Amendments to the Sentencing Guidelines

April 30, 2013

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1. TRADE SECRETS

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

Section 3(a) of the Act directs the Commission to "review and, if appropriate, amend" the guidelines "applicable to persons convicted of offenses relating to the transmission or attempted transmission of a stolen trade secret outside of the United States or economic espionage, in order to reflect the intent of Congress that penalties for such offenses under the Federal sentencing guidelines and policy statements appropriately reflect the seriousness of these offenses, account for the potential and actual harm caused by these offenses, and provide adequate deterrence against such offenses." Section 3(b) of the Act states that, in carrying out the directive, the Commission shall consider, among other things, whether the guidelines adequately address the simple misappropriation of a trade secret; the transmission or attempted transmission of a stolen trade secret outside of the United States; and the transmission or attempted transmission of a stolen trade secret outside of the United States that is committed or attempted to be committed for the benefit of a foreign government, foreign instrumentality, or foreign agent.

The offenses described in the directive may be prosecuted under 18 U.S.C. § 1831 (Economic espionage), which requires that the defendant specifically intend or know that the offense "will benefit any foreign government, foreign instrumentality, or foreign agent," and 18 U.S.C. § 1832 (Theft of trade secrets), which does not require such specific intent or knowledge. The statutory maximum terms of imprisonment are 15 years for a section 1831 offense and 10 years for a section 1832 offense. Both offenses are referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud).

In response to the directive, the amendment revises the existing specific offense characteristic at §2B1.1(b)(5), which provides an enhancement of two levels "[i]f the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent," in two ways. First, it broadens the scope of the enhancement to provide a 2-level increase for trade secret offenses in which the defendant knew or intended that the trade secret would be transported or transmitted out of the United States. Second, it increases the severity of the enhancement to provide a 4-level enhancement and a minimum offense level of 14 for trade secret offenses in which the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent. The enhancement also is redesignated as subsection (b)(13).

In responding to the directive, the Commission consulted with individuals or groups representing law enforcement, owners of trade secrets, victims of economic espionage offenses, the United States Department of Justice, the United States Department of Homeland Security, the United States Department of State, the Office of the United States Trade Representative, the Federal Public and Community Defenders, and standing advisory groups, among others. The Commission also considered relevant data and literature.

The Commission received public comment and testimony that the transmission of stolen trade secrets outside of the United States creates significant obstacles to effective investigation and prosecution and

causes both increased harm to victims and more general harms to the nation. With respect to the victim, civil remedies may not be readily available or effective, and the transmission of a stolen trade secret outside of the United States substantially increases the risk that the trade secret will be exploited by a foreign competitor. In contrast, the simple movement of a stolen trade secret within a domestic multinational company (e.g., from a United States office to an overseas office of the same company) may not pose the same risks or harms. More generally, the Commission heard that foreign actors increasingly target United States companies for trade secret theft and that such offenses pose a growing threat to the nation's global competitiveness, economic growth, and national security. Accordingly, the Commission determined that a 2-level enhancement is warranted for cases in which the defendant knew or intended that a stolen trade secret would be transported or transmitted outside of the United States.

The Commission also received public comment and testimony that cases involving economic espionage (i.e., trade secret offenses that benefit foreign governments or entities under the substantial control of foreign governments) are particularly serious. In such cases, the United States is unlikely to obtain a foreign government's cooperation when seeking relief for the victim, and offenders backed by a foreign government likely will have significant financial resources to combat civil remedies. In addition, a foreign government's involvement increases the threat to the nation's economic and national security. Accordingly, the Commission determined that the existing enhancement for economic espionage should be increased from 2 to 4 levels and that such offenses should be subject to a minimum offense level of 14. This heightened enhancement is consistent with the higher statutory maximum penalties and fines applicable to such offenses and the Commission's established treatment of economic espionage as a more serious form of trade secret theft.

Consistent with the directive, the Commission also considered whether the guidelines appropriately account for the simple misappropriation of a trade secret. The Commission determined that such offenses are adequately accounted for by existing provisions in the Guidelines Manual, such as the loss table in §2B1.1(b)(1), the sophisticated means enhancement at §2B1.1(b)(10), and the adjustment for abuse of position of trust or use of special skill at §3B1.3.

Proposed Amendment:

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

(a) Base Offense Level:

(1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) **6**, otherwise.

(b) Specific Offense Characteristics

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

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

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

(A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;

(B) involved 50 or more victims, increase by **4** levels; or

(C) involved 250 or more victims, increase by **6** levels.

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

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

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

~~(6)~~(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.

~~(7)~~(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.

~~(8)~~(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by **2** levels; (ii) more than $7,000,000, increase by **3** levels; or (iii) more than $20,000,000, increase by **4** levels.

Note: Paragraph (8) is intentionally left unused by the renumbering of paragraphs made by this amendment. The Commission has promulgated a separate amendment (relating to pre-retail medical products) that inserts a new paragraph (8).

(9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

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

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

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

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

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

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

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

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

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

(~~15~~16) (Apply the greater) If—

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

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

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

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

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

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

(i) 18 U.S.C. § 1030, and the offense involved a computer

system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.

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

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

(~~18~~19) If the offense involved—

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

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

increase by **4** levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the

resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

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

Commentary

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Application Notes:

* * *

6. *Application of Subsection (b)~~(7)~~(6).—For purposes of subsection (b)~~(7)~~(6), "improper means" includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.*

* * *

10. *Application of Subsection (b)~~(13)~~(14).—Subsection (b)~~(13)~~(14) provides a minimum offense level in the case of an ongoing, sophisticated operation (e.g., an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft. A "cargo shipment" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.*

11. *Gross Receipts Enhancement under Subsection (b)~~(15)~~(16)(A).—*

(A) In General.—For purposes of subsection (b)~~(15)~~(16)(A), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.

