



Proposed Amendments to the Sentencing Guidelines (Preliminary)

January 9, 2015

This document collects the proposed amendments to the sentencing guidelines, policy statements, and commentary, in the “reader-friendly” form in which they were made available at the public meeting on January 9, 2015. As with all proposed amendments on which a vote to publish for comment has been made but not yet officially submitted to the Federal Register for formal publication, authority to make technical and conforming changes may be exercised and motions to reconsider may be made. Once submitted to the Federal Register, official text of the proposed amendments as submitted will be posted on the Commission’s website at www.ussc.gov and will be available in a forthcoming edition of the Federal Register, and an updated “reader-friendly” version of the proposed amendments as submitted will be posted on the Commission’s website at www.ussc.gov.

Upon publication in the Federal Register, a 60-day period for public comment will begin. Further information on the submission of public comment will be provided in the forthcoming edition of the Federal Register referred to above. Such information will also be available at www.ussc.gov.

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PROPOSED AMENDMENT: TECHNICAL

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

The proposed amendment contains three parts, as follows.

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

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

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

Part C makes clerical changes to—

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

(A) **Reclassification of sections of United States Code**

Proposed Amendment:

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

* * *

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

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

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

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

* * *

§2H2.1. Obstructing an Election or Registration

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Commentary

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

* * *

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

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Commentary

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

Application Notes:

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

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

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§5E1.2. Fines for Individual Defendants

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Commentary

Application Notes:

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5. *Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others: 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to \$8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to \$4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of \$500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C. § 1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. § 1319(c), which authorizes a fine of up to \$50,000 per day for violations of the Water Pollution Control Act; 42 U.S.C. § 6928(d), which authorizes a fine of up to \$50,000 per day for violations of the Resource Conservation Act; and ~~2 U.S.C. § 437g(d)(1)(D)~~ **52 U.S.C. § 30109(d)(1)(D)**, which authorizes, for violations of the Federal Election Campaign Act under ~~2 U.S.C. § 441f~~ **52 U.S.C. § 30122**, a fine up to the greater of \$50,000 or 1,000 percent of the amount of the violation, and which requires, in the case of such a violation, a minimum fine of not less than 300 percent of the amount of the violation.*

* * *

APPENDIX A - STATUTORY INDEX

2 U.S.C. § 192	2J1.1, 2J1.5
2 U.S.C. § 390	2J1.1, 2J1.5
2 U.S.C. § 437g(d)	2C1.8
2 U.S.C. § 439a	2C1.8
2 U.S.C. § 441a	2C1.8
2 U.S.C. § 441a-1	2C1.8
2 U.S.C. § 441b	2C1.8
2 U.S.C. § 441c	2C1.8

