed amendment, the method provided is no longer a rebuttable presumption. As revised by the proposed amendment, the special rule provides that the court may use any method that is appropriate and practicable under the circumstances, and provides one such method the court may consider.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2015, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair noted that many of the commissioners wished to make a statement on economic crime generally, but some also wanted to discuss other amendments.

Vice Chair Breyer recounted how the Commission, two years ago, began its study of the factors used to determine sentences in fraud offenses. He noted that the Commission held a symposium in New York, NY, involving judges, academics, practitioners, the Commission's Victims Advisory Group, and other interested parties, and that an American Bar Association (ABA) study group comprised of judges and practitioners submitted recommendations to the Commission.

Vice Chair Breyer stated that among the concerns identified by these groups was that the Loss Table in §2B1.1, which increases sentence length, was unfair, unduly punitive, and inappropriate as a useful measure of the true harm suffered by victims. He recalled that the ABA suggested that instead of emphasizing the loss calculation, the Commission should look at factors that reflect the individual defendant's culpability. Vice Chair Breyer expressed his agreement with many of the ABA's observations. Nevertheless, he added, before assigning levels of punishment for these factors, the Commission wanted first to determine how the courts were currently sentencing fraud offenders and the results were informative.

Vice Chair Breyer agreed with Chair Saris that there was a strong correlation between the guidelines and the actual sentence imposed at the lower levels of loss, especially in cases where the loss is less than \$400,000. However, he added, as the loss increased, so did the disparity between the guideline sentence and the actual sentence imposed; once the loss is greater than \$7 million, judges followed the guidelines in only one out of four cases.

Vice Chair Breyer believed that whatever justification the Commission had for not changing the impact of the Loss Table at the lower loss amount, that justification fails at the higher levels.

Commission data indicates that while 83.0 percent of cases studied involved losses of less than \$400,000, 17.0 percent had greater loss amounts. In Vice Chair Breyer's view, the Commission's proposed amendment fails to address this issue.

Vice Chair Breyer asked why it matters that judges do not follow the guidelines in 17.0 percent of fraud cases. His answer was that the Commission has a duty to address the problem, not only because courts in a significant percentage of cases fail to recognize the anchoring effect of the guidelines but, more significantly, the Commission must publish guidelines that judges find lead to reasonable sentences.

Vice Chair Breyer recounted that under the Sentencing Reform Act of 1984, Congress instructed the Commission to examine sentencing practices and where such practices substantially varied from the guidelines, consider whether to amend the guidelines to make them more relevant to federal judges. He noted that while some commissioners intend to address the issue in the future, he believed it should have been addressed now.

Commissioner Barkow concurred with Vice Chair Breyer's statements regarding the Commission study of the fraud guidelines. She noted that the Commission received many thoughtful and helpful comments that the guidelines disproportionately focus on loss amount and do not sufficiently distinguish among defendants of varying levels of culpability.

Commissioner Barkow agreed with the ABA's diagnosis of the issues and its recommendation to target culpability. However, in her view, the problem of insufficient focus on culpability is not unique to fraud; it is widespread throughout the guidelines. Commissioner Barkow stated that the guidelines place an emphasis on objective factors of harm without paying attention to the defendant's culpability with respect to that harm. She explained that the guidelines do not draw distinctions between offenders who seek to achieve a certain harm and those who never intended or foresaw that harm.

Commissioner Barkow asserted that the question is how to fix this fundamental problem that transcends fraud and permeates the Guidelines Manual. She agreed that the Commission has taken a step in that direction by expanding when mitigating role should apply. Commissioner Barkow explained that the guidelines assume that an offender intended all the harms caused and sets an offense level on that basis. However, she continued, the mitigating role provisions carve out exceptions for those of lesser culpability and is designed for those who play lesser roles in offenses or who do not plan or make decisions about how the crime will be committed.

Unfortunately, Commissioner Barkow stated, judges do not seem to be paying sufficient attention to the mitigating role adjustment and it is unclear why. But today, she continued, the Commission has taken steps to increase its use by emphasizing that a defendant may receive a mitigating role adjustment even if he or she performs an essential or indispensable role in the criminal activity or is less culpable than the average participant in the criminal activity. The Commission has also provided a non-exhaustive list of factors for the judges to consider, and Commissioner Barkow observed that some of the factors echo the culpability factors identified by the ABA.

While pleased with the Commission's actions today, Commissioner Barkow urged the Commission to go further. Mitigating role provides a 2- to 4-level reduction, but such reductions are more effective at lower offense levels. She noted that in areas like drug and fraud offenses, where quantity and loss can quickly raise offense levels, the fortuity of quantity and loss are doing significantly more work than the more relevant question of the defendant's culpability and relative role; for those fraud offenders with high loss amounts, mitigating role is not enough to achieve punishment proportional to culpability. As a result, Commissioner Barkow stated that the Commission should set as a future priority a mitigating role cap in fraud cases and to seriously consider whether the 2- or 4-level mitigating role adjustment makes sense or whether it needs modification and expansion.

More fundamentally, Commissioner Barlow believed that the guidelines should expand how the guidelines account for culpability for all offenders. In her view mitigating role focuses only on role in the offense, but does not pay sufficient attention to the defendant's mens rea with respect to the harm factors identified by the guidelines. She stressed that mens rea is a bedrock principle of criminal law for a reason and its absence from the guidelines is a mistake. In addition, she expressed regret that the Commission was unable to agree in the current amendment cycle to change the rules regarding "jointly undertaken criminal activity" to require consideration of the defendant's intent regarding a co-participant's activity. Currently, Commissioner Barkow noted, the guidelines hold defendants accountable for the actions of others under a negligence standard of reasonable foreseeability that imposes liability even on those defendants who honestly had idea that the co-participant would engage in such conduct.

Negligent standards, Commissioner Barkow observed, are rare in criminal law because the point of criminal law is to punish those who deserve it because of culpable choices. She explained that throughout American history and in the common law, negligent standards were reserved for the most serious harms, such as conduct that results in death. The guidelines, in contrast, use negligence as an animating principle of relevant conduct and in general and as a result produce guideline sentences that are not proportionate to culpability. Commissioner Barkow believes judges, in contrast, appear attuned to notions of culpability and in a post-*Booker* world are accounting for them. She expressed the view that the guidelines should reflect this as well, and hoped the Commission can do more work on this fundamental issue as it considers what the guidelines should look like in an advisory world.

Commissioner Friedrich thanked the many stakeholders that commented on the proposed fraud guidelines amendment and believed the thorough and thoughtful comments assisted the Commission in its deliberations. While noting that the amendments did not change the structure of the fraud guidelines significantly, Commissioner Friedrich expressed her hope that the Commission will consider broader changes in the future as part of a larger scale review of the advisory guidelines system. She recalled that it has been more than ten years since *Booker* and yet the federal courts continue to operate under a guidelines scheme designed to be mandatory.

Commissioner Friedrich stated that one of the most complex guidelines is the fraud guideline, with its two separate base offense levels, 19 specific offense characteristics, four cross references, and 18 pages of application notes. Under the current system, courts must routinely

engage in complicated sentencing calculations to arrive at a correct starting point only to set the sentencing range aside and exercise their broad discretion to vary pursuant to *Booker* and the factors at 18 U.S.C. § 3553(a). Such variances, she added, though common, are subject to little, if any, substantive appellate review. And, contrary to the Supreme Court's prediction in *Booker*, Commissioner Friedrich believes it is quite clear that appellate review for reasonableness has done little to iron out the sentencing differences among courts.

Commissioner Friedrich observed that the Commission's study of post-*Booker* case law and data revealed ever increasing and unwarranted disparities across the country - - in regions, districts and even within courthouses. She strongly believes that the time has come for the Commission to work hand in hand with Congress to reform the current advisory system to make it a binding or presumptive system. To satisfy the constitutional requirements of *Booker*, and to better achieve the goals of the Sentencing Reform Act, Commissioner Friedrich stated that the Commission should first simplify the guidelines, particularly the fraud guideline, and then seek statutory changes that would require prosecutors to prove beyond a reasonable doubt to a jury any aggravating factors that are not admitted by a defendant and which would increase the potential sentencing range. Finally, she added, the Commission should appropriately and fairly cabin departures or variances from that sentencing range and couple this limited authority with meaningful appellate review.

Commissioner Friedrich believes that under the system she suggested the fraud guideline would be dramatically simplified with fewer loss categories and many fewer specific offender characteristics. Such an across the board structure, she stated, would also invite the Commission to revisit the role of relevant conduct in the fraud and other guidelines, yet another important issue for which no substantive changes were made today. Commissioner Friedrich acknowledged that her proposed reforms were significant ones that would require careful study and deliberation by the Commission and other stakeholders, but she continues to believe, as others before her have elegantly advocated, that such structural reforms will best further the important goals of the Sentencing Reform Act.

Commissioner Pryor also thanked those who submitted comments on, and participated in, the Commission's deliberations on the proposed fraud guideline amendments. He cautioned that today's Commission vote to make modest changes to the guideline should not be understood that all commissioners are happy about the current operation of that guideline or about the general condition of the federal sentencing system. He, for one, was not. In his view, the Guideline Manual, designed for a mandatory system, is unsustainable in the post-*Booker* world.

Commissioner Pryor recalled that five years after *Booker*, Commissioner Wroblewski sent the Commission the annual report of the Department of Justice on the operation of the sentencing guidelines and what he wrote was true then and is even truer today. In that report, Commissioner Wroblewski explained that the data compiled by the Commission showed that federal sentencing practice is fragmenting into at least two distinct and very different sentencing regimes. On the one hand there is the federal sentencing regime that remains closely tied to the sentencing guidelines; on the other hand there is a second regime that has largely lost its moorings to the sentencing guidelines.

Commissioner Pryor explained that the Department of Justice identified three problems with what it called an “evolution of federal sentencing into two different regimes.” First, it leads to unwarranted disparities. Second, these dichotomous regimes will over time breed disrespect for the federal courts. Third, although certainty in sentencing is critical to reducing crime rates further and deterring future criminal conduct, the current trends are toward less certainty.

Commissioner Pryor stated his view that the time has come for the Commission to undertake a comprehensive review of the operation of the guidelines and to begin a discussion with Congress and the public about how to simplify the guidelines and make them effective in a post-*Booker* world where the government has to prove any aggravating factor to a jury beyond a reasonable doubt.

Commissioner Wroblewski thanked his fellow commissioners for their work during the amendment cycle and especially for their consideration of the views of the Department of Justice. He stated that the work on the economic crimes issue is an example of how the Commission does its best work. Commissioner Wroblewski recounted how the Commission collected and analyzed data, held multiple hearings, provided notice of proposed amendments, received hundreds of pages of comments, and how he was present for very thoughtful and serious consideration and deliberation among the commissioners. In his view, this process represented a thorough and thoughtful approach and again expressed his appreciation for all the work done.

Commissioner Wroblewski joined his fellow commissioners by thanking staff for their work putting together the symposium, performing data analysis, and all the other work staff did. He also thanked the other stakeholders for all of their input during the amendment cycle.

Commissioner Wroblewski noted that he was honored to be part of the ABA working group and knows that among the Commission and the working group that there is some frustration. But, he added, as can be heard from some of the commissioners’ comments, the ABA’s work had an impact on the Commission’s thinking, and in his view will have an impact on future Commission work. Commissioner Wroblewski explained that the ABA product addressed the structure of the guidelines, issues of culpability, complexity, the role of the guidelines, the role of the sentencing judge, the role of the prosecutor, and many large structural issues. He believes that the Commission will consider these issues in the years ahead and is looking forward to those discussions.