* * *

12. *Application of Subsection (b)~~(15)~~(16)(B).—*

(A) *Application of Subsection (b)~~(15)~~(16)(B)(i).—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:*

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(B) *Application of Subsection (b)~~(15)~~(16)(B)(ii).—*

* * *

13. *Application of Subsection (b)~~(17)~~(18).—*

(A) *Definitions.—For purposes of subsection (b)~~(17)~~(18):*

* * *

(B) *Subsection (b)~~(17)~~(18)(A)(iii).—If the same conduct that forms the basis for an enhancement under subsection (b)~~(17)~~(18)(A)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)~~(15)~~(16)(B), do not apply the enhancement under subsection (b)~~(15)~~(16)(B).*

14. *Application of Subsection (b)~~(18)~~(19).—*

(A) *Definitions.—For purposes of subsection (b)~~(18)~~(19):*

* * *

(B) *In General.—A conviction under a securities law or commodities law is not required in order for subsection (b)~~(18)~~(19) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.*

(C) *Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)~~(18)~~(19) applies, do not apply §3B1.3.*

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19. *Departure Considerations.—*

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(B) *Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)~~(17)~~(18)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a*

debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.

* * *

Background: * * *

Subsection (b)~~(6)~~(5) implements the instruction to the Commission in section 2 of Public Law 105–101 and the directive to the Commission in section 3 of Public Law 110–384.

Subsection (b)~~(8)~~(7) implements the directive to the Commission in section 10606 of Public Law 111–148.

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Subsection (b)(13) implements the directive in section 3 of Public Law 112–269.

Subsection (b)~~(14)~~(15)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)~~(15)~~(16)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (b)~~(15)~~(16)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)~~(16)~~(17) implements the directive in section 209 of Public Law 110–326.

Subsection (b)~~(17)~~(18) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)~~(17)~~(18)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.

2. PRE-RETAIL MEDICAL PRODUCTS

Reason for Amendment: *This amendment responds to the Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2012, Pub. L. 112–186 (enacted October 5, 2012) (the "Act"), which addressed various offenses involving "pre-retail medical products," defined as "a medical product that has not yet been made available for retail purchase by a consumer." The Act created a new criminal offense at 18 U.S.C. § 670 for theft of pre-retail medical products, increased statutory penalties for certain related offenses when a pre-retail medical product is involved, and contained a directive to the Commission.*

New Offense at 18 U.S.C. § 670

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

(1) embezzle, steal, or by fraud or deception obtain, or knowingly and unlawfully take, carry away, or conceal a pre-retail medical product;

(2) knowingly and falsely make, alter, forge, or counterfeit the labeling or documentation (including documentation relating to origination or shipping) of a pre-retail medical product;

(3) knowingly possess, transport, or traffic in a pre-retail medical product that was involved in a violation of paragraph (1) or (2);

(4) with intent to defraud, buy, or otherwise obtain, a pre-retail medical product that has expired or been stolen;

(5) with intent to defraud, sell, or distribute, a pre-retail medical product that is expired or stolen; or

(6) attempt or conspire to violate any of paragraphs (1) through (5).

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

(1) the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product; or

(2) the violation—
- *(A) involves the use of violence, force, or a threat of violence or force;*
- *(B) involves the use of a deadly weapon;*
- *(C) results in serious bodily injury or death, including serious bodily injury or death resulting from the use of*

the medical product involved; or

(D) is subsequent to a prior conviction for an offense under section 670.

Specifically, the higher statutory maximum terms of imprisonment are:

(1) Five years, if—

(A) the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product; or

(B) the violation (i) involves the use of violence, force, or a threat of violence or force, (ii) involves the use of a deadly weapon, or (iii) is subsequent to a prior conviction for an offense under section 670.

(2) 15 years, if the value of the medical products involved in the offense is $5,000 or greater.

(3) 20 years, if both (1) and (2) apply.

(4) 30 years, if the offense results in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved.

The amendment amends Appendix A (Statutory Index) to reference the new offense at 18 U.S.C. § 670 to §2B1.1 (Theft, Property Destruction, and Fraud). The Commission concluded that §2B1.1 is the appropriate guideline because the elements of the new offense include theft or fraud.

<u>Response to Directive</u>

Section 7 of the Act directs the Commission to "review and, if appropriate, amend" the federal sentencing guidelines and policy statements applicable to the new offense and the related offenses "to reflect the intent of Congress that penalties for such offenses be sufficient to deter and punish such offenses, and appropriately account for the actual harm to the public from these offenses." The amendment amends §2B1.1 to address offenses involving pre-retail medical products in two ways.

First, the amendment adds a new specific offense characteristic at §2B1.1(b)(8) that provides a two-pronged enhancement with an instruction to apply the greater. Prong (A) provides a 2-level enhancement if the offense involved conduct described in 18 U.S.C. § 670. Prong (B) provides a 4-level enhancement if the offense involved conduct described in 18 U.S.C. § 670 and the defendant was employed by, or an agent of, an organization in the supply chain for the pre-retail product. Accompanying this new specific offense characteristic is new Commentary providing that, if prong (B) applies, "do not apply an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill)."

Based on public comment, testimony and sentencing data, the Commission concluded that an enhancement differentiating fraud and theft offenses involving medical products from those involving other products is warranted by the additional risk such offenses pose to public health and safety. In

addition, such offenses undermine the public's confidence in the medical regulatory and distribution system. The Commission also concluded that the risks and harms it identified would be present in any theft or fraud offense involving a pre-retail medical product, regardless of the offense of conviction. Therefore application of the new specific offense characteristic is not limited to offenses charged under 18 U.S.C. § 670.

The amendment provides a 4-level enhancement for defendants who commit such offenses while employed in the supply chain for the pre-retail medical product. Such defendants are subject to an increased statutory maximum and the Commission determined that a heightened enhancement should apply to reflect the likelihood that the defendant's position in the supply chain facilitated the commission or concealment of the offense. Defendants who receive the 4-level enhancement are not subject to the adjustment at §3B1.3 because the new enhancement adequately accounts for the concerns covered by §3B1.3. The Commission determined that existing specific offense characteristics generally account for other aggravating factors included in the Act, such as loss, use or threat of force, risk of death or serious bodily injury, and weapon involvement, and therefore additional new specific offense characteristics are not necessary. See, e.g., §§2B1.1(b)(1), (b)(3), and (b)(15) (as redesignated by the amendment).