~~2 U.S.C. § 441d~~ — 2C1.8

~~2 U.S.C. § 441e~~ — 2C1.8

~~2 U.S.C. § 441f~~ — 2C1.8

~~2 U.S.C. § 441g~~ — 2C1.8

~~2 U.S.C. § 441h(a)~~ — 2C1.8

~~2 U.S.C. § 441i~~ — 2C1.8

~~2 U.S.C. § 441k~~ — 2C1.8

7 U.S.C. § 6 2B1.1

7 U.S.C. § 6b(A) 2B1.1

* * *

42 U.S.C. § 1761(o)(2) 2B1.1

~~42 U.S.C. § 1973i(c)~~ — 2H2.1

~~42 U.S.C. § 1973i(d)~~ — 2H2.1

~~42 U.S.C. § 1973i(e)~~ — 2H2.1

~~42 U.S.C. § 1973j(a)~~ — 2H2.1

~~42 U.S.C. § 1973j(b)~~ — 2H2.1

~~42 U.S.C. § 1973j(c)~~ — 2X1.1

~~42 U.S.C. § 1973aa~~ — 2H2.1

~~42 U.S.C. § 1973aa-1~~ — 2H2.1

~~42 U.S.C. § 1973aa-1a~~ — 2H2.1

~~42 U.S.C. § 1973aa-3~~ — 2H2.1

~~42 U.S.C. § 1973bb~~ — 2H2.1

~~42 U.S.C. § 1973gg-10~~ — 2H2.1

42 U.S.C. § 2000e-13 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3

* * *

50 U.S.C. § 421	2M3.9
50 U.S.C. § 783	2M3.3
50 U.S.C. § 1705	2M5.1, 2M5.2, 2M5.3
50 U.S.C. § 3121	2M3.9
50 U.S.C. App. § 462	2M4.1
50 U.S.C. App. § 527(e)	2X5.2
50 U.S.C. App. § 2410	2M5.1
52 U.S.C. § 10307(c)	2H2.1
52 U.S.C. § 10307(d)	2H2.1
52 U.S.C. § 10307(e)	2H2.1
52 U.S.C. § 10308(a)	2H2.1
52 U.S.C. § 10308(b)	2H2.1
52 U.S.C. § 10308(c)	2X1.1
52 U.S.C. § 10501	2H2.1
52 U.S.C. § 10502	2H2.1
52 U.S.C. § 10503	2H2.1
52 U.S.C. § 10505	2H2.1
52 U.S.C. § 10701	2H2.1
52 U.S.C. § 20511	2H2.1
52 U.S.C. § 30109	2C1.8
52 U.S.C. § 30114	2C1.8
52 U.S.C. § 30116	2C1.8

52 U.S.C. § 30117	2C1.8
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52 U.S.C. § 30119	2C1.8
52 U.S.C. § 30120	2C1.8
52 U.S.C. § 30121	2C1.8
52 U.S.C. § 30122	2C1.8
52 U.S.C. § 30123	2C1.8
52 U.S.C. § 30124(a)	2C1.8
52 U.S.C. § 30125	2C1.8
52 U.S.C. § 30126	2C1.8

(B) Stylistic changes to the Illustrations of the Operation of the Multiple-Count Rules

Proposed Amendment:

§3D1.5. Determining the Total Punishment

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

Commentary

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

* * * * *

Concluding Commentary to Part D of Chapter Three

Illustrations of the Operation of the Multiple-Count Rules

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

- 1. Defendant A was convicted on four counts, each charging robbery of a different bank. Each would represent a distinct Group. §3D1.2. In each of the first three robberies, the offense level was 22 (20 plus a 2-level increase because a financial institution was robbed) (§2B3.1(b)). In the fourth robbery \$12,000 was taken and a firearm was displayed; the offense level was therefore 28. As the first three counts are 6 levels lower than the fourth, each of the first three represents one-half unit for purposes of §3D1.4. Altogether there are 2 1/2 Units, and the offense level for the most serious (28) is therefore increased by 3 levels under the table. The combined offense level is 31.*
- 2. Defendant B was convicted on four counts: (1) distribution of 230 grams of cocaine; (2) distribution of 150 grams of cocaine; (3) distribution of 75 grams of heroin; (4) offering a DEA agent \$20,000 to avoid prosecution. The combined offense level for drug offenses is determined by the total quantity of drugs, converted to marihuana equivalents (using the Drug Equivalency Tables in the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking)). The first count translates into 46 kilograms of marihuana; the second count translates into 30 kilograms of marihuana; and the third count translates into 75 kilograms of marihuana. The total is 151 kilograms of marihuana. Under §2D1.1, the combined offense level for the drug offenses is 24. In addition, because of the attempted bribe of the DEA agent, this offense level is increased by 2 levels to 26 under §3C1.1 (Obstructing or Impeding the*

Administration of Justice). Because the conduct constituting the bribery offense is accounted for by §3C1.1, it becomes part of the same Group as the drug offenses pursuant to §3D1.2(c). The combined offense level is 26 pursuant to §3D1.3(a), because the offense level for bribery (22) is less than the offense level for the drug offenses (26).