Chair Saris observed that there was a broad range of views on many of the complex issues raised by the economic crimes guidelines. She noted that the review began in earnest in 2010 when the Commission heard from stakeholders that the economic crime guidelines, and particularly the “fraud” guideline was too high, that it produced unreasonable sentences, and that was “fundamentally broken.” At the same time the Commission found in a survey of federal district judges that the vast majority – approximately 90.0 percent – thought the fraud guidelines were either just right or too low.

Chair Saris stated that the Commission struggled to interpret these contradictory results. What the Commission found was that in most cases the fraud guideline provided an anchoring effect, but that there were opportunities for targeted changes. Accordingly, she explained, the proposed amendment shifts the current focus of the fraud guideline, while maintaining the core principles that have formed the basis of sentencing these offenses since the guidelines' creation. These targeted changes, the Chair continued, respond to concerns raised by commissioners, judges, and other commenters. In particular, the amendments respond to comments that the guideline should better address qualitative harms to victims and appropriately assess defendant culpability, while also recognizing some concerns regarding double-counting of the victim enhancements and the loss table.

Chair Saris stated that the proposed changes to the victim enhancement were intended to address concerns raised by the Commission's Victims Advisory Group and others that the existing guideline overemphasizes the number of victims to the detriment of qualitative harms that a smaller number of victims may suffer. Today, she added, the Commission has proposed to include a victim enhancement if even one victim suffers a substantial financial harm. However, the proposed amendment also eliminates the 4- and 6-level enhancements based only on the number of victims without looking at the quality of the harm.

Chair Saris explained that the proposed amendment also shifts the focus to the offender's individual culpability in a variety of ways to ensure that when the court is calculating "intended loss" that only the amounts the defendant purposely sought to inflict are counted and that the enhancement for sophisticated means addresses only the defendant's own conduct. She also noted that an earlier adopted amendment amends the mitigating role guideline to encourage reductions for low-level fraud offenders who played minor roles such as those with no proprietary interest in the criminal activity.

Chair Saris cautioned that there are a very few cases at the high end of the loss table -- 64 in the top four levels (involving over \$50 million) and only 14 in the top two levels (in fiscal year 2014) (involving over \$200 million). Many judges and stakeholders, she reported, voiced concerns about fraud on the market offenses, but there were only seven fraud on the market cases in fiscal years 2012 and 2013. These very high loss levels are rarely reached but can result in tremendously contentious and costly litigation. She expressed the Commission's hope that the shift to a greater emphasis on individual culpability will make these sentences more proportionate and fair.

Chair Saris stated that the Commission believed that the proposed fraud guideline amendments taken together with other amendments on mitigating role allows the guidelines the needed flexibility to differentiate among fraud offenders based on culpability and harm while ensuring appropriate punishments for the most serious offenders.

Vice Chair Breyer stated that on the issue of loss in fraud on the market cases involving publically traded securities, the Commission has decided to strike the rebuttable presumption that a market approach should be utilized for the measurement of loss. As a judge who has tried to use this market approach, Vice Chair Breyer stated that he has found it to be unworkable in cases

where the security retained more than a nominal value. He stated that there is no evidence that courts can successfully use this approach, especially in light of the Supreme Court's unanimous decision in Dura Pharmaceuticals v. Broudo, 544 U.S. 336 (2005). Vice Chair Breyer suggested that utilizing a market approach method will only result in a "battle of the experts" leading to an empirically inaccurate measurement.

Vice Chair Breyer expressed his hope that failure to remove this flawed and cumbersome method is not viewed by judges as an invitation to conduct lengthy evidently hearings which give the pretext of exactitude. In his view it should only be used in cases which will result in a reasonable and accurate measure of loss, but he does not believe that will ever be the case where the price of securities are affected by numerous market forces.

Hearing no further discussion, Chair Saris called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Chair Saris noted that in January the Commission voted to publish an issue for comment seeking comment on offenses in which controlled substances are colored, packaged or flavored in ways that appear to be designed to attract use by children. Today, she observed, the Commission did not vote to promulgate an amendment addressing this issue and several commissioners wished to make comments concerning the matter.

Vice Chair Breyer asserted that the Commission has failed by declining to take action on a proposal to enhance penalties for drug offenders who flavor or market controlled substances with the intent to get children to purchase these drugs. He stated his strong disagreement with other commissioners who held the view that such an enhancement was not warranted. Vice Chair Breyer believed the record shows otherwise.

First, Vice Chair Breyer observed, the Commission received comment endorsing such an enhancement from many sources, particularly a bipartisan effort lead by Senators Charles Grassley and Diane Feinstein. He noted that this is not a recent position of these senators nor of the senate as a whole; proposed legislation was adopted by a unanimous Senate in 2010 and has been recently reintroduced in the Senate again.

Second, Vice Chair Breyer continued, Senators Grassley and Feinstein cited more than 30 examples of incidences involving flavored drugs. Acknowledging these cases are not pending in federal court, he believes that they nonetheless reflect the concern that, with states legalizing certain controlled substances, it is essential to ensure that these drugs are not marketed to children.

Finally, Vice Chair Breyer noted, numerous law enforcement agencies and organizations have called for increased penalties. He concluded by expressing his regret that the Commission did not act in this matter and his belief that that Congress will direct the Commission to take action in the future.

Commissioner Barkow thanked Senators Grassley and Feinstein, and the many law enforcement

agencies who brought the issue of flavored and candied drugs to the Commission's attention. As the commenters rightly point out, she continued, anyone who flavors drugs with the intent to appeal to children should be subject to a higher punishment and all of the commissioners agree with this position.

Commissioner Barkow observed, however, that the question is whether the Commission is in a position to take action on this issue right now and, in her review of the record before the Commission, it would be premature to take action. She stated that staff combed Commission records and reached out to the DEA and the Commission's Probation Officers Advisory Group, but could not identify a single federal case where a defendant marketed or distributed flavored or candied drugs to children.

Commissioner Barkow stated that, in the absence of cases, the Department of Justice asked the Commission to proceed cautiously as it was not certain whether this problem, should it arise, would best be addressed with a mandatory vulnerable victim enhancement or through a provision that targets deceptive packaging. She added that the question of packaging is complicated by the fact that Washington State and Colorado have legalized marijuana and those states are currently addressing how best to ensure that marijuana products are appropriately labeled so that they do not end up in the hands of children.

Without a single federal case on this issue, Commissioner Barkow continued, the Commission would be setting policy based on guess work, not on data or real world experience and would be doing so against the backdrop of serious federalism concerns raised by Washington and Colorado's regulation of marijuana sales. In light of these issues, Commissioner Barkow concluded, it was not appropriate to amend the guidelines at this time. Instead, she suggested that the sound course was to continue to monitor and study the issue closely and to take action once the Commission has the appropriate record to do so.

Commissioners Friedrich and Pryor stated their agreement with Commissioner Barkow's statements.

Chair Saris asked Ms. Grilli if there were any remaining matters for the Commission's consideration.

Ms. Grilli advised the Commission that some of the just promulgated amendments, including the amendments affecting the single sentence rule, inflationary adjustments, hydrocodone, and economic crimes, may have the effect of lowering the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses. In light of that, she asked whether there was a motion pursuant to Rule 2.2 of the Commission's Rules of Practice and Procedure to instruct staff to prepare a retroactivity impact analysis for these amendments.

Chair Saris called for a motion as suggested by Ms. Grilli. Hearing none, the proposal failed for lack of a motion.

Chair Saris explained that whenever the Commission promulgates an amendment that lowers

penalties, it has a statutory obligation to consider whether to make such amendments retroactive. This was, she continued, an obligation that the Commission does not take lightly. In making the determination, the Commission considers, among other things, the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively.

In Chair Saris' opinion, those factors did not weigh in favor of making the single sentence rule, inflationary adjustments, or economic crime amendments retroactive.

Chair Saris noted that the Commission voted to use a hydrocodone (actual weight) standard in calculating drug quantity but did not ask staff to conduct a retroactivity impact analysis for that amendment, which was different from what the Commission did with oxycodone in 2003. She explained that staff reviewed all hydrocodone drug trafficking cases sentenced after October 6, 2014, when the DEA rescheduled the drug to Schedule II, and did not identify any offenders who would receive a lower guideline range if the promulgated amendment was made retroactive. For this reason, Chair Saris stated that she was confident that no retroactivity impact analysis was necessary for hydrocodone.

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 Barkow made a motion to adjourn, with Commissioner Friedrich seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 2:00 p.m.

EXHIBIT A

PROPOSED AMENDMENT: TECHNICAL

Synopsis of Proposed Amendment: *This proposed amendment makes certain technical changes to the Guidelines Manual.*

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

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

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

Finally, it makes clerical changes to—

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

Proposed Amendment:

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

* * *

Commentary

Application Notes:

* * *

Background: Subsections (a) and (b)(1) provide that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the *ex post facto* clause in Article I, § 9 of the United States Constitution. Under 18 U.S.C. § 3553, the court is to apply the guidelines and policy statements in effect at the time of sentencing. However, the Supreme Court has held that the *ex post facto* clause applies to sentencing guideline amendments that subject the defendant to increased punishment. See *Peugh v. United States*, ~~144~~133 S. Ct. 2072, 2078 (2013) (holding that “there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense”).

* * *

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

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 215, 224, 225; 26 U.S.C. §§ 9012(e), 9042(d); ~~41 U.S.C. §§ 53, 5441~~ U.S.C. §§ 8702, 8707; 42 U.S.C. §§ 1395nn(b)(1), (2), 1396h(b)(1),(2); 49 U.S.C. § 11902. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

Background: This guideline applies to violations of various federal bribery statutes that do not involve governmental officials. The base offense level is to be enhanced based upon the value of the unlawful payment or the value of the action to be taken or effected in return for the unlawful payment, whichever is greater.

* * *

This guideline also applies to making prohibited payments to induce the award of subcontracts on federal projects for which the maximum term of imprisonment authorized is ten years. ~~41 U.S.C. §§ 51, 53-5441~~ U.S.C. §§ 8702, 8707. Violations of 42 U.S.C. § 1320a-7b involve the offer or acceptance of a payment to refer an individual for services or items paid for under a federal health care program (e.g., the Medicare and Medicaid programs).

* * *

§2C1.8. Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property

* * *

Commentary

Statutory Provisions: ~~2 U.S.C. §§ 437g(d)(1), 439a, 441a, 441a-1, 441b, 441c, 441d, 441e, 441f, 441g, 441h(a), 441i, 441k;~~ 18 U.S.C. § 607; 52 U.S.C. §§ 30109(d), 30114, 30116, 30117, 30118, 30119, 30120, 30121, 30122, 30123, 30124(a), 30125, 30126. For additional provision(s), see Appendix A (Statutory Index) (~~Appendix A~~).

Application Notes:

1. Definitions.—For purposes of this guideline:

“Foreign national” has the meaning given that term in section 319(b) of the Federal Election Campaign Act of 1971, ~~2 U.S.C. § 441e(b)~~ 52 U.S.C. § 30121(b).

“Government of a foreign country” has the meaning given that term in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611(e)).

“Governmental funds” means money, assets, or property, of the United States government, of a State government, or of a local government, including any branch, subdivision, department, agency, or other component of any such government. “State” means any of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, or American Samoa. “Local government” means the government of a political subdivision of a State.