Second, it amends the upward departure provisions in the Commentary to §2B1.1 at Application Note 19(A) to provide — as an example of a case in which an upward departure would be warranted — a case "involving conduct described in 18 U.S.C. § 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product." Public comment and testimony indicated that §2B1.1 may not adequately account for the harm created by theft or fraud offenses involving pre-retail medical products when such serious bodily injury or death actually occurs as a result of the offense. For example, some pre-retail medical products are stolen as part of a scheme to re-sell them into the supply chain, but if the products have not been properly stored in the interim, their subsequent use can seriously injure the individual consumers who buy and use them. Thus, the amendment expands the scope of the existing upward departure provision to address such harms and to clarify that an upward departure is appropriate in such cases not only if serious bodily injury or death occurred during the theft or fraud, but also if such serious bodily injury or death resulted from the victim's use of a pre-retail medical product that had previously been obtained by theft or fraud.

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

Proposed Amendment:

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

* * *

(b) Specific Offense Characteristics

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~~(8)~~(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by **2** levels; (ii) more than $7,000,000, increase by **3** levels; or (iii) more than $20,000,000, increase by **4** levels.

Note: The renumbering of paragraph (8) to paragraph (7) as indicated above is made not by this amendment but by a separate amendment (relating to trade secrets) promulgated by the Commission.

(8) (Apply the greater) If—

(A) the offense involved conduct described in 18 U.S.C. § 670, increase by **2** levels; or

(B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by **4** levels.

* * *

Commentary

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

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

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

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

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

* * *

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

subsection (b)(1).

* * *

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

(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note ~~9~~10(A).

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7. Application of Subsection (b)(8)(B).—If subsection (b)(8)(B) applies, do not apply an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

~~7.~~8. * * *

~~8.~~9. * * *

~~9.~~10. * * *

~~10.~~11. * * *

~~11.~~12. * * *

~~12.~~13. * * *

~~13.~~14. * * *

~~14.~~15. * * *

~~15.~~16. * * *

~~16.~~17. * * *

~~*17.*~~*18.* * * *

~~*18.*~~*19.* * * *

~~*19.*~~*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.*

* * *

Background: * * *

Subsection (b)(8) implements the directive to the Commission in section 7 of Public Law 112–186.

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

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18 U.S.C. § 669	2B1.1

18 U.S.C. § 670	2B1.1

* * *

3. COUNTERFEIT AND ADULTERATED DRUGS; COUNTERFEIT MILITARY PARTS

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

Section 2320 and Counterfeit Military Goods and Services

First, the amendment responds to changes to section 2320 made by the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112–81 (enacted December 31, 2011) (the "NDAA"). In general, section 2320 prohibits trafficking in goods or services using a counterfeit mark, and provides a statutory maximum term of imprisonment of 10 years, or 20 years for a second or subsequent offense. If the offender knowingly or recklessly causes or attempts to cause serious bodily injury or death, the statutory maximum is increased to 20 years or any term of years or life, respectively. Offenses under section 2320 are referenced in Appendix A (Statutory Index) to §2B5.3 (Criminal Infringement of Copyright or Trademark).

Section 818 of the NDAA amended section 2320 to add a new subsection (a)(3) that prohibits trafficking in counterfeit military goods and services, the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or national security. A "counterfeit military good or service" is defined as a good or service that uses a counterfeit mark and that (A) is falsely identified or labeled as meeting military specifications, or (B) is intended for use in a military or national security application. See 18 U.S.C. § 2320(f)(4). An individual who commits an offense under subsection (a)(3) is subject to a statutory maximum term of imprisonment of 20 years, or 30 years for a second or subsequent offense. See 18 U.S.C. § 2320(b)(3).

The legislative history of the NDAA indicates that Congress amended section 2320 because of concerns about national security and the protection of United States servicemen and women. After reviewing the legislative history, public comment, testimony, and data, the Commission determined that an offense involving counterfeit military goods and services that jeopardizes the safety of United States troops and compromises mission effectiveness warrants increased punishment.

Specifically, the amendment addresses offenses involving counterfeit military goods and services by amending §2B5.3 to create a new specific offense characteristic at subsection (b)(7). Subsection (b)(7) provides a 2-level enhancement and a minimum offense level of 14 if the offense involves a counterfeit military good or service the use, malfunction, or failure of which is likely to cause the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security. The Commission set the minimum offense level at 14 so that it would be proportionate to the minimum offense level in the enhancement for "conscious or reckless risk of death or serious bodily injury" at subsection (b)(5)(A). That enhancement is moved from (b)(5)(A) to (b)(6)(A) by the amendment.

Although section 2320(a)(3) includes offenses that are likely to cause "serious bodily injury or death,"

the new specific offense characteristic does not because the Commission determined that such risk of harm is adequately addressed by the existing enhancement for offenses involving the "conscious or reckless risk of death or serious bodily injury." Consistent with that approach, the amendment includes commentary providing that the "other significant harm" specified in subsection (b)(7) does not include death or serious bodily injury and that §2B5.3(b)(6)(A) would apply if the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death.

Section 2320 and Counterfeit Drugs

Second, the amendment responds to changes made by section 717 of the Food and Drug Administration Safety and Innovation Act, Pub. L. 112–144 (enacted July 9, 2012) (the "FDASIA"), which amended section 2320 to add a new subsection (a)(4) that prohibits trafficking in a counterfeit drug. A "counterfeit drug" is a drug, as defined by section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 321), that uses a counterfeit mark. See 18 U.S.C. § 2320(f)(6). An individual who commits an offense under subsection (a)(4) is subject to the same statutory maximum term of imprisonment as for an offense involving a counterfeit military good or service — 20 years, or 30 years for a second or subsequent offense. See 18 U.S.C. § 2320(b)(3).