3. *Defendant DC was convicted of four counts arising out of a scheme pursuant to which the defendant received kickbacks from subcontractors. The counts were as follows: (1) The defendant received ~~\$27,000~~ \$1,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received ~~\$12,000~~ \$1,000 from subcontractor A relating to contract X (Commercial Bribery). (3) The defendant received ~~\$15,000~~ \$1,000 from subcontractor A relating to contract Y (Mail Fraud). (4) The defendant received ~~\$20,000~~ \$1,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts are covered by §2B1.1 (Theft, Property Destruction, and Fraud). The bribery counts are covered by §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), which treats the offense as a sophisticated fraud. The total money involved is ~~\$74,000~~ \$4,000, which results in an offense level of ~~16~~ 9 under either §2B1.1 (assuming the application of the “sophisticated means” enhancement in §2B1.1(b)(10)) or §2B4.1. Since these two guidelines produce identical offense levels, the combined offense level is ~~16~~ 9.*

(C) Clerical Changes

Proposed Amendment:

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

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Commentary

Application Notes:

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

* * *

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

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Commentary

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

* * *

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

* * *

This guideline also applies to making prohibited payments to induce the award of subcontracts on federal projects for which the maximum term of imprisonment authorized is ten years. ~~41 U.S.C. §§ 51, 53-54~~ 41 U.S.C. §§ 8702, 8707. Violations of 42 U.S.C. § 1320a-7b involve the offer or

acceptance of a payment to refer an individual for services or items paid for under a federal health care program (e.g., the Medicare and Medicaid programs).

* * *

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

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

Listed Chemicals and Quantity

Base Offense Level

* * *

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

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

List II Chemicals

- At least 440 G but less than 726 G of Acetic Anhydride;
- At least 47 KG but less than 82.25 KG of Acetone;
- At least 800 G but less than 1.4 KG of Benzyl Chloride;
- At least 43 KG but less than 75.25 KG of Ethyl Ether;
- At least 48 KG but less than 84 KG of Methyl Ethyl Ketone;

At least 400 G but less than 700 G of Potassium Permanganate;
At least 52 KG but less than 91 KG of Toluene.

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

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Commentary

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Application Notes:

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

* * *

PROPOSED AMENDMENT: “SINGLE SENTENCE” RULE

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

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

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

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

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

See §4A1.2(a)(2).

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

In King, there were two different sets of prior sentences that each qualified as a single sentence. Each set of prior sentences included a sentence that ordinarily would qualify as a career offender predicate and several other sentences that were not career offender predicates, imposed to run concurrently. The panel indicated that, within a “single sentence,” only one sentence receives the criminal history points. For the first set of sentences, one of the non-predicate sentences “should receive the criminal history point for this group because it was the longest.” Id. at 849. Accordingly, the sentence that ordinarily would qualify as a career offender predicate did not receive criminal history points and therefore did not

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

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

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

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

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

The proposed amendment generally follows the Sixth Circuit’s approach in *Williams*. It amends the commentary to §4A1.2 to provide that, when multiple prior sentences are counted as a single sentence,

the court should treat each of the multiple prior sentences as if it received criminal history points for purposes of determining predicate offenses. As a result, it also states that a prior sentence included in a single sentence may serve as a predicate under the career offender guideline (or other guidelines that involve predicates) if it independently would have received criminal history points.

In addition, the proposed amendment provides two issues for comment. The first issue for comment is on whether the Commission should use a different approach to respond to the King/Williams conflict over the “single sentence” rule. The second issue for comment is on whether the application issues presented by the “single sentence” rule are also presented by other provisions involved in calculating the criminal history score, such as the provision in §4A1.1(c) (adding 1 point for certain prior offenses up to a total of 4 points).