“Illegal transaction” means (A) any contribution, donation, solicitation, or expenditure of money or anything of value, or any other conduct, prohibited by the Federal Election Campaign Act of 1971, ~~2 U.S.C. § 431 et seq.~~ 52 U.S.C. § 30101 et seq.; (B) any contribution, donation, solicitation, or expenditure of money or anything of value made in excess of the amount of such contribution, donation, solicitation, or expenditure that may be made under such Act; and (C) in the case of a violation of 18 U.S.C. § 607, any solicitation or receipt of money or anything of value under that section. The terms “contribution” and “expenditure” have the meaning given those terms in section 301(8) and (9) of the Federal Election Campaign Act of 1971 (~~2 U.S.C. § 431(8) and (9)~~ 52 U.S.C. § 30101(8) and (9)), respectively.

* * *

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

* * *

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

Listed Chemicals and Quantity

Base Offense Level

* * *

(7) List I Chemicals **Level 18**

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

List II Chemicals

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

* * *

§2H2.1. Obstructing an Election or Registration

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 242, 245(b)(1)(A), 592, 593, 594, 597, 1015(f); ~~42 U.S.C. §§ 1973i, 1973j(a), (b)~~ 52 U.S.C. §§ 10307, 10308(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

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

* * *

Commentary

* * *

Application Notes:

* * *

2. Application of Subsection (b)(2).—Section 1851 of title 29, United States Code, covers a wide range of conduct. Accordingly, the enhancement in subsection (b)(2) applies only if the instant offense is similar to previous misconduct that resulted in a civil or administrative adjudication under the provisions of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. § 1801 ~~et. et~~ seq.).

* * *

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

* * *

Commentary

Statutory Provision: 50 U.S.C. § ~~421~~3121.

Application Notes:

1. See Commentary to §2M3.1.
2. This guideline applies only to violations of 50 U.S.C. § ~~421~~3121 by persons who have or previously had authorized access to classified information. This guideline does not apply to violations of 50 U.S.C. § ~~421~~3121 by defendants, including journalists, who disclosed such information without having or having had authorized access to classified information. Violations of 50 U.S.C. § ~~421~~3121 not covered by this guideline may vary in the degree of harm they inflict, and the court should impose a sentence that reflects such harm. See §2X5.1 (Other Offenses).

3. *A term of imprisonment imposed for a conviction under 50 U.S.C. § ~~421~~3121 shall be imposed consecutively to any other term of imprisonment. See 50 U.S.C. § ~~421~~3121(d).*

Background: The alternative base offense levels reflect a statutory distinction by providing a greater base offense level for a violation of 50 U.S.C. § ~~421~~3121 by an official who has or had authorized access to classified information identifying a covert agent than for a violation by an official with authorized access only to other classified information. This guideline does not apply to violations of 50 U.S.C. § ~~421~~3121 by defendants who disclosed such information without having, or having had, authorized access to classified information.

* * *

§3D1.5. Determining the Total Punishment

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

Commentary

This section refers the court to Chapter Five (Determining the Sentence) in order to determine the total punishment to be imposed based upon the combined offense level. The combined offense level is subject to adjustments from Chapter Three, Part E (Acceptance of Responsibility) and Chapter Four, Part B (Career Offenders and Criminal Livelihood).

* * * * *

Concluding Commentary to Part D of Chapter Three

Illustrations of the Operation of the Multiple-Count Rules

The following examples, drawn from presentence reports in the Commission's files, illustrate the operation of the guidelines for multiple counts. The examples are discussed summarily; a more thorough, step-by-step approach is recommended until the user is thoroughly familiar with the guidelines.

1. *Defendant A was convicted ~~on~~ of four counts, each charging robbery of a different bank. Each would represent a distinct Group. §3D1.2. In each of the first three robberies, the offense level was 22 (20 plus a 2-level increase because a financial institution was robbed) (§2B3.1(b)). In the fourth robbery \$12,000 was taken and a firearm was displayed; the offense level was therefore 28. As the first three counts are 6 levels lower than the fourth, each of the first three represents one-half unit for purposes of §3D1.4. Altogether there are 2 1/2 Units, and the offense level for the most serious (28) is therefore increased by 3 levels under the table. The combined offense level is 31.*
2. *Defendant ~~EB~~ was convicted ~~on~~ of four counts: (1) distribution of 230 grams of cocaine; (2) distribution of 150 grams of cocaine; (3) distribution of 75 grams of heroin; (4) offering a DEA agent \$20,000 to avoid prosecution. The combined offense level for drug offenses is*

determined by the total quantity of drugs, converted to marihuana equivalents (using the Drug Equivalency Tables in the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking)). The first count translates into 46 kilograms of marihuana; the second count translates into 30 kilograms of marihuana; and the third count translates into 75 kilograms of marihuana. The total is 151 kilograms of marihuana. Under §2D1.1, the combined offense level for the drug offenses is 24. In addition, because of the attempted bribe of the DEA agent, this offense level is increased by 2 levels to 26 under §3C1.1 (Obstructing or Impeding the Administration of Justice). Because the conduct constituting the bribery offense is accounted for by §3C1.1, it becomes part of the same Group as the drug offenses pursuant to §3D1.2(c). The combined offense level is 26 pursuant to §3D1.3(a), because the offense level for bribery (2220) is less than the offense level for the drug offenses (26).

3. Defendant DC was convicted of four counts arising out of a scheme pursuant to which the defendant received kickbacks from subcontractors. The counts were as follows: (1) The defendant received ~~\$27,000~~ \$1,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received ~~\$12,000~~ \$1,000 from subcontractor A relating to contract X (Commercial Bribery). (3) The defendant received ~~\$15,000~~ \$1,000 from subcontractor A relating to contract Y (Mail Fraud). (4) The defendant received ~~\$20,000~~ \$1,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts are covered by §2B1.1 (Theft, Property Destruction, and Fraud). The bribery counts are covered by §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), which treats the offense as a sophisticated fraud. The total money involved is ~~\$74,000~~ \$4,000, which results in an offense level of 169 under either §2B1.1 (assuming the application of the “sophisticated means” enhancement in §2B1.1(b)(10)) or §2B4.1. Since these two guidelines produce identical offense levels, the combined offense level is 169.

* * *

§5E1.2. Fines for Individual Defendants

* * *

Commentary

Application Notes:

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5. Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others: 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to \$8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to \$4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of \$500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C. § 1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. § 1319(c), which authorizes a fine of up to \$50,000 per day for violations of the Water Pollution Control Act; 42

*U.S.C. § 6928(d), which authorizes a fine of up to \$50,000 per day for violations of the Resource Conservation Act; and ~~2 U.S.C. § 437g(d)(1)(D)~~ **52 U.S.C. § 30109(d)(1)(D)**, which authorizes, for violations of the Federal Election Campaign Act under ~~2 U.S.C. § 441f~~ **52 U.S.C. § 30122**, a fine up to the greater of \$50,000 or 1,000 percent of the amount of the violation, and which requires, in the case of such a violation, a minimum fine of not less than 300 percent of the amount of the violation.*

* * *

APPENDIX A - STATUTORY INDEX

2 U.S.C. § 192	2J1.1, 2J1.5
2 U.S.C. § 390	2J1.1, 2J1.5
2 U.S.C. § 437g(d)	2C1.8
2 U.S.C. § 439a	2C1.8
2 U.S.C. § 441a	2C1.8
2 U.S.C. § 441a-1	2C1.8
2 U.S.C. § 441b	2C1.8
2 U.S.C. § 441c	2C1.8
2 U.S.C. § 441d	2C1.8
2 U.S.C. § 441e	2C1.8
2 U.S.C. § 441f	2C1.8
2 U.S.C. § 441g	2C1.8
2 U.S.C. § 441h(a)	2C1.8
2 U.S.C. § 441i	2C1.8
2 U.S.C. § 441k	2C1.8
7 U.S.C. § 6	2B1.1
7 U.S.C. § 6b(A)	2B1.1

* * *

42 U.S.C. § 1761(o)(2) 2B1.1
~~42 U.S.C. § 1973i(c) 2H2.1~~
~~42 U.S.C. § 1973i(d) 2H2.1~~
~~42 U.S.C. § 1973i(e) 2H2.1~~
~~42 U.S.C. § 1973j(a) 2H2.1~~
~~42 U.S.C. § 1973j(b) 2H2.1~~
~~42 U.S.C. § 1973j(c) 2X1.1~~
~~42 U.S.C. § 1973aa 2H2.1~~
~~42 U.S.C. § 1973aa-1 2H2.1~~
~~42 U.S.C. § 1973aa-1a 2H2.1~~
~~42 U.S.C. § 1973aa-3 2H2.1~~
~~42 U.S.C. § 1973bb 2H2.1~~
~~42 U.S.C. § 1973gg-10 2H2.1~~
42 U.S.C. § 2000e-13 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3

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~~50 U.S.C. § 421 2M3.9~~
50 U.S.C. § 783 2M3.3
50 U.S.C. § 1705 2M5.1, 2M5.2, 2M5.3
50 U.S.C. § 3121 2M3.9
50 U.S.C. App. § 462 2M4.1
50 U.S.C. App. §
527(e) 2X5.2
50 U.S.C. App. § 2410 2M5.1
52 U.S.C. § 10307(c) 2H2.1

52 U.S.C. § 10307(d)	2H2.1
52 U.S.C. § 10307(e)	2H2.1
52 U.S.C. § 10308(a)	2H2.1
52 U.S.C. § 10308(b)	2H2.1
52 U.S.C. § 10308(c)	2X1.1
52 U.S.C. § 10501	2H2.1
52 U.S.C. § 10502	2H2.1
52 U.S.C. § 10503	2H2.1
52 U.S.C. § 10505	2H2.1
52 U.S.C. § 10701	2H2.1
52 U.S.C. § 20511	2H2.1
52 U.S.C. § 30109(d)	2C1.8
52 U.S.C. § 30114	2C1.8
52 U.S.C. § 30116	2C1.8
52 U.S.C. § 30117	2C1.8
52 U.S.C. § 30118	2C1.8
52 U.S.C. § 30119	2C1.8
52 U.S.C. § 30120	2C1.8
52 U.S.C. § 30121	2C1.8
52 U.S.C. § 30122	2C1.8
52 U.S.C. § 30123	2C1.8
52 U.S.C. § 30124(a)	2C1.8
52 U.S.C. § 30125	2C1.8
52 U.S.C. § 30126	2C1.8

EXHIBIT B

PROPOSED AMENDMENT: “SINGLE SENTENCE” RULE

Synopsis of Proposed Amendment: *This proposed amendment responds to a circuit conflict regarding the meaning of the “single sentence” rule and its implications for the career offender guideline and other guidelines that use predicate offenses.*

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

The “single sentence” rule in subsection (a)(2) to §4A1.2 (Definitions and Instructions for Computing Criminal History) provides:

If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also §4A1.1(e).

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

See §4A1.2(a)(2).

In 2010, in King v. United States, the Eighth Circuit held that when two or more prior sentences are counted as a single sentence, all the criminal history points attributable to the single sentence are assigned to only one of the prior sentences — specifically, the one that was the longest. King, 595 F.3d 844, 852 (8th Cir. 2010). Accordingly, only that prior sentence may be considered a predicate for purposes of the career offender guideline. Id. at 849, 852.