Section 717 of the FDASIA also contained a directive to the Commission to "review and amend, if appropriate" the guidelines and policy statements applicable to persons convicted of an offense described in section 2320(a)(4) — i.e., offenses involving counterfeit drugs — "in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by the guidelines and policy statements." See Pub. L. 112–144, § 717(b)(1). In addition, section 717(b)(2) provides that, in responding to the directive, the Commission shall, among other things, ensure that the guidelines reflect the serious nature of section 2320(a)(4) offenses and consider the extent to which the guidelines account for the potential and actual harm to the public resulting from such offenses.

After reviewing the legislative history of the FDASIA, public comment, testimony, and data, the Commission determined that offenses involving counterfeit drugs involve a threat to public safety and undermine the public's confidence in the drug supply chain. Furthermore, unlike many other goods covered by the infringement guideline, offenses involving counterfeit drugs circumvent a regulatory scheme established to protect the health and safety of the public. Accordingly, the amendment responds to the directive by adding a new specific offense characteristic at §2B5.3(b)(5) that provides a 2-level enhancement if the offense involves a counterfeit drug.

Offenses Resulting in Death or Serious Bodily Injury

Third, the amendment amends the Commentary to §2B5.3 to add a new upward departure consideration if the offense resulted in death or serious bodily injury. The addition of this departure consideration recognizes the distinction between an offense involving the risk of death or serious bodily injury and one in which death or serious bodily injury actually results. Departures for these reasons are already authorized in the guidelines, see §§5K2.1 (Death) (Policy Statement), 5K2.2 (Physical Injury) (Policy Statement), but the amendment is intended to heighten awareness of the availability of a departure in such cases.

Section 333 and Offenses Involving Intentionally Adulterated Drugs

Finally, the amendment provides a statutory reference for the new offense at 21 U.S.C. § 333(b)(7) created by section 716 of the FDASIA. Section 333(b)(7) applies to any person who knowingly and intentionally adulterates a drug such that the drug is adulterated under certain provisions of 21 U.S.C. § 351 and has a reasonable probability of causing serious adverse health consequences or death to humans or animals. It provides a statutory maximum term of imprisonment of 20 years.

The amendment amends Appendix A (Statutory Index) to reference offenses under section 333(b)(7) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury). The Commission concluded that offenses under section 333(b)(7) are similar to tampering offenses under 18 U.S.C. § 1365 (Tampering with consumer products), which are referenced to §2N1.1. In addition, the public health harms that Congress intended to target in adulteration cases are similar to those targeted by violations of section 1365(a) and are best addressed under §2N1.1.

Proposed Amendment:

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

(a) Base Offense Level: **8**

(b) Specific Offense Characteristics

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

(2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.

(3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12.**

(4) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but the resulting offense level shall be not less than level **8**.

(5) If the offense involved a counterfeit drug, increase by **2** levels.

~~(5)~~(6) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

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

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

* * *

3. Application of Subsection (b)(7).—In subsection (b)(7), "other significant harm to a member of the Armed Forces" means significant harm other than serious bodily injury or death. In a case in which the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, subsection (b)(6)(A) (conscious or reckless risk of serious bodily injury or death) would apply.

~~3.~~4. Application of §3B1.3.—If the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.

~~4.~~5. Departure Considerations.—If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:

(A) The offense involved substantial harm to the reputation of the copyright or trademark owner.

(B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.

(C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.

(D) The offense resulted in death or serious bodily injury.

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

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

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

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

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21 U.S.C. § 333(b)(1)–(6)	2N2.1
21 U.S.C. § 333(b)(7)	2N1.1

4. TAX DEDUCTIONS

Reason for Amendment: *This amendment responds to a circuit conflict regarding whether a sentencing court, in calculating tax loss as defined in §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), may consider previously unclaimed credits, deductions, and exemptions that the defendant legitimately could have claimed if he or she had filed an accurate tax return.*

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

Six other circuit courts — the Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh — have reached the opposite conclusion, directly or indirectly holding that a court may not consider unclaimed deductions to reduce the tax loss. These circuit courts generally reason that the "object of the [defendant's] offense" is established by the amount stated on the fraudulent return, and that courts should not be required to reconstruct the defendant's return based on speculation regarding the many hypothetical ways the defendant could have completed the return. See United States v. Delfino, 510 F.3d 468, 473 (4th Cir. 2007) ("The law simply does not require the district court to engage in [speculation as to what deductions would have been allowed], nor does it entitle the Delfinos to the benefit of deductions they might have claimed now that they stand convicted of tax evasion."); United States v. Phelps, 478 F.3d 680, 682 (5th Cir. 2007) (holding that the defendant could not reduce tax loss by taking a social security tax deduction that he did not claim on the false return); United States v. Chavin, 316 F.3d 666, 677 (7th Cir. 2002) ("Here, the object of [the defendant]'s offense was the amount by which he underreported and fraudulently stated his tax liability on his return; reference to other unrelated mistakes on the return such as unclaimed deductions tells us nothing about the amount of loss to the government that his scheme intended to create."); United States v. Psihos, 683 F.3d 777, 781-82 (7th Cir. 2012) (following Chavin in disallowing consideration of unclaimed deductions); United States v. Sherman, 372 F.App'x 668, 676-77 (8th Cir. 2010); United States v. Blevins, 542 F.3d 1200, 1203 (8th Cir. 2008) (declining to decide "whether an unclaimed tax benefit may ever offset tax loss," but finding the district court properly declined to reduce tax loss based on taxpayers' unclaimed deductions); United States v. Yip, 592 F.3d 1035, 1041 (9th Cir. 2010) ("We hold that § 2T1.1 does not entitle a defendant to reduce the tax loss charged to him by the amount of potentially legitimate, but unclaimed, deductions even if those deductions are related to the offense."); United States v. Clarke, 562 F.3d 1158, 1165 (11th Cir. 2009) (holding that the defendant was not entitled to a tax loss calculation based on a filing status other than the one he actually used; "[t]he district court did not err in computing the tax loss based on the

fraudulent return Clarke actually filed, and not on the tax return Clarke could have filed but did not.").