Proposed Amendment:

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

(a) Prior Sentence

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

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

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

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

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

(b) Sentence of Imprisonment Defined

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

(c) Sentences Counted and Excluded

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

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

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

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

- Fish and game violations
- Hitchhiking
- Juvenile status offenses and truancy
- Local ordinance violations (except those violations that are also

violations under state criminal law)
Loitering
Minor traffic infractions (e.g., speeding)
Public intoxication
Vagrancy.

(d) Offenses Committed Prior to Age Eighteen

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

(e) Applicable Time Period

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

(f) Diversionsary Dispositions

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

entered, except that diversion from juvenile court is not counted.

(g) Military Sentences

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

(h) Foreign Sentences

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

(i) Tribal Court Sentences

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

(j) Expunged Convictions

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

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

- (1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.
- (2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (see §4A1.2(e)(1)); (B) in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on such sentence (see §4A1.2(d)(2)(A)); and (C) in any other case, the date of the original sentence (see §4A1.2(d)(2)(B) and (e)(2)).

(l) Sentences on Appeal

Prior sentences under appeal are counted except as expressly provided below. In

the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and (e) shall apply as if the execution of such sentence had not been stayed.

(m) Effect of a Violation Warrant

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

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

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

(o) Felony Offense

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

(p) Crime of Violence Defined

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

Commentary

Application Notes:

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

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

2. Sentence of Imprisonment.—To qualify as a sentence of imprisonment, the defendant must have

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

3. **Counting Multiple Prior Sentences Separately or as a Single Sentence (Subsection (a)(2)).—**

(A) **In General.**—In some cases, multiple prior sentences are counted as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, each of the multiple prior sentences included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (see §4B1.2(c)) or other guidelines with predicate offenses, such as §2K1.3(a) and §2K2.1(a), if it independently would have received criminal history points.

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

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

4. **Sentences Imposed in the Alternative.**—A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (e.g., \$1,000 fine or ninety

days' imprisonment) is treated as a non-imprisonment sentence.

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

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

7. Offenses Committed Prior to Age Eighteen.—Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a "juvenile," this provision applies to all offenses committed prior to age eighteen.
8. Applicable Time Period.—Section 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term "commencement of the instant offense" includes any relevant conduct. See §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category).
9. Diversionsary Dispositions.—Section 4A1.2(f) requires counting prior adult diversionsary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.
10. Convictions Set Aside or Defendant Pardoned.—A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).
11. Revocations to be Considered.—Section 4A1.2(k) covers revocations of probation and other

conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

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

12. Application of Subsection (c).—

- (A) In General.—In determining whether an unlisted offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.
- (B) Local Ordinance Violations.—A number of local jurisdictions have enacted ordinances covering certain offenses (e.g., larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (e.g., a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.
- (C) Insufficient Funds Check.—“Insufficient funds check,” as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account.

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

Issues for Comment:

1. *The proposed amendment follows the Sixth Circuit’s approach in Williams regarding the meaning of the “single sentence” rule and its implications for guidelines that use predicate offenses. The Commission seeks comment on whether a different approach should be used to respond to the King/Williams conflict over the “single sentence” rule. For example, should the Commission follow the Eighth Circuit’s approach in King, and amend the commentary to §4A1.2 to provide that, if prior sentences are counted as a single sentence, only one of the sentences included in the single sentence is counted (the sentence with the longest term of imprisonment) and any other sentences included in the single sentence cannot serve as a predicate under the career offender guideline (or other guidelines that involve predicates)?*
2. *The Commission seeks comment on whether the application issues presented by the King/Williams conflict over the “single sentence” rule are also presented by other provisions involved in calculating the criminal history score and, if so, whether and how they should be addressed.*