In King, there were two different sets of prior sentences that each qualified as a single sentence. Each set of prior sentences included a sentence that ordinarily would qualify as a career offender predicate and several other sentences that were not career offender predicates, imposed to run concurrently. The panel indicated that, within a “single sentence,” only one sentence receives the criminal history points. For the first set of sentences, one of the non-predicate sentences “should receive the criminal history

point for this group because it was the longest.” *Id.* at 849. Accordingly, the sentence that ordinarily would qualify as a career offender predicate did not receive criminal history points and therefore did not qualify as a career offender predicate. *Id.* For the second set of sentences, the sentence that ordinarily would qualify as a career offender predicate was the same length as the one of the non-predicate sentences, and longer than any of the other sentences; it was unclear which of the two should be treated as the “longest”. Given the uncertainty, the panel applied the rule of lenity and attributed the criminal history points to the sentence that was not a career offender predicate. *Id.* As a result, the sentence that ordinarily would qualify as a career offender predicate did not receive criminal history points and did not qualify as a career offender predicate.

In June 2014, in *United States v. Williams*, a panel of the Sixth Circuit considered and rejected *King* as “nonsensical,” because it permitted the defendant to “evade career offender status because he committed more crimes”. *Williams*, 753 F.3d 626, 639 (6th Cir. 2014) (emphasis in original). The facts in *Williams* were similar to the second set of sentences in *King*: the single sentence included one sentence that ordinarily would qualify as a career offender predicate and one sentence that was not a career offender predicate. The two sentences were equally long. Because each of the sentences ordinarily would receive criminal history points, the panel held, the sentence that ordinarily would qualify as a career offender predicate was not disqualified by the single sentence rule; it remained eligible to serve as a career offender predicate. *Id.*

On August 26, 2014, a different panel of the Eighth Circuit agreed with the Sixth Circuit’s analysis in *Williams* but was not in a position to overrule the earlier panel’s decision in *King*. See *Donnell v. United States*, 765 F.3d 817, 820 (8th Cir. 2014) (“we are bound by this court’s prior decision in *King* even though a majority of the panel believe it should now be overruled to eliminate a conflict with the Sixth Circuit”). Before then, other panels of the Eighth Circuit had followed *King*, applying it to a case involving the firearms guideline rather than the career offender guideline and to a case in which the prior sentences were consecutive rather than concurrent. See, e.g., *Pierce v. United States*, 686 F.3d 529, 533 n.3 (8th Cir. 2012) (indicating that the reasoning of *King* would also apply to predicate offenses under the firearms guideline); *United States v. Parker*, 762 F.3d 801, 808 (8th Cir. 2014) (“*King*’s logic is equally applicable to consecutive sentences”).

The Eleventh Circuit anticipated this issue in dicta in *United States v. Cornog*, a 1991 decision not cited by either *King* or *Williams*. See 945 F.2d 1504 (11th Cir. 1991). The defendant in *Cornog* had two prior sentences, one that ordinarily would qualify as a career offender predicate and another that was not a career offender predicate but was the longer of the two. He argued under the “related cases” rule (predecessor to the “single sentence” rule) that only the longer sentence should receive criminal history points and therefore the shorter sentence should be disqualified from serving as a career offender predicate. The Eleventh Circuit found this unpersuasive: “It would be illogical ... to ignore a conviction for a violent felony just because it happened to be coupled with a nonviolent felony conviction having a longer sentence.” See 945 F.2d at 1506 n.3.

Of the other cases discussing this issue, some have been consistent with the Sixth Circuit’s approach in *Williams*. See, e.g., *United States v. Carr*, 2013 WL 4855341 (N.D. Ga. 2013); *United States v. Augurs*, 2014 WL 3735584 (W.D. Pa., July 28, 2014). Others have been consistent with the Eighth Circuit’s approach in *King*. See, e.g., *United States v. Santiago*, 387 F. App’x 223 (3d Cir. 2010); *United States v. McQueen*, 2014 WL 3749215 (E.D. Wash., July 29, 2014).

The proposed amendment generally follows the Sixth Circuit’s approach in Williams. It amends the commentary to §4A1.2 to provide that, for purposes of determining predicate offenses, a prior sentence included in a single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. It also provides examples.

Finally, §§4A1.1 and 4A1.2 are revised stylistically so that sentences “counted” as a single sentence are referred to instead as sentences “treated” as a single sentence.

Proposed Amendment:

§4A1.1. Criminal History Category

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

- (a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this subsection.
- (d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
- (e) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was ~~counted~~**treated** as a single sentence, up to a total of **3** points for this subsection.

Commentary

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

Application Notes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For example, a defendant's criminal history includes two robbery convictions for offenses committed on different occasions. The sentences for these offenses were imposed on the same day and are ~~counted~~treated as a single prior sentence. See §4A1.2(a)(2). If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(e) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant

received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(e) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment.

Background: Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts. There are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement. To minimize problems with imperfect measures of past crime seriousness, criminal history categories are based on the maximum term imposed in previous sentences rather than on other measures, such as whether the conviction was designated a felony or misdemeanor. In recognition of the imperfection of this measure however, §4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances.

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

Section 4A1.1(d) adds two points if the defendant was under a criminal justice sentence during any part of the instant offense.

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

(a) Prior Sentence

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

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

- (3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).
- (4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense set forth in §4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.

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

(b) Sentence of Imprisonment Defined

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

(c) Sentences Counted and Excluded

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

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

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

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

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

(d) Offenses Committed Prior to Age Eighteen

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

(e) Applicable Time Period

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

(f) Diversionsary Dispositions

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

(g) Military Sentences

Sentences resulting from military offenses are counted if imposed by a general or special court-martial. Sentences imposed by a summary court-martial or Article 15 proceeding are not counted.

(h) Foreign Sentences

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

(i) Tribal Court Sentences

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

(j) Expunged Convictions

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

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

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

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

such sentence (see §4A1.2(d)(2)(A)); and (C) in any other case, the date of the original sentence (see §4A1.2(d)(2)(B) and (e)(2)).

(l) Sentences on Appeal

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

(m) Effect of a Violation Warrant

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

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

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

(o) Felony Offense

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

(p) Crime of Violence Defined

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

Commentary

Application Notes:

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

Under §4A1.2(a)(4), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.1(c) if a sentence resulting from such conviction otherwise would have been counted. In the case of an offense set forth in §4A1.2(c)(1) (which

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

2. *Sentence of Imprisonment.*—To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time). See §4A1.2(a)(3) and (b)(2). For the purposes of applying §4A1.1(a), (b), or (c), the length of a sentence of imprisonment is the stated maximum (e.g., in the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant’s twenty-first birthday, the stated maximum is the amount of time in pre-trial detention plus the amount of time between the date of sentence and the defendant’s twenty-first birthday). That is, criminal history points are based on the sentence pronounced, not the length of time actually served. See §4A1.2(b)(1) and (2). A sentence of probation is to be treated as a sentence under §4A1.1(c) unless a condition of probation requiring imprisonment of at least sixty days was imposed.

3. *Application of “Single Sentence” Rule (Subsection (a)(2)).*—

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

For example, a defendant’s criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

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

(B) Upward Departure Provision.—~~Counting~~**Treating** multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant’s criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were ~~counted~~**treated** as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant’s criminal history or the frequency with which the defendant has committed crimes.

4. Sentences Imposed in the Alternative.—A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (e.g., \$1,000 fine or ninety days’ imprisonment) is treated as a non-imprisonment sentence.
5. Sentences for Driving While Intoxicated or Under the Influence.—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply.
6. Reversed, Vacated, or Invalidated Convictions.—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (e.g., 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

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

7. Offenses Committed Prior to Age Eighteen.—Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant’s commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a “juvenile,” this provision applies to all offenses committed prior to age eighteen.
8. Applicable Time Period.—Section 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term “commencement of the instant offense” includes any relevant conduct. See §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category).

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

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

12. Application of Subsection (c).—
 - (A) In General.—In determining whether an unlisted offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.
 - (B) Local Ordinance Violations.— A number of local jurisdictions have enacted ordinances covering certain offenses (e.g., larceny and assault misdemeanors) that are also

violations of state criminal law. This enables a local court (e.g., a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.

- (C) Insufficient Funds Check.—“Insufficient funds check,” as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.

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

* * *

EXHIBIT C

PROPOSED AMENDMENT: JOINTLY UNDERTAKEN CRIMINAL ACTIVITY

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission's effort to simplify the operation of the guidelines, including, among other matters, the use of relevant conduct in offenses involving multiple participants. See United States Sentencing Commission, "Notice of Final Priorities," 79 Fed. Reg. 49378 (Aug. 20, 2014).*

The proposed amendment would revise §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) to provide more guidance on the use of "jointly undertaken criminal activity" in determining relevant conduct under the guidelines. See §1B1.3(a)(1)(B). Specifically, it restructures the guideline and its commentary to set out more clearly the three-step analysis the court applies in determining whether the defendant is accountable for acts of others in the jointly undertaken criminal activity. The three-step test requires that the court (1) identify the scope of the jointly undertaken criminal activity; (2) determine whether the conduct of others in the jointly undertaken criminal activity was in furtherance of that criminal activity; and (3) determine whether the conduct of others was reasonably foreseeable in connection with that criminal activity.

Proposed Amendment:

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

- (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy); ~~all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,~~ all acts and omissions of others that were—
- (i) ~~within the scope of the jointly undertaken criminal activity,~~
- (ii) ~~in furtherance of that criminal activity, and~~
- (iii) ~~reasonably foreseeable in connection with that criminal~~

activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

- (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
 - (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
 - (4) any other information specified in the applicable guideline.
- (b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. *The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.*
2. **Accountability Under More Than One Provision.**—*[In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant’s accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.]**
- ~~2.3.~~ **Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).**—
 - (A) **In General.**—*A “jointly undertaken criminal activity” is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.*

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a

* The bracketed text currently appears in the commentary in the illustration referring to Defendants A and B. The proposed amendment would place the text here, while also leaving it intact in the illustration.

defendant is accountable for the conduct (acts and omissions) of others that was both:

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

*[The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant meets all three criteria set forth in subdivisions (i) through (iii) (i.e., “within the scope,” “in furtherance,” and “reasonably foreseeable”) is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision.]***

- (B) **Scope.**—Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the “jointly undertaken criminal activity”) is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant’s accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant’s agreement).—

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant’s agreement), in doing so, the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. Accordingly, the accountability of the defendant for the acts of others is limited by the scope of his or her agreement to jointly undertake the particular criminal activity. Acts of others that were not within the scope of the defendant’s agreement, even if those acts were known or reasonably foreseeable to the defendant, are not relevant conduct under subsection (a)(1)(B).

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

** The bracketed text was originally placed as part of the third paragraph of the current Application Note 2.

activities.]***

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

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

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

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

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

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e.,

*** The bracketed text was originally placed as the last paragraph in example (c)(8) of the “Illustrations of Conduct for Which the Defendant is Accountable.”

**** The bracketed text was originally placed as the last paragraph of Application Note 2, before the “Illustrations of Conduct for Which the Defendant is Accountable.”

acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

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

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

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

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B)(applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity and all three criteria of subsection (a)(1)(B) are met. First, the conduct was within the scope of the criminal activity (the scope of which was the importation of the shipment of marihuana). Second, the off-loading of the shipment of marihuana was in furtherance of the criminal activity, as described above. And third, a finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established. See Application Note 2.