The amendment resolves the conflict by amending the Commentary to §2T1.1 to establish a new application note regarding the consideration of unclaimed credits, deductions, or exemptions in calculating a defendant's tax loss. This amendment reflects the Commission's view that consideration of legitimate unclaimed credits, deductions, or exemptions, subject to certain limitations and exclusions, is most consistent with existing provisions regarding the calculation of tax loss in §2T1.1. See, e.g., USSG §2T1.1, comment. (n.1) ("the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts"); USSG §2T1.1, comment. (backg'd.) ("a greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics"); USSG §2T1.1, comment. (n.1) (allowing a sentencing court to go beyond the presumptions set forth in the guideline if "the government or defense provides sufficient information for a more accurate assessment of the tax loss," and providing "the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed").

The new application note first provides that courts should always account for the standard deduction and personal and dependent exemptions to which the defendant was entitled. The Commission received public comment and testimony that such deductions and exemptions are commonly considered and accepted by the government during the course of its investigation and during the course of plea negotiations. Consistent with this standard practice, the Commission determined that accounting for these generally undisputed and readily verifiable deductions and exemptions where they are not previously claimed (most commonly where the offense involves a failure to file a tax return) is appropriate.

The new application note further provides that courts should also account for any other previously unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss, but only to the extent certain conditions are met. First, the credit, deduction, or exemption must be one that was related to the tax offense and could have been claimed at the time the tax offense was committed. This condition reflects the Commission's determination that a defendant should not be permitted to invoke unforeseen or after-the-fact changes or characterizations — such as offsetting losses that occur before or after the relevant tax year or substituting a more advantageous depreciation method or filing status — to lower the tax loss. To permit a defendant to optimize his return in this manner would unjustly reward defendants, and could require unjustifiable speculation and complexity at the sentencing hearing.

Second, the otherwise unclaimed credit, deduction, or exemption must be reasonably and practicably ascertainable. Consistent with the instruction in Application Note 1, this condition reaffirms the Commission's position that sentencing courts need only make a reasonable estimate of tax loss. In this regard, the Commission recognized that consideration of some unclaimed credits, deductions, or exemptions could require sentencing courts to make unnecessarily complex tax determinations, and therefore concluded that limiting consideration of unclaimed credits, deductions, or exemptions to those that are reasonably and practicably ascertainable is appropriate.

Third, the defendant must present information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy. Consistent with the principles set forth in §6A1.3

(Resolution of Disputed Factors) (Policy Statement), this condition ensures that the parties have an adequate opportunity to present information relevant to the court's consideration of any unclaimed credits, deductions, or exemptions raised at sentencing.

In addition, the new application note provides that certain categories of credits, deductions, or exemptions shall not be considered by the court in any case. In particular, "the court shall not account for payments to third parties made in a manner that encouraged or facilitated a separate violation of law (e.g., 'under the table' payments to employees or expenses incurred to obstruct justice)." The Commission determined that payments made in this manner result in additional harm to the tax system and the legal system as a whole. Therefore, to use them to reduce the tax loss would unjustifiably benefit the defendant and would result in a tax loss figure that understates the seriousness of the offense and the culpability of the defendant.

Finally, the application note makes clear that the burden is on the defendant to establish any credit, deduction, or exemption permitted under this new application note by a preponderance of the evidence, which is also consistent with the commentary in §6A1.3.

Proposed Amendment:

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

(a) Base Offense Level:

(1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or

(2) **6**, if there is no tax loss.

(b) Specific Offense Characteristics

(1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(2) If the offense involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(c) Special Instructions

For the purposes of this guideline --

(1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

Notes:

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

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

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

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

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

Notes:

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

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

(3) If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.

(4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.

(5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

Commentary

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

Application Notes:

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

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

   * * *

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

2. *Total Tax Loss Attributable to the Offense.—In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: ~~(a)~~(A) there is a continuing pattern of violations of the tax laws by the defendant; ~~(b)~~(B) the defendant uses a consistent method to evade or camouflage income, e.g., backdating documents or using off-shore accounts; ~~(c)~~(C) the violations involve the same or a related series of transactions; ~~(d)~~(D) the violation in each instance involves a false or inflated claim of a similar deduction or credit; and ~~(e)~~(E) the violation in each instance involves a failure to report or an understatement of a specific source of income, e.g., interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive.*

3. *Unclaimed Credits, Deductions, and Exemptions.—In determining the tax loss, the court should account for the standard deduction and personal and dependent exemptions to which the*

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

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

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

~~3~~*4. Application of Subsection (b)(1) (Criminal Activity).—"Criminal activity" means any conduct constituting a criminal offense under federal, state, local, or foreign law.*

~~4~~*5. Application of Subsection (b)(2) (Sophisticated Means ~~Enhancement~~).— For purposes of subsection (b)(2), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.*

~~5~~*6. Other Definitions.—For purposes of this section:*

A "credit claimed against tax" is an item that reduces the amount of tax directly. In contrast, a "deduction" is an item that reduces the amount of taxable income.

~~6.~~ *"Gross income"~~income," for the purposes of this section,~~ has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61.*

7. Aggregation of Individual and Corporate Tax Loss.—If the offense involved both individual and corporate tax returns, the tax loss is the aggregate tax loss from the individual tax offense and the corporate tax offense added together. Accordingly, in a case in which a defendant fails to report income derived from a corporation on both the defendant's individual tax return and the defendant's corporate tax return, the tax loss is the sum of (A) the unreported or diverted amount multiplied by (i) 28%; or (ii) the tax rate for the individual tax offense, if sufficient information is available to make a more accurate assessment of that tax rate; and (B) the unreported or diverted amount multiplied by (i) 34%; or (ii) the tax rate for the corporate tax offense, if sufficient information is available to make a more accurate assessment of that tax rate. For example, the defendant, the sole owner of a Subchapter C corporation, fraudulently understates the corporation's income in the amount of $100,000 on the corporation's tax return, diverts the funds to the defendant's own use, and does not report these funds on the defendant's individual tax return. For purposes of this example, assume the use of 34% with respect to the corporate tax loss and the use of 28% with respect to the individual tax loss. The tax loss attributable to

the defendant's corporate tax return is $34,000 ($100,000 multiplied by 34%). The tax loss attributable to the defendant's individual tax return is $28,000 ($100,000 multiplied by 28%). The tax loss for the offenses are added together to equal $62,000 ($34,000 + $28,000).