In particular, there may be cases in which the defendant has more than four sentences that each could qualify for a criminal history point under §4A1.1(c), which instructs the court to add 1 point for each such sentence, “up to a total of 4 points”. In a case in which the defendant has more than four such sentences, and one of the sentences would ordinarily qualify as a career offender predicate, should that sentence (A) always qualify as a career offender predicate, following the reasoning of Williams; (B) never qualify as a career offender predicate, following the reasoning of King; or (C) qualify as a career offender predicate in some circumstances but not in others? For example, some helpline callers have asked whether the sentences under §4A1.1(c) should be placed in chronological sequence, with the first four sentences each receiving a point (and being eligible to serve as a career offender predicate) and any remaining sentences not receiving a point (and being ineligible to serve as a career offender predicate). A similar issue may also be presented by the 3-point limitation in §4A1.1(e), which instructs courts to add 1 point for certain prior sentences “up to a total of 3 points”.

Are there application issues presented by these provisions, or other provisions in the guidelines, that are similar to the issues presented by the King/Williams conflict over the “single sentence” rule? If so, how, if at all, should the Commission address them?

Finally, if the Commission were to address this circuit conflict and/or any similar application issues, what conforming or clarifying changes, if any, should be made to other provisions of the guidelines? In particular, are there places in the guidelines that refer to the “single sentence” rule (or, conversely, refer to whether prior sentences are “counted separately”) that should be revised to clarify how they operate? If so, which ones, and how should the Commission address them?

PROPOSED AMENDMENT: JOINTLY UNDERTAKEN CRIMINAL ACTIVITY

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

This proposed amendment is being published to inform the Commission's consideration of these issues. The Commission seeks comment on revisions that would provide further guidance on the operation of the "jointly undertaken criminal activity" provision as well as on possible revisions that would change the operation of the provision.

Proposed Additional Guidance

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

Possible Policy Changes

An issue for comment is provided on whether the Commission should make changes for policy reasons to the operation of "jointly undertaken criminal activity." Several options are presented for comment.

Proposed Amendment:

§1B1.3.

Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), ~~all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, all acts and omissions of others that were—~~
 - (i) ~~within the scope of the criminal activity that the defendant agreed to jointly undertake,~~
 - (ii) ~~in furtherance of the jointly undertaken criminal activity, and~~
 - (iii) ~~reasonably foreseeable in connection with that criminal activity;~~

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

- (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
- (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
- (4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. *The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.*

2. *Accountability Under More Than One Provision.—[In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. If a defendant’s accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.]**

2.3. *Jointly Undertaken Criminal Activity (Subsection (a)(1)(B)).—*

(A) In General.—A “jointly undertaken criminal activity” is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

(i) within the scope of the criminal activity that the defendant agreed to jointly undertake;

(Aii) in furtherance of the jointly undertaken criminal activity; and

(Biii) reasonably foreseeable in connection with that criminal activity.

*[The conduct of others that was both within the scope of, in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not within the scope of the criminal activity that the defendant agreed to jointly undertake, was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.]***

(B) Scope.—Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the “jointly undertaken criminal activity”) is not necessarily the same

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

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

as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement).—

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

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

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

(C) ~~In Furtherance.—The court must determine if the conduct (acts and omissions) of others was in furtherance of the criminal activity that the defendant agreed to jointly undertake.~~

(D) ~~Reasonably Foreseeable.—The court must then determine if the conduct (acts and omissions) of others in furtherance of the jointly undertaken criminal activity was reasonably foreseeable in connection with the criminal activity that the defendant agreed to jointly undertake.~~

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

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

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

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

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

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

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

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

In certain cases, a defendant may be accountable for particular conduct under

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

(bB) Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable acts and omissions in a jointly undertaken criminal activity.—

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

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

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

(+i) Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then

uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not ~~in furtherance~~ within the scope of the criminal activity he ~~agreed to jointly undertook~~ undertake with Defendant D (i.e., the forgery of the \$800 check).