(b) Acts and omissions aided or abetted by the defendant; requirement that the conduct of

~~others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable acts and omissions in a jointly undertaken criminal activity.—~~

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

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

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

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

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

(3iii) Defendants H and I engaged in an ongoing marijuana importation conspiracy

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

- (4iv) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity ~~(to distribute child pornography with Defendant K), in furtherance of that criminal activity,~~ and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because ~~the scope of his jointly undertaken criminal activity is limited to that amount~~ ~~he is not engaged in a jointly undertaken criminal activity with the other defendants.~~ For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.
- (5v) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not ~~in furtherance~~ ~~within the scope~~ of her jointly undertaken criminal activity (i.e., the one delivery).
- (6vi) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast,

Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of the jointly undertaken that criminal activity, and reasonably foreseeable in connection with that criminal activity.

(7vii) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (i.e., the 500 grams).

(8viii) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. See Application Note 3(B).

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911. * * *

1012. * * *

* * *

EXHIBIT D

PROPOSED AMENDMENT: INFLATIONARY ADJUSTMENTS

Synopsis of Proposed Amendment: *This proposed amendment adjusts monetary tables in the guidelines to account for inflation. Congress has generally mandated that agencies in the executive branch must, every four years, adjust the civil monetary penalties they impose to account for inflation. See Section 4 of the Federal Civil Penalties Inflationary Adjustment Act of 1990 (28 U.S.C. § 2461 note). The work of the Commission does not involve civil monetary penalties. It involves establishing appropriate criminal sentences for categories of offenses and offenders, including appropriate amounts for criminal fines. See, e.g., 28 U.S.C. § 994(b)(1), (a)(1)(B). While some of the monetary values in the Chapter Two offense guidelines have been revised since they were originally established in 1987 (e.g., the loss table in §2B1.1 was substantially amended in 2001), they have never been revised specifically to account for inflation. Other monetary values in the Chapter Two offense guidelines, as well as the monetary values in the fine tables for individual defendants and for organizational defendants, have never been revised.*

Specifically, the proposed amendment sets forth an approach for amending the monetary tables in the guidelines to adjust for inflation, i.e., the tables in §§2B1.1 (Theft, Property, Destruction, and Fraud), 2B2.1 (Burglary), 2B3.1 (Robbery), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 2T4.1 (Tax Table), 5E1.2 (Fines for Individual Defendants), and 8C2.4 (Base Fine). The approach is based on changes to the Bureau of Labor Statistics' Consumer Price Index and on different time frames (taking into consideration the year each monetary table was last amended).

For each of the seven tables, the proposed amendment adjusts the amounts in the monetary tables using a specific multiplier derived from the Consumer Price Index, and then rounds—

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

For the loss table in §2B1.1(b)(1) and the tax table in §2T4.1, the proposed amendment adjusts for inflation since 2001, the year both tables were last amended. According to the Consumer Price Index, \$1.00 in 2001 has the same buying power as \$1.34 in 2014. For the loss tables in §§2B2.1 (Burglary) and 2B3.1 (Robbery), and the fine table for individual defendants at §5E1.2(c)(3), the proposed amendment adjusts for inflation since 1989, the year these tables were last amended. The adjustments take into account that \$1.00 in 1989 has the same buying power as \$1.91 in 2014, according to the Consumer Price Index. For the antitrust table in §2R1.1(b)(2), the proposed amendment adjusts for inflation since 2005, the year the table was last amended. According to the Consumer Price Index, \$1.00 in 2005 has the same buying power as \$1.22 in 2014. And, finally, for the fine table for organizational defendants at §8C2.4(d), the proposed amendment adjusts for inflation since 1991, as the table has not been substantially amended since it was promulgated. The adjustments take into account that, according to the Consumer Price Index, \$1.00 in 1991 has the same buying power as \$1.74 in 2014.

Each of the tables shows the initial multiplier used to make the adjustments for inflation taken from the Consumer Price Index. Also, as an aid to the reader, the proposed amendment is set forth in a manner that indicates, at each level of the monetary tables, the effective amount of the multiplier that results from the rounding methodology used. In addition, the proposed amendment includes conforming changes to other Chapter Two guidelines that refer to the monetary tables.

The proposed amendment also includes a special instruction to both §§5E1.2 and 8C2.4 providing that for offenses committed prior to November 1, 2015, the court should use the fine table that was set forth in the version of the corresponding guideline that was in effect on November 1, 2014, rather than the fine table as amended for inflation.

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

* * *

(b) Specific Offense Characteristics

(1) If the loss exceeded ~~\$5,000~~ \$6,500, increase the offense level as follows:

<u>[Multiplier Comparison to Current Table]</u>	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
[1.30]	(A) \$5,000 \$6,500 or less	no increase
[1.30]	(B) More than \$5,000 \$6,500	add 2
[1.50]	(C) More than \$10,000 \$15,000	add 4
[1.33]	(D) More than \$30,000 \$40,000	add 6
[1.36]	(E) More than \$70,000 \$95,000	add 8
[1.25]	(F) More than \$120,000 \$150,000	add 10
[1.25]	(G) More than \$200,000 \$250,000	add 12
[1.38]	(H) More than \$400,000 \$550,000	add 14
[1.50]	(I) More than \$1,000,000 \$1,500,000	add 16
[1.40]	(J) More than \$2,500,000 \$3,500,000	add 18
[1.36]	(K) More than \$7,000,000 \$9,500,000	add 20
[1.50]	(L) More than \$20,000,000 \$25,000,000	add 22
[1.40]	(M) More than \$50,000,000 \$65,000,000	add 24
[1.50]	(N) More than \$100,000,000 \$150,000,000	add 26
[1.50]	(O) More than \$200,000,000 \$250,000,000	add 28
[1.38]	(P) More than \$400,000,000 \$550,000,000	add 30.

* * *

§2B1.4. Insider Trading

* * *

(b) Specific Offense Characteristics

- (1) If the gain resulting from the offense exceeded ~~\$5,000~~ \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§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

* * *

(b) Specific Offense Characteristics

- (1) If the value of the cultural heritage resource or paleontological resource (A) exceeded ~~\$2,000~~ \$2,500 but did not exceed ~~\$5,000~~ \$6,500, increase by 1 level; or (B) exceeded ~~\$5,000~~ \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B2.1. Burglary of a Residence or a Structure Other than a Residence

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the loss exceeded ~~\$2,500~~ \$5,000, increase the offense level as follows:

<u><i>[Multiplier Comparison to Current Table]</i></u>	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
<i>[2.00]</i>	(A) \$2,500 \$5,000 or less	no increase
<i>[2.00]</i>	(B) More than \$2,500 \$5,000	add 1
<i>[2.00]</i>	(C) More than \$10,000 \$20,000	add 2
<i>[1.90]</i>	(D) More than \$50,000 \$95,000	add 3
<i>[2.00]</i>	(E) More than \$250,000 \$500,000	add 4
<i>[1.88]</i>	(F) More than \$800,000 \$1,500,000	add 5
<i>[2.00]</i>	(G) More than \$1,500,000 \$3,000,000	add 6
<i>[2.00]</i>	(H) More than \$2,500,000 \$5,000,000	add 7
<i>[1.90]</i>	(I) More than \$5,000,000 \$9,500,000	add 8.

* * *

§2B2.3. Trespass

* * *

(b) Specific Offense Characteristics

* * *

- (3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded ~~\$2,000~~**\$2,500** but did not exceed ~~\$5,000~~**\$6,500**, increase by **1** level; or (ii) exceeded ~~\$5,000~~**\$6,500**, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B3.1. Robbery

* * *

(b) Specific Offense Characteristics

* * *

- (7) If the loss exceeded ~~\$10,000~~**\$20,000**, increase the offense level as follows:

<u>[Multiplier Comparison to Current Table]</u>	<u>Loss</u> (Apply the Greatest)	<u>Increase in Level</u>
[2.00]	(A) \$10,000 \$20,000 or less	no increase
[2.00]	(B) More than \$10,000 \$20,000	add 1
[1.90]	(C) More than \$50,000 \$95,000	add 2
[2.00]	(D) More than \$250,000 \$500,000	add 3
[1.88]	(E) More than \$800,000 \$1,500,000	add 4
[2.00]	(F) More than \$1,500,000 \$3,000,000	add 5
[2.00]	(G) More than \$2,500,000 \$5,000,000	add 6
[1.90]	(H) More than \$5,000,000 \$9,500,000	add 7 .

* * *

§2B3.2. Extortion by Force or Threat of Injury or Serious Damage

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the greater of the amount demanded or the loss to the victim exceeded ~~\$10,000~~**\$20,000**, increase by the corresponding number of levels from the table in §2B3.1(b)(7).

* * *

§2B3.3. Blackmail and Similar Forms of Extortion

* * *

(b) Specific Offense Characteristic

- (1) If the greater of the amount obtained or demanded (A) exceeded ~~\$2,000~~**\$2,500** but did not exceed ~~\$5,000~~**\$6,500**, increase by 1 level; or (B) exceeded ~~\$5,000~~**\$6,500**, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

- (1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded ~~\$2,000~~**\$2,500** but did not exceed ~~\$5,000~~**\$6,500**, increase by 1 level; or (B) exceeded ~~\$5,000~~**\$6,500**, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B5.1. Offenses Involving Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

- (1) If the face value of the counterfeit items (A) exceeded ~~\$2,000~~**\$2,500** but did not exceed ~~\$5,000~~**\$6,500**, increase by 1 level; or (B) exceeded ~~\$5,000~~**\$6,500**, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

- (1) If the infringement amount (A) exceeded ~~\$2,000~~ \$2,500 but did not exceed ~~\$5,000~~ \$6,500, increase by 1 level; or (B) exceeded ~~\$5,000~~ \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

- (1) If the retail value of the motor vehicles or parts (A) exceeded ~~\$2,000~~ \$2,500 but did not exceed ~~\$5,000~~ \$6,500, increase by 1 level; or (B) exceeded ~~\$5,000~~ \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§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**

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded ~~\$5,000~~ \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the value of the gratuity exceeded ~~\$5,000~~ \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2C1.8. **Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property**

* * *

(b) Specific Offense Characteristics

- (1) If the value of the illegal transactions exceeded ~~\$5,000~~ \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2E5.1. **Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations**

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded ~~\$2,000~~ \$2,500 but did not exceed ~~\$5,000~~ \$6,500, increase by 1 level; or (B) exceeded ~~\$5,000~~ \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

(3) (If more than one applies, use the greater):

(A) If the market value of the fish, wildlife, or plants (i) exceeded ~~\$2,000~~**\$2,500** but did not exceed ~~\$5,000~~**\$6,500**, increase by 1 level; or (ii) exceeded ~~\$5,000~~**\$6,500**, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount; or

* * *

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

* * *

(b) Specific Offense Characteristics

* * *

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

<u><i>[Multiplier Comparison to Current Table]</i></u>	<u>Volume of Commerce</u> (Apply the Greatest)	<u>Adjustment to Offense Level</u>
<i>[1.00]</i>	(A) More than \$1,000,000	add 2
<i>[1.00]</i>	(B) More than \$10,000,000	add 4
<i>[1.25]</i>	(C) More than \$40,000,000 \$50,000,000	add 6
<i>[1.00]</i>	(D) More than \$100,000,000	add 8
<i>[1.20]</i>	(E) More than \$250,000,000 \$300,000,000	add 10
<i>[1.20]</i>	(F) More than \$500,000,000 \$600,000,000	add 12
<i>[1.20]</i>	(G) More than \$1,000,000,000 \$1,200,000,000	add 14
<i>[1.23]</i>	(H) More than \$1,500,000,000 \$1,850,000,000	add 16.