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

* * *

5. ACCEPTANCE OF RESPONSIBILITY

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

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

The first circuit conflict involves the government's discretion under subsection (b) and, in particular, whether the government may withhold a motion based on an interest not identified in §3E1.1, such as the defendant's refusal to waive his right to appeal. The second conflict involves the court's discretion under subsection (b) and, in particular, whether the court may decline to apply the third level of reduction when the government has moved for it.

These circuit conflicts are unusual in that they involve guideline and commentary provisions that Congress directly amended. See section 401(g) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21 (the "PROTECT Act"); see also USSG App. C, Amendment 649 (effective April 30, 2003) (implementing amendments to the guidelines made directly by the PROTECT Act). They also implicate a congressional directive to the Commission not to "alter or repeal" the congressional amendments. See section 401(j)(4) of the PROTECT Act. Accordingly, in considering these conflicts, the Commission has not only reviewed public comment, sentencing data, case law, and the other types of information it ordinarily considers, but has also studied the operation of §3E1.1 before the PROTECT Act, the congressional action to amend §3E1.1, and the legislative history of that congressional action.

The Government's Discretion to Withhold the Motion

The first circuit conflict involves the government's discretion under subsection (b) and, in particular, whether the government may withhold a motion based on an interest not identified in §3E1.1, such as the defendant's refusal to waive his right to appeal.

Several circuits have held that a defendant's refusal to sign an appellate waiver is a legitimate reason for the government to withhold a §3E1.1(b) motion. See, e.g., United States v. Johnson, 581 F.3d 994, 1002 (9th Cir. 2009) (holding that "allocation and expenditure of prosecutorial resources for the purposes of defending an appeal is a rational basis" for such refusal); United States v. Deberry, 576 F.3d 708, 711 (7th Cir. 2009) (holding that requiring the defendant to sign an appeal waiver would avoid "expense and uncertainty" on appeal); United States v. Newson, 515 F.3d 374, 378 (5th Cir. 2008) (holding that the government's interests under §3E1.1 encompass not only the government's time and effort at

prejudgment stage but also at post-judgment proceedings).

In contrast, the Fourth Circuit has held that a defendant's refusal to sign an appellate waiver is not a legitimate reason for the government to withhold a §3E1.1(b) motion. See United States v. Divens, 650 F.3d 343, 348 (4th Cir. 2011) (stating that "the text of §3E1.1(b) reveals a concern for the efficient allocation of trial resources, not appellate resources" [emphasis in original]); see also United States v. Davis, No. 12-3552, slip op. at 5, __ F.3d __ (7th Cir., April 9, 2013) (Rovner, J., concurring) ("insisting that [the defendant] waive his right to appeal before he may receive the maximum credit under the Guidelines for accepting responsibility serves none of the interests identified in section 3E1.1"). The majority in Davis called for the conflict to be resolved, stating: "Resolution of this conflict is the province of the Supreme Court or the Sentencing Commission." Davis, slip op. at 3, __ F.3d at __ (per curiam). The Second Circuit, stating that the Fourth Circuit's reasoning in Divens applies "with equal force" to the defendant's request for an evidentiary hearing on sentencing issues, held that the government may not withhold a §3E1.1 motion based upon such a request. See United States v. Lee, 653 F.3d 170, 175 (2d Cir. 2011).

The PROTECT Act added Commentary to §3E1.1 stating that "[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing." See §3E1.1, comment. (n.6). The PROTECT Act also amended §3E1.1(b) to provide that the government motion state, among other things, that the defendant's notification of his intention to enter a plea of guilty permitted "the government to avoid preparing for trial and . . . the government and the court to allocate their resources efficiently . . .".

In its study of the PROTECT Act, the Commission could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1. Furthermore, consistent with Divens and the concurrence in Davis, the Commission determined that the defendant's waiver of his or her right to appeal is an example of an interest not identified in §3E1.1. Accordingly, this amendment adds an additional sentence to the Commentary stating that "[t]he government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."

The Court's Discretion to Deny the Motion

The second conflict involves the court's discretion under subsection (b) and, in particular, whether the court may decline to apply the third level of reduction when the government has moved for it.

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

In contrast, the Fifth Circuit has held that the district court retains discretion to deny the motion. See United States v. Williamson, 598 F.3d 227, 230 (5th Cir. 2010). In Williamson, the defendant was convicted after jury trial but successfully appealed. After remand, he pled guilty to a lesser offense. The government moved for the third level of reduction, but the court declined to grant it because "regardless of however much additional trial preparation the government avoided through Williamson's guilty plea

following remand, the preparation for the initial trial and the use of the court's resources for that trial meant that the § 3E1.1(b) benefits to the government and the court were not obtained". Id. at 231. The Fifth Circuit affirmed, holding that the decision whether to grant the third level of reduction "is the district court's — not the government's — even though the court may only do so on the government's motion". Id. at 230.

This amendment amends the Commentary to §3E1.1 by adding the following statement: "If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion."