- (2ii) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the criminal activity they agreed to jointly undertake (the scheme to sell fraudulent stocks), ~~was in furtherance of the jointly undertaken~~ that criminal activity, and was reasonably foreseeable in connection with that criminal activity.
- (3iii) Defendants H and I engaged in an ongoing marijuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marijuana. Defendant J is accountable for the entire single shipment of marijuana he helped import under subsection (a)(1)(A) and any acts and omissions ~~of others related to in furtherance of the importation of that shipment on the basis of subsection (a)(1)(B) that were reasonably foreseeable~~ (see the discussion in example (A)(i) above). He is not accountable for prior or subsequent shipments of marijuana imported by Defendants H or I because those acts were not ~~in furtherance~~ within the scope of his jointly undertaken criminal activity (the importation of the single shipment of marijuana).
- (4iv) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity (to distribute child pornography with Defendant K), in furtherance of that criminal activity, and reasonably

foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because ~~the scope of his jointly undertaken criminal activity is limited to that amount~~ **he is not engaged in a jointly undertaken criminal activity with the other defendants.** For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

- (5v) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not ~~in furtherance~~ **within the scope** of her jointly undertaken criminal activity (i.e., the one delivery).
- (6vi) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were **within the scope of the jointly undertaken criminal activity**, in furtherance of ~~the jointly undertaken~~ **that criminal activity**, and reasonably foreseeable in connection with that criminal activity.
- (7vii) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R. **Defendant S is not accountable under subsection (a)(1)(B) for the other quantities imported by Defendant R because those quantities were not within the scope of his jointly undertaken criminal activity (i.e., the 500 grams).**
- (8viii) Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of

which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity (which under subsection (a)(1)(B) were also in furtherance of, and reasonably foreseeable in connection with, the criminal activity). In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities. See Application Note 3(A).

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Issues for Comment:

1. Additional Guidance. The Commission seeks comment on whether additional or different guidance should be provided on the “jointly undertaken criminal activity” provision in subsection (a)(1)(B). In particular, should the Commission provide further guidance on how to determine (A) the scope of the jointly undertaken criminal activity, (B) whether the conduct of others was in furtherance of the criminal activity, and (C) whether the conduct of others was reasonably foreseeable in connection with the criminal activity? Does the proposed amendment provide adequate guidance on the operation of “jointly undertaken criminal activity”?

Should the Commission provide additional or different examples to better explain the operation of “jointly undertaken criminal activity”? If so, what examples should be provided? Are there examples that are no longer good illustrations of present-day criminal cases? If so, should those

examples be deleted or revised, or should they be replaced with more appropriate illustrations of present-day criminal cases?

2. Possible Policy Changes. *The Commission seeks comment on whether changes should be made for policy reasons to the operation of “jointly undertaken criminal activity,” such as to provide greater limitations on the extent to which a defendant is held accountable at sentencing for the conduct of co-participants that the defendant did not aid, abet, counsel, command, induce, procure, or willfully cause. (Such conduct is covered by §1B1.3(a)(1)(A).) In particular, but without limitation, the Commission seeks comment on two options for possible changes that could be made to the operation of “jointly undertaken criminal activity”, as follows.*

(A) Option A: Requiring a Higher State of Mind Than “Reasonable Foreseeability”

This option would revise “jointly undertaken criminal activity” by changing the “reasonable foreseeability” part of the analysis. The requirement that the other participant’s conduct be reasonably foreseeable has been described as a “negligence” standard, that is, the defendant should have known or should have foreseen the conduct.

The Commission seeks specific comment on whether “jointly undertaken criminal activity” should require a higher state of mind, such as recklessness or deliberate indifference; knowledge; or intent. For example, if a co-participant possessed a weapon, should the defendant be held accountable for the weapon only if he was deliberately indifferent to whether a weapon would be possessed; or only if he knew the weapon would be possessed; or only if he intended that the weapon be possessed?

(B) Option B: Requiring a Conviction for Conspiracy or At Least a “Pinkerton Conviction”

This option would hold a defendant accountable for a “jointly