* * *

§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

(a) Base Offense Level:

- (1) The level from §2T4.1 (Tax Table) corresponding to the tax loss, if the tax loss exceeded ~~\$1,000~~ \$1,500; or
- (2) 5, if the tax loss exceeded ~~\$100~~ \$200 but did not exceed ~~\$1,000~~ \$1,500; or
- (3) 4, if the tax loss did not exceed ~~\$100~~ \$200.

For purposes of this guideline, the “tax loss” is the amount of the duty.

* * *

§2T4.1. Tax Table

<u>[Multiplier Comparison to Current Table]</u>	<u>Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
[1.25]	(A) \$2,000 \$2,500 or less	6
[1.25]	(B) More than \$2,000 \$2,500	8
[1.30]	(C) More than \$5,000 \$6,500	10
[1.20]	(D) More than \$12,500 \$15,000	12
[1.33]	(E) More than \$30,000 \$40,000	14
[1.25]	(F) More than \$80,000 \$100,000	16
[1.25]	(G) More than \$200,000 \$250,000	18
[1.38]	(H) More than \$400,000 \$550,000	20
[1.50]	(I) More than \$1,000,000 \$1,500,000	22
[1.40]	(J) More than \$2,500,000 \$3,500,000	24
[1.36]	(K) More than \$7,000,000 \$9,500,000	26
[1.25]	(L) More than \$20,000,000 \$25,000,000	28
[1.30]	(M) More than \$50,000,000 \$65,000,000	30
[1.50]	(N) More than \$100,000,000 \$150,000,000	32
[1.25]	(O) More than \$200,000,000 \$250,000,000	34
[1.38]	(P) More than \$400,000,000 \$550,000,000	36.

* * *

§5E1.2. Fines for Individual Defendants

- (a) The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.
- (b) The applicable fine guideline range is that specified in subsection (c) below. If, however, the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) of this section.
- (c) (1) The minimum of the fine guideline range is the amount shown in column

A of the table below.

* * *

(3) Fine Table

Offense Level	A Minimum	<u>[Multiplier Comparison to Current Table]</u>	B Maximum	<u>[Multiplier Comparison to Current Table]</u>
3 and below	\$100\$200	[2.00]	\$5,000\$9,500	[1.90]
4-5	\$250\$500	[2.00]	\$5,000\$9,500	[1.90]
6-7	\$500\$1,000	[2.00]	\$5,000\$9,500	[1.90]
8-9	\$1,000\$2,000	[2.00]	\$10,000\$20,000	[2.00]
10-11	\$2,000\$4,000	[2.00]	\$20,000\$40,000	[2.00]
12-13	\$3,000\$5,500	[1.83]	\$30,000\$55,000	[1.83]
14-15	\$4,000\$7,500	[1.88]	\$40,000\$75,000	[1.88]
16-17	\$5,000\$10,000	[2.00]	\$50,000\$95,000	[1.90]
18-19	\$6,000\$10,000	[1.67]	\$60,000\$100,000	[1.67]
20-22	\$7,500\$15,000	[2.00]	\$75,000\$150,000	[2.00]
23-25	\$10,000\$20,000	[2.00]	\$100,000\$200,000	[2.00]
26-28	\$12,500\$25,000	[2.00]	\$125,000\$250,000	[2.00]
29-31	\$15,000\$30,000	[2.00]	\$150,000\$300,000	[2.00]
32-34	\$17,500\$35,000	[2.00]	\$175,000\$350,000	[2.00]
35-37	\$20,000\$40,000	[2.00]	\$200,000\$400,000	[2.00]
38 and above	\$25,000\$50,000	[2.00]	\$250,000\$500,000.	[2.00]

* * *

(h) Special Instruction

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

* * *

§8C2.4. Base Fine

* * *

(d) Offense Level Fine Table

<u>[Multiplier Comparison to Current Table]</u>	Offense Level	Amount
[1.70]	6 or less	\$5,000\$8,500
[2.00]	7	\$7,500\$15,000

[1.50]	8	\$10,000	\$15,000
[1.67]	9	\$15,000	\$25,000
[1.75]	10	\$20,000	\$35,000
[1.67]	11	\$30,000	\$50,000
[1.75]	12	\$40,000	\$70,000
[1.67]	13	\$60,000	\$100,000
[1.76]	14	\$85,000	\$150,000
[1.60]	15	\$125,000	\$200,000
[1.71]	16	\$175,000	\$300,000
[1.80]	17	\$250,000	\$450,000
[1.71]	18	\$350,000	\$600,000
[1.70]	19	\$500,000	\$850,000
[1.54]	20	\$650,000	\$1,000,000
[1.65]	21	\$910,000	\$1,500,000
[1.67]	22	\$1,200,000	\$2,000,000
[1.88]	23	\$1,600,000	\$3,000,000
[1.67]	24	\$2,100,000	\$3,500,000
[1.79]	25	\$2,800,000	\$5,000,000
[1.76]	26	\$3,700,000	\$6,500,000
[1.77]	27	\$4,800,000	\$8,500,000
[1.59]	28	\$6,300,000	\$10,000,000
[1.85]	29	\$8,100,000	\$15,000,000
[1.90]	30	\$10,500,000	\$20,000,000
[1.85]	31	\$13,500,000	\$25,000,000
[1.71]	32	\$17,500,000	\$30,000,000
[1.81]	33	\$22,000,000	\$40,000,000
[1.75]	34	\$28,500,000	\$50,000,000
[1.81]	35	\$36,000,000	\$65,000,000
[1.76]	36	\$45,500,000	\$80,000,000
[1.74]	37	\$57,500,000	\$100,000,000
[2.07]	38 or more	\$72,500,000	\$150,000,000.

(e) Special Instruction

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

* * *

EXHIBIT E

PROPOSED AMENDMENT: MITIGATING ROLE

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission’s study of the operation of §3B1.2 (Mitigating Role) and related provisions in the Guidelines Manual. See United States Sentencing Commission, “Notice of Final Priorities,” 79 Fed. Reg. 49378 (Aug. 20, 2014). The mitigating role guideline provides an adjustment of 2, 3, or 4 levels for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.*

First, the proposed amendment addresses differences among the circuits about what determining the “average participant” requires. The Seventh and Ninth Circuits have concluded that the “average participant” means only those persons who actually participated in the criminal activity at issue in the defendant’s case, so that the defendant’s relative culpability is determined only by reference to his or her co-participants. See, e.g., United States v. Benitez, 34 F.3d 1489, 1498 (9th Cir. 1994) (explaining that “the relevant comparison . . . is to the conduct of co-participants in the case at hand.”); United States v. Cantrell, 433 F.3d 1269, 1283 (9th Cir. 2006) (“While a comparison to the conduct of a hypothetical average participant may be appropriate in determining whether a downward adjustment is warranted at all, the relevant comparison in determining which of the §3B1.2 adjustments to grant a given defendant is to the conduct of co-participants in the case at hand.”) (internal quotations omitted); United States v. DePriest, 6 F.3d 1201, 1214 (7th Cir. 1993) (“The controlling standard for an offense level reduction under [§3B1.2] is whether the defendant was substantially less culpable than the conspiracy’s other participants.”). The First and Second Circuits have concluded that the “average participant” also includes typical offenders who commit similar crimes. See, e.g., United States v. Santos, 357 F.3d 136, 142 (1st Cir. 2004) (“[A] defendant must prove that he is both less culpable than his cohorts in the particular criminal endeavor and less culpable than the majority of those within the universe of persons participating in similar crimes.”); United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999) (“A reduction will not be available simply because the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant’s conduct must be ‘minor’ or ‘minimal’ as compared to the average participant in such a crime.”). Under this latter approach, courts will ordinarily consider the defendant’s culpability relative both to his co-participants and to the typical offender. The proposed amendment generally adopts the approach of the Seventh and Ninth Circuits.

Second, the proposed amendment provides a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment. It provides as an example that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for a mitigating role adjustment.

Third, the proposed amendment provides that the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive a mitigating role adjustment, if he or she is substantially less culpable than the average participant in the criminal activity.

Fourth, the Commentary to §3B1.2 provides that certain individuals who perform limited functions in criminal activity are “not precluded” from consideration for a mitigating role adjustment. The proposed amendment revises this language to state that such an individual “may receive” a mitigating role

adjustment.

Proposed Amendment:

§3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, “participant” has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).
2. Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.
3. Applicability of Adjustment.—
 - (A) Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant **in the criminal activity.**

*A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in **the concerted criminal activity is not precluded from consideration for may receive** an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose **role participation** in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored **is not precluded from consideration for may receive** an adjustment under this guideline.*

Likewise, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal

gain from a fraud offense ~~and/or~~ who had limited knowledge of the scope of the scheme is ~~not precluded from consideration for~~ **may receive** an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose ~~role~~ **participation** in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, ~~is not precluded from consideration for~~ **may receive** an adjustment under this guideline.

- (B) Conviction of Significantly Less Serious Offense.—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 12 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.
- (C) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:

- (i) **the degree to which the defendant understood the scope and structure of the criminal activity;**
- (ii) **the degree to which the defendant participated in planning or organizing the criminal activity;**
- (iii) **the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;**
- (iv) **the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;**
- (v) **the degree to which the defendant stood to benefit from the criminal activity.**

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

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

4. *Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in the criminal~~concerted~~ activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.*
5. *Minor Participant.— Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.*
6. *Application of Role Adjustment in Certain Drug Cases.—In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.*

* * *

EXHIBIT F

PROPOSED AMENDMENT: HYDROCODONE

Synopsis of Proposed Amendment: *This proposed amendment addresses the new statutory penalty structure for offenses involving hydrocodone and hydrocodone combination products in light of two recent administrative actions. As a result of those actions, all hydrocodone products are now schedule II controlled substances rather than schedule III controlled substances.*

A. *Until Recently, the Scheduling of Hydrocodone Has Depended on Whether It Is a Single-Entity Product (Schedule II) or A Combination Product (Schedule III)*

Products featuring hydrocodone in combination with one or more unscheduled active pharmaceutical ingredients have been schedule III controlled substances, until recently. Such “hydrocodone combination” products are the most frequently prescribed opioids in the United States, with nearly 137 million prescriptions for such products dispensed in 2013, according to the Drug Enforcement Administration. See Drug Enforcement Administration, “Schedules of Controlled Substances: Rescheduling of Hydrocodone Combination Products From Schedule III to Schedule II,” 79 FR 49661 (August 22, 2014). There are several hundred hydrocodone combination products on the market. The hydrocodone combination products that were most frequently prescribed in 2013 were combinations of hydrocodone and acetaminophen, with brand names such as Vicodin and Lortab as well as generics. Id.

In contrast, single-entity, or “standalone,” hydrocodone products have been, and continue to be, schedule II controlled substances. However, there have been no single-entity hydrocodone products on the United States market, until recently.

B. *All Hydrocodone Products Are Now Schedule II Controlled Substances*

Two recent administrative actions have had the effect of moving all offenses involving hydrocodone (whether in combination or standing alone) to schedule II.

First, in October 2013 the Food and Drug Administration approved a single-entity hydrocodone product (brand name Zohydro), the first such product to be approved for the United States market. According to the Food and Drug Administration, Zohydro is “an opioid analgesic medication for the management of moderate to severe chronic pain when a continuous, around-the-clock opioid analgesic is needed for an extended period of time.” It is marketed in extended-release capsules and formulated in dose strengths up to 50 milligrams. See Food and Drug Administration, “Anesthetic and Analgesic Drug Products Advisory Committee: Notice of Meeting,” 77 FR 67380 (November 9, 2012). As mentioned above, such a product is a schedule II controlled substance. Other single-entity hydrocodone products are also being considered for the U.S. market.

Second, the Drug Enforcement Administration published a final rule that moved all hydrocodone combination products from schedule III to schedule II. See Drug Enforcement Administration, “Schedules of Controlled Substances: Rescheduling of Hydrocodone Combination Products From Schedule III to Schedule II,” 79 FR 49661 (August 22, 2014). This action imposes stronger regulatory controls and administrative and civil sanctions on persons who handle hydrocodone combination products. As discussed in more detail below, it also changes the statutory and guideline penalty

structure for offenses involving hydrocodone combination products.

C. The Statutory and Guideline Penalty Structures

By statute, an offense involving a schedule III controlled substance has a statutory maximum term of imprisonment of 10 years, unless certain aggravating factors are present (such as a prior conviction for a felony drug offense or the use of the substance resulting in death or bodily injury). See 21 U.S.C. § 841(b)(1)(E). An offense involving a schedule II controlled substance, in contrast, has a statutory maximum term of imprisonment of 20 years, unless such an aggravating factor is present. See 21 U.S.C. § 841(b)(1)(C).

Under the guidelines, an offense involving “schedule III hydrocodone” generally has a base offense level determined by the number of pills, tablets, or capsules, without regard to the weight of the pills, tablets, or capsules or the quantity of hydrocodone in them. The base offense levels for schedule III hydrocodone range from a minimum of level 6 to a maximum of level 30, and quantity is determined by a marijuana equivalency under which 1 “unit” (i.e., 1 pill, tablet, or capsule) equals 1 gram of marijuana.

An offense involving schedule II hydrocodone generally has a base offense level determined by the weight of the entire pill, tablet, or capsule involved. The base offense levels for schedule II hydrocodone range from a minimum of level 12 to a maximum of level 38, and quantity is determined by a marijuana equivalency under which 1 gram of the pills, tablets, or capsules equals 500 grams of marijuana.

D. The Proposed Amendment Deletes the Reference to “Schedule III Hydrocodone” and Proposes a Marijuana Equivalency Using “Hydrocodone (Actual)”

The proposed amendment responds to the administrative actions in two ways. First, the proposed amendment deletes references in the guidelines to “Schedule III Hydrocodone.” In light of the rescheduling of hydrocodone combination products from schedule III to schedule II, the references to schedule III hydrocodone are obsolete.

Second, the proposed amendment provides a single marijuana equivalency for hydrocodone offenses, whether single-entity or in combination, that is based on the actual weight of the hydrocodone involved rather than the number of pills involved or the weight of an entire pill. Specifically, a marijuana equivalency under which 1 gram of “hydrocodone (actual)” equates to 6,700 grams of marijuana is proposed.

The use of an “actual” approach for hydrocodone in the proposed amendment is informed by the Commission’s decision in 2003 to use an “actual” approach for oxycodone. See USSG App. C, amend. 657 (effective November 1, 2003). Oxycodone is an opium alkaloid found in certain prescription pain relievers such as Percocet and OxyContin, generally sold in pill form. The Commission determined that a penalty structure based on the weight of the entire pill resulted in proportionality issues because (1) products come in different pill sizes and formulations and (2) products of the same size and formulation come in different dosages, containing different amounts of oxycodone. The Commission remedied these proportionality issues by adopting a penalty structure for oxycodone offenses using the weight of the actual oxycodone instead of the weight of the entire pill. See USSG App. C, amend. 657 (Reason for Amendment).

Such proportionality issues may also arise with offenses involving hydrocodone products, to the extent those products come in different pill sizes, formulations, or dosages. The proposed use of an “actual” approach for hydrocodone addresses these proportionality issues by providing sentences for hydrocodone offenses using the weight of the actual hydrocodone instead of the number of pills or the weight of an entire pill.

The rescheduling of hydrocodone combination products also raises severity issues, and the proposed amendment addresses the severity issues by assigning hydrocodone (actual) the same marijuana equivalency as oxycodone (actual). This severity level (6,700 gm) is based on a 1:1 ratio of hydrocodone to oxycodone in marijuana equivalency, which reflects a view that equivalent amounts of hydrocodone and oxycodone cause the same pharmacological effects on the body.

Proposed Amendment:

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

* * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

* * *

- | | | |
|-----|---|-----------------|
| (5) | <ul style="list-style-type: none"> ● At least 1 KG but less than 3 KG of Heroin; ● At least 5 KG but less than 15 KG of Cocaine; ● At least 280 G but less than 840 G of Cocaine Base; ● At least 1 KG but less than 3 KG of PCP, or
at least 100 G but less than 300 G of PCP (actual); ● At least 500 G but less than 1.5 KG of Methamphetamine, or
at least 50 G but less than 150 G of Methamphetamine (actual), or
at least 50 G but less than 150 G of “Ice”; ● At least 500 G but less than 1.5 KG of Amphetamine, or
at least 50 G but less than 150 G of Amphetamine (actual); ● At least 10 G but less than 30 G of LSD; ● At least 400 G but less than 1.2 KG of Fentanyl; ● At least 100 G but less than 300 G of a Fentanyl Analogue; ● At least 1,000 KG but less than 3,000 KG of Marijuana; ● At least 200 KG but less than 600 KG of Hashish; ● At least 20 KG but less than 60 KG of Hashish Oil; ● At least 1,000,000 but less than 3,000,000 units of Ketamine; ● At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants; ● 1,000,000 units or more of Schedule III Hydrocodone; ● At least 62,500 but less than 187,500 units of Flunitrazepam. | Level 30 |
| (6) | <ul style="list-style-type: none"> ● At least 700 G but less than 1 KG of Heroin; | Level 28 |

- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 196 G but less than 280 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or
at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or
at least 35 G but less than 50 G of Methamphetamine (actual), or
at least 35 G but less than 50 G of “Ice”;
- At least 350 G but less than 500 G of Amphetamine, or
at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- ~~● At least 700,000 but less than 1,000,000 units of Schedule III Hydrocodone;~~
- At least 43,750 but less than 62,500 units of Flunitrazepam.

(7)

- At least 400 G but less than 700 G of Heroin;
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 112 G but less than 196 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or
at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or
at least 20 G but less than 35 G of Methamphetamine (actual), or
at least 20 G but less than 35 G of “Ice”;
- At least 200 G but less than 350 G of Amphetamine, or
at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- ~~● At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;~~
- At least 25,000 but less than 43,750 units of Flunitrazepam.

Level 26

(8)

- At least 100 G but less than 400 G of Heroin;
- At least 500 G but less than 2 KG of Cocaine;
- At least 28 G but less than 112 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or
at least 10 G but less than 40 G of PCP (actual);
- At least 50 G but less than 200 G of Methamphetamine, or

Level 24

at least 5 G but less than 20 G of Methamphetamine (actual), or
at least 5 G but less than 20 G of “Ice”;

- At least 50 G but less than 200 G of Amphetamine, or
at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD;
- At least 40 G but less than 160 G of Fentanyl;
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Ketamine;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- ~~● At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;~~
- At least 6,250 but less than 25,000 units of Flunitrazepam.

(9)

- At least 80 G but less than 100 G of Heroin;
- At least 400 G but less than 500 G of Cocaine;
- At least 22.4 G but less than 28 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or
at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or
at least 4 G but less than 5 G of Methamphetamine (actual), or
at least 4 G but less than 5 G of “Ice”;
- At least 40 G but less than 50 G of Amphetamine, or
at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD;
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- ~~● At least 80,000 but less than 100,000 units of Schedule III Hydrocodone;~~
- At least 5,000 but less than 6,250 units of Flunitrazepam.

Level 22

(10)

- At least 60 G but less than 80 G of Heroin;
- At least 300 G but less than 400 G of Cocaine;
- At least 16.8 G but less than 22.4 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or
at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or
at least 3 G but less than 4 G of Methamphetamine (actual), or
at least 3 G but less than 4 G of “Ice”;
- At least 30 G but less than 40 G of Amphetamine, or
at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD;

Level 20

- At least 24 G but less than 32 G of Fentanyl;
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- ~~At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;~~
- 60,000 units or more of Schedule III substances (except Ketamine or Hydrocodone);
- At least 3,750 but less than 5,000 units of Flunitrazepam.

- (11)
- At least 40 G but less than 60 G of Heroin;
 - At least 200 G but less than 300 G of Cocaine;
 - At least 11.2 G but less than 16.8 G of Cocaine Base;
 - At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
 - At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of “Ice”;
 - At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
 - At least 400 MG but less than 600 MG of LSD;
 - At least 16 G but less than 24 G of Fentanyl;
 - At least 4 G but less than 6 G of a Fentanyl Analogue;
 - At least 40 KG but less than 60 KG of Marihuana;
 - At least 8 KG but less than 12 KG of Hashish;
 - At least 800 G but less than 1.2 KG of Hashish Oil;
 - At least 40,000 but less than 60,000 units of Ketamine;
 - At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
 - ~~At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;~~
 - At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine or Hydrocodone);
 - At least 2,500 but less than 3,750 units of Flunitrazepam.

Level 18

- (12)
- At least 20 G but less than 40 G of Heroin;
 - At least 100 G but less than 200 G of Cocaine;
 - At least 5.6 G but less than 11.2 G of Cocaine Base;
 - At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
 - At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of “Ice”;
 - At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
 - At least 200 MG but less than 400 MG of LSD;
 - At least 8 G but less than 16 G of Fentanyl;

Level 16

- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 1,250 but less than 2,500 units of Flunitrazepam.

- (13)
- At least 10 G but less than 20 G of Heroin;
 - At least 50 G but less than 100 G of Cocaine;
 - At least 2.8 G but less than 5.6 G of Cocaine Base;
 - At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
 - At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of “Ice”;
 - At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
 - At least 100 MG but less than 200 MG of LSD;
 - At least 4 G but less than 8 G of Fentanyl;
 - At least 1 G but less than 2 G of a Fentanyl Analogue;
 - At least 10 KG but less than 20 KG of Marihuana;
 - At least 2 KG but less than 5 KG of Hashish;
 - At least 200 G but less than 500 G of Hashish Oil;
 - At least 10,000 but less than 20,000 units of Ketamine;
 - At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
 - At least 10,000 but less than 20,000 units of Schedule III Hydrocodone;
 - At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine or Hydrocodone);
 - At least 625 but less than 1,250 units of Flunitrazepam.

Level 14

- (14)
- Less than 10 G of Heroin;
 - Less than 50 G of Cocaine;
 - Less than 2.8 G of Cocaine Base;
 - Less than 10 G of PCP, or less than 1 G of PCP (actual);
 - Less than 5 G of Methamphetamine, or less than 500 MG of Methamphetamine (actual), or less than 500 MG of “Ice”;
 - Less than 5 G of Amphetamine, or less than 500 MG of Amphetamine (actual);
 - Less than 100 MG of LSD;
 - Less than 4 G of Fentanyl;
 - Less than 1 G of a Fentanyl Analogue;

Level 12

- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- ~~● At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;~~
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 312 but less than 625 units of Flunitrazepam;
- 80,000 units or more of Schedule IV substances (except Flunitrazepam).

- (15) **Level 10**
- At least 2.5 KG but less than 5 KG of Marihuana;
 - At least 500 G but less than 1 KG of Hashish;
 - At least 50 G but less than 100 G of Hashish Oil;
 - At least 2,500 but less than 5,000 units of Ketamine;
 - At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
 - ~~● At least 2,500 but less than 5,000 units of Schedule III Hydrocodone;~~
 - At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine or Hydrocodone);
 - At least 156 but less than 312 units of Flunitrazepam;
 - At least 40,000 but less than 80,000 units of Schedule IV substances (except Flunitrazepam).

- (16) **Level 8**
- At least 1 KG but less than 2.5 KG of Marihuana;
 - At least 200 G but less than 500 G of Hashish;
 - At least 20 G but less than 50 G of Hashish Oil;
 - At least 1,000 but less than 2,500 units of Ketamine;
 - At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
 - ~~● At least 1,000 but less than 2,500 units of Schedule III Hydrocodone;~~
 - At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine or Hydrocodone);
 - Less than 156 units of Flunitrazepam;
 - At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam);
 - 160,000 units or more of Schedule V substances.

- (17) **Level 6**
- Less than 1 KG of Marihuana;
 - Less than 200 G of Hashish;
 - Less than 20 G of Hashish Oil;
 - Less than 1,000 units of Ketamine;
 - Less than 1,000 units of Schedule I or II Depressants;
 - ~~● Less than 1,000 units of Schedule III Hydrocodone;~~
 - Less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);
 - Less than 16,000 units of Schedule IV substances (except Flunitrazepam);
 - Less than 160,000 units of Schedule V substances.

***Notes to Drug Quantity Table:**

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.
- (B) The terms “PCP (actual)”, “Amphetamine (actual)”, and “Methamphetamine (actual)” refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.
- The terms “Hydrocodone (actual)” and “Oxycodone (actual)” refer to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.
- (C) “Ice,” for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.
- (D) “Cocaine base,” for the purposes of this guideline, means “crack.” “Crack” is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.
- (E) In the case of an offense involving marijuana plants, treat each plant, regardless of sex, as equivalent to 100 grams of marijuana. *Provided*, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana.
- (F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one “unit” means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one “unit” means 0.5 milliliters. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 milligrams of an anabolic steroid is one “unit”.

* * *

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)-(3), (7), (g), 860a, 865, 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

* * *

7. Multiple Transactions or Multiple Drug Types.—Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.

8. Use of Drug Equivalency Tables.—

* * *

(D) Drug Equivalency Tables.—

Schedule I or II Opiates*

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Hydrocodone (actual) =	6700 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg of marihuana

*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

* * *

Schedule III Substances (except ketamine and hydrocodone)***

1 unit of a Schedule III Substance = 1 gm of marihuana

***Provided, that the combined equivalent weight of all Schedule III substances (except ketamine and

hydrocodone), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of marihuana.

Schedule III Hydrocodone****

1 unit of Schedule III hydrocodone = 1 gm of marihuana

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

* * *

27. Departure Considerations.—

- (A) Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations.—If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant’s purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.
- (B) Upward Departure Based on Drug Quantity.—In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.
- (C) Upward Departure Based on Unusually High Purity.—Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant’s role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.

* * *

EXHIBIT G

PROPOSED AMENDMENT: ECONOMIC CRIME

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission's multi-year study of §2B1.1 (Theft, Property, Destruction, and Fraud), and related guidelines, including examination of the loss table, the definition of loss, role in the offense, and offenses involving fraud on the market. See United States Sentencing Commission, "Notice of Final Priorities," 79 Fed. Reg. 49378 (Aug. 20, 2014).*

Intended Loss

First, the proposed amendment revises the definition of "intended loss" at §2B1.1, comment. (n.3(A)(ii)). While the current definition for intended loss was added as part of the Economic Crime Package in 2001, see USSG App. C, amend. 617 (eff. Nov. 1, 2001), the concept of intended loss has been included in the fraud and theft guidelines since the inception of the guidelines, see USSG §2F1.1, comment. (n.7) (1987). Note 3(A)(ii) states that "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).

The Commission has received comment expressing concern regarding the operation of intended loss, including suggestions that the Commission consider certain revisions to better reflect a defendant's culpability. In addition to these comments, the Commission has observed some disagreement in the case law regarding whether intended loss requires a subjective or objective inquiry. In United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011), the Tenth Circuit held that a subjective inquiry is required, which is similar to holdings in the Second, Third and Fifth Circuits. See United States v. Confredo, 528 F.3d 143, 152 (2d Cir. 2008) (remanding for consideration of whether defendant had "proven a subjective intent to cause a loss of less than the aggregate amount" of fraudulent loans); United States v. Kopp, 951 F.2d 521 (3d Cir. 1991) (holding that intended loss is the loss the defendant subjectively intended to inflict on the victim); United States v. Diallo, 710 F.3d 147, 151 (3d Cir. 2013) ("To make this determination, we look to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims."); United States v. Sanders, 343 F.3d 511, 527 (5th Cir. 2003) ("our case law requires the government prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level"). On the other hand, the First and the Seventh Circuits have issued decisions that support a more objective inquiry. See United States v. Innarelli, 524 F.3d 286, 291 (1st Cir. 2008) ("we focus our loss inquiry for purposes of determining a defendant's offense level on the objectively reasonable expectation of a person in his position at the time he perpetrated the fraud, not on his subjective intentions or hopes"); United States v. Lane, 323 F.3d 568, 590 (7th Cir. 2003) ("The determination of intended loss under the Sentencing Guidelines therefore focuses on the conduct of the defendant and the objective financial risk to victims caused by that conduct").

The proposed amendment would provide that intended loss means the pecuniary harm "that the defendant purposely sought to inflict." This reflects certain principles discussed in the Tenth Circuit's

decision in United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011). In Manatau, the defendant was convicted of bank fraud and aggravated identity theft. The district court determined that the intended loss should be determined by adding up the credit limits of the stolen convenience checks, because a loss up to those credit limits was “both possible and potentially contemplated by the defendant’s scheme.” 647 F.3d at 1049-1050. On appeal, the Tenth Circuit reversed, holding that “intended loss” contemplates “a loss the defendant purposely sought to inflict,” and that the appropriate standard was one of “subjective intent to cause the loss.” 647 F.3d at 1055. Such an intent, the court held, may be based on making “reasonable inferences about the defendant’s mental state from the available facts.” 647 F.3d at 1056.

Victims Table

Second, the proposed amendment addresses issues relating to the impact of the victims table in §2B1.1(b)(2) as well as other provisions relating to victims in §2B1.1. The victims table provides a tiered enhancement based on the number of victims. It provides an enhancement of 2 levels if the offense involved 10 or more victims or was committed through mass-marketing; 4 levels if the offense involved 50 or more victims; and 6 levels if the offense involved 250 or more victims.

The proposed amendment revises the victims table at subsection (b)(2) to incorporate substantial financial hardship as a factor. Specifically, it amends the victims table so that the 2-level enhancement applies if the offense involved 10 or more victims or mass-marketing, or if the offense resulted in substantial financial hardship to one or more victims. The 4-level enhancement applies if the offense resulted in substantial financial hardship to five or more victims, and the 6-level enhancement applies if the offense resulted in substantial financial hardship to 25 or more victims. As a conforming change, the “mailbox rule” in Note 4(C)(ii) is revised to refer to 10 victims rather than 50 victims.

The proposed amendment provides factors for the court to consider in determining whether substantial financial hardship resulted. Because one of these factors, substantial harm to a victim’s credit record, is also reflected in the departure provision at Note 20(A)(vi), the proposed amendment deletes that factor from the departure provision. Finally, the proposed amendment deletes prong (iii) of subsection (b)(16)(B), relating to an offense that substantially endangered the solvency or financial security of 100 or more victims.

Sophisticated Means

Third, the proposed amendment revises the specific offense characteristic for sophisticated means in subsection (b)(10)(C). The existing enhancement applies if “the offense otherwise involved sophisticated means.” Applying this language, courts have applied this enhancement without a determination of whether the defendant’s own conduct was “sophisticated.” See, e.g., United States v. Green, 648 F.3d 569, 576 (7th Cir. 2011) (rejecting argument that trial court erred by applying enhancement to all defendants “on the basis of the sophistication of the general scheme rather than [defendant’s] activities in particular”; explaining that “a sophisticated means enhancement could be applied to [defendant] so long as the use of sophisticated means by other criminal associates was reasonably foreseeable to him”); United States v. Bishop-Oyedepo, 480 Fed. App’x 431, 433-34 (7th Cir. 2012) (affirming enhancement for mortgage loan officer who submitted three fraudulent applications because the other schemer’s actions were “reasonably foreseeable”; stating that “because [the defendant] knew of the scheme and the scheme as a whole was sophisticated, the adjustment was appropriate regardless of the

sophistication of her individual actions”); *United States v. Jenkins-Watt*, 574 F.3d 950, 965 (8th Cir. 2009) (affirming enhancement because defendant was “aware of how the conspiracy worked” and, “[a]t the very least, the conspiracy’s criminal conduct was reasonably foreseeable”).

The proposed amendment narrows the scope of the specific offense characteristic at subsection (b)(10)(C) to cases in which the defendant intentionally engaged in or caused (rather than the offense involved) sophisticated means.

Fraud on the Market and Related Offenses

Fourth, the proposed amendment addresses offenses involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. Securities fraud is prosecuted under 18 U.S.C. § 1348 (Securities and commodities fraud), which makes it unlawful to knowingly execute, or attempt to execute, a scheme or artifice (1) to defraud any person in connection with a security or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of a security. The statutory maximum term of imprisonment for an offense under section 1348 is 25 years. Offenses under section 1348 are referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud).

Securities fraud is also prosecuted under 18 U.S.C. § 1350 (Failure of corporate officers to certify financial reports), violations of the provisions of law referred to in 15 U.S.C. § 78c(a)(47), and violations of the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to those provisions of law. *See* §2B1.1, comment. (n.14(A)). In addition, there are cases in which the defendant committed a securities law violation but is prosecuted under a general fraud statute. In general, these offenses are likewise referenced to §2B1.1.

The proposed amendment revises the special rule at Application Note 3(F)(ix), which sets forth a method for calculating loss in cases involving the fraudulent inflation in the value of a publicly traded security or commodity and establishes the formula as a rebuttable presumption of the actual loss. Under the proposed amendment, the method provided is no longer a rebuttable presumption. As revised by the proposed amendment, the special rule provides that the court may use any method that is appropriate and practicable under the circumstances, and provides one such method the court may consider.

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) * * *

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

(A) (i) involved 10 or more victims; ~~or~~ (ii) was committed through mass-marketing; ~~or~~ (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;

(B) ~~involved 50 or more victims~~ resulted in substantial financial hardship to five or more victims, increase by 4 levels; or

(C) ~~involved 250 or more victims~~ resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.

* * *

(10) 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 and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

* * *

(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; ~~or~~ (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)(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**.

* * *

Commentary

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Application Notes:

* * *

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~~ the defendant purposely sought to inflict; 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).

* * *

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

* * *

(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 court may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by—

(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~~10 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.
- (F) Substantial Financial Hardship.—In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—
 - (i) becoming insolvent;
 - (ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);
 - (iii) suffering substantial loss of a retirement, education, or other savings or investment fund;
 - (iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;
 - (v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and
 - (vi) suffering substantial harm to his or her ability to obtain credit.

* * *

9. Sophisticated Means Enhancement under Application of 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 under Subsection (b)(10)(C).—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.*

* * *

20. *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.*

* * *