In its study of the PROTECT Act, the Commission could discern no congressional intent to take away from the court its responsibility under §3E1.1 to make its own determination of whether the conditions were met. In particular, both the language added to the Commentary by the PROTECT Act and the legislative history of the PROTECT Act speak in terms of allowing the court discretion to "grant" the third level of reduction. See USSG §3E1.1, comment. (n.6) (stating that the third level of reduction "may only be granted upon a formal motion by the Government"); H.R. Rep. No. 108–66, at 59 (2003) (Conf. Rep.) (stating that the PROTECT Act amendment would "only allow courts to grant an additional third point reduction for 'acceptance of responsibility' upon motion of the government."). In addition, the Commission observes that one of the considerations in §3E1.1(b) is whether the defendant's actions permitted the court to allocate its resources efficiently, and the court is in the best position to make that determination. Accordingly, consistent with congressional intent, this amendment recognizes that the court continues to have discretion to decide whether to grant the third level of reduction.

Finally, and as mentioned above, the Commission in its study of the PROTECT Act could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1. For that reason, this amendment indicates that, if the government has filed the motion and the court also determines that the circumstances identified in §3E1.1 are present, the court should grant the motion.

Proposed Amendment:

§3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.

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

Commentary

Application Notes:

1. *In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:*

   (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;

   (B) voluntary termination or withdrawal from criminal conduct or associations;

   (C) voluntary payment of restitution prior to adjudication of guilt;

   (D) voluntary surrender to authorities promptly after commission of the offense;

   (E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

   (F) voluntary resignation from the office or position held during the commission of the offense;

   (G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and

   (H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. *This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.*

3. *Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility*

for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. *Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.*

5. *The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.*

6. *Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.*

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

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

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

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has

accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

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

6. SETSER

Reason for Amendment: *This amendment responds to a recent Supreme Court decision that federal courts have discretion to order that the sentence run consecutively to (or concurrently with) an anticipated, but not yet imposed, state sentence. See Setser v. United States, 132 S. Ct. 1463, 1468 (2012).*

The discretion recognized in Setser for anticipated state sentences is similar to the discretion that federal courts have under 18 U.S.C. § 3584 for previously imposed sentences. Under section 3584, a federal court imposing a sentence generally has discretion to order that the sentence run consecutively to (or, in the alternative, concurrently with) a term of imprisonment previously imposed but not yet discharged. See 18 U.S.C. § 3584(a). Section 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) provides guidance to the court in determining whether, and how, to use the discretion under section 3584, i.e., whether the sentence should run consecutively to (or, in the alternative, concurrently with) the prior undischarged term of imprisonment.

The amendment amends the background commentary to §5G1.3 to include a statement that, in addition to the discretion provided by section 3584, federal courts also generally have discretion under Setser to order that the sentences they impose will run consecutively to or concurrently with other state sentences that are anticipated but not yet imposed. Determining whether, and how, to use this discretion will depend on the adequacy of the information available. See Setser, 132 S.Ct. at 1471 n.6 ("Of course, a district court should exercise the power to impose anticipatory consecutive (or concurrent) sentences intelligently. In some situations, a district court may have inadequate information and may forbear, but in other situations, that will not be the case."). Adding this statement to the guideline that applies to the court's discretion under section 3584 is intended to provide heightened awareness of the court's similar discretion under Setser.

Proposed Amendment:

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

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court

determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Commentary

* * *

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

7. MISCELLANEOUS AND TECHNICAL

Reason for Amendment: *This amendment responds to recently enacted legislation and miscellaneous and technical guideline issues.*

Aiming a Laser Pointer at an Aircraft

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

The amendment amends Appendix A (Statutory Index) to reference section 39A offenses to §2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle). Section 2A5.2 is the most analogous guideline because the offense involves interference with an aircraft in flight.

Restraining the Harassment of a Victim or Witness

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

The amendment amends Appendix A (Statutory Index) to reference section 1514(c) offenses to §2J1.2 (Obstruction of Justice). Section 2J1.2 is the most analogous guideline because the offense involves interference with judicial proceedings.

Restricted Buildings and Grounds

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

The amendment amends Appendix A (Statutory Index) to reference section 1752 offenses to §2A2.4 (Obstructing or Impeding Officers) and §2B2.3 (Trespass). These guidelines are most analogous

because the elements of offenses under section 1752 involve either trespass at certain locations (i.e., locations permanently or temporarily protected by the Secret Service) or interference with official business at such locations, or both.

The amendment also amends §2B2.3(b)(1) to ensure that a trespass under section 1752 provides a 4-level enhancement if the trespass occurred at the White House or the Vice President's official residence, or a 2-level enhancement if the trespass occurred at any other location permanently or temporarily protected by the Secret Service. Section 2B2.3(b)(1) provides a 2-level enhancement if the trespass occurred at locations that involve a significant federal interest, such as nuclear facilities, airports, and seaports. A trespass at a location protected by the Secret Service is no less serious than a trespass at other locations that involve a significant federal interest and warrants an equivalent enhancement of 2 levels. Section 2B2.3(b)(1) also provides a 2-level enhancement if the trespass occurred at a residence. A trespass at the residence of the President or the Vice President is more serious and poses a greater risk of harm than a trespass at an ordinary residence and warrants an enhancement of 4 levels.

Aviation Smuggling

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

The amendment amends Appendix A (Statutory Index) to reference offenses under section 1590(d)(1) to §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property). In such cases, §2T3.1 is the most analogous guideline because the offense involves smuggling. The amendment also amends Appendix A (Statutory Index) to reference offenses under section 1590(d)(2) to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). In such cases, §2D1.1 is the most analogous guideline because controlled substances are involved in these offenses.

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

Fifth, the amendment responds to an application issue that may arise in cases in which the defendant is sentenced under an offense guideline in Chapter Two, Part J (Offenses Involving the Administration of Justice) and the defendant may also be subject to an adjustment under Chapter Three, Part C (Obstruction and Related Adjustments). Specifically, there are application notes in four Chapter Two, Part J guidelines that, it has been argued, preclude the court from applying adjustments in Chapter Three, Part C. See, e.g., United States v. Duong, 665 F.3d 364 (1st Cir. 2012) (observing that, "according to the literal terms" of the application notes, an adjustment under Chapter Three, Part C "'does not apply'", but "reject[ing] that premise").

The amendment amends the relevant application notes in Chapter Two, Part J (see §§2J1.2, comment. (n.2(A)); 2J1.3, comment. (n.2); 2J1.6, comment. (n.2); 2J1.9, comment. (n.1)) to clarify the Commission's intent that they restrict the court from applying §3C1.1 (Obstructing or Impeding the Administration of Justice) but do not restrict the court from applying §§3C1.2, 3C1.3, and 3C1.4. These changes resolve the application issue consistent with Duong and promote clarity and consistency in the application of these adjustments.

Export Offenses Under 18 U.S.C. § 554

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

The amendment amends Appendix A (Statutory Index) to add §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism) to the list of guidelines to which offenses under section 554 are referenced. Not all offenses under section 554 involve munitions, cultural resources, or wildlife, so a reference to an additional guideline is warranted. For example, a section 554 offense may be based on the export of ordinary commercial goods in violation of economic sanctions or on the export of "dual-use" goods (i.e., goods that have both commercial and military applications). For such cases, the additional reference to §2M5.1 promotes clarity and consistency in guideline application, and the penalty structure of §2M5.1 provides appropriate distinctions between offenses that violate national security controls and offenses that do not.

Technical and Stylistic Changes

Finally, the amendment makes certain technical and stylistic changes to the Guidelines Manual. First, it amends the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud) to provide updated references to the definitions contained in 7 U.S.C. § 1a, which were renumbered by Public Law 111–203 (enacted July 21, 2010). Second, it amends the Notes to the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to provide updated references to the definition of tetrahydrocannabinols contained in 21 C.F.R. § 1308.11(d), which were renumbered by 75 Fed. Reg. 79296 (December 20, 2010). Third, it makes several stylistic revisions in the Guidelines Manual to change "court martial" to "court-martial". The changes are not substantive.

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**

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Commentary

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Application Notes:

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~~14~~15. * * *

Note: The renumbering of Note 14 to Note 15 as indicated above is made not by this amendment but by a separate amendment (relating to pre-retail medical products) promulgated by the Commission.

(A) *Definitions.*— * * *

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

"Commodity pool operator" has the meaning given that term in section 1a(~~5~~11) of the Commodity Exchange Act (7 U.S.C. § 1a(~~5~~11)).

"Commodity trading advisor" has the meaning given that term in section 1a(~~6~~12) of the Commodity Exchange Act (7 U.S.C. § 1a(~~6~~12)).

"Futures commission merchant" has the meaning given that term in section 1a(~~20~~28) of the Commodity Exchange Act (7 U.S.C. § 1a(~~20~~28)).

"Introducing broker" has the meaning given that term in section 1a(~~23~~31) of the Commodity Exchange Act (7 U.S.C. § 1a(~~23~~31)).

* * *

§2B2.3. **Trespass**

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

(b) Specific Offense Characteristics

(1) (Apply the greater) If—

(A) ~~If~~ the trespass occurred (i) ~~(A)~~ at a secure government facility; (ii) ~~(B)~~ at a nuclear energy facility; (iii) ~~(C)~~ on a vessel or aircraft of the United States; (iv) ~~(D)~~ in a secure area of an

airport or a seaport; (v) ~~(E)~~ at a residence; (vi) ~~(F)~~ at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration; (vii) at any restricted building or grounds; or (viii) ~~(G)~~ on a computer system used (I) ~~(i)~~ to maintain or operate a critical infrastructure; or (II) ~~(ii)~~ by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels; or~~.~~

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

(2) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

* * *

(c) Cross Reference

(1) If the offense was committed with the intent to commit a felony offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above.

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

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

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

* * *

2. Application of Subsection (b)(3).—Valuation of loss is discussed in the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

* * *

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including

Possession with Intent to Commit These Offenses); Attempt or Conspiracy

* * *

***Notes to Drug Quantity Table:**

* * *

(H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(~~30~~31)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

(I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(~~30~~31)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

* * *

§2J1.2. Obstruction of Justice

* * *

Commentary

* * *

Application Notes:

* * *

2. Chapter Three Adjustments.—

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

* * *

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

* * *

Commentary

* * *

Application Notes:

* * *

2. *For offenses covered under this section, ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply, unless the defendant obstructed the investigation or trial of the perjury count.*

3. *In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which he committed perjury, subornation of perjury, or witness bribery), see the Commentary to ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1, and to §3D1.2(c) (Groups of Closely Related Counts).*

* * *

§2J1.6. Failure to Appear by Defendant

* * *

Commentary

* * *

Application Notes:

* * *

2. *For offenses covered under this section, ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply, unless the defendant obstructed the investigation or trial of the failure to appear count.*

* * *

§2J1.9. Payment to Witness

* * *

Commentary

* * *

Application Notes:

1. *For offenses covered under this section, ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1 (Obstructing or Impeding the Administration of Justice) does not apply unless the defendant obstructed the investigation or trial of the payment to witness count.*

2. *In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which the payment was made), see the Commentary to ~~Chapter Three, Part C (Obstruction and Related Adjustments)~~§3C1.1, and to §3D1.2(c) (Groups of Closely Related Counts).*

* * *

§4A1.1. Criminal History Category

* * *

Commentary

* * *

Application Notes:

* * *

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

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

* * *

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

* * *

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

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

* * *

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

* * *

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

* * *

(g) Military Sentences

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

* * *

APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 38	2B1.1
18 U.S.C. § 39A	2A5.2

* * *

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

* * *

18 U.S.C. § 1513	2A1.1, 2A1.2, 2A1.3, 2A2.1, 2A2.2, 2A2.3, 2B1.1, 2J1.2
18 U.S.C. § 1514(c)	2J1.2

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18 U.S.C. § 1751(e)	2A2.2, 2A2.3
18 U.S.C. § 1752	2A2.4, 2B2.3

* * *

19 U.S.C. § 1586(e)	2T3.1
19 U.S.C. § 1590(d)(1)	2T3.1
19 U.S.C. § 1590(d)(2)	2D1.1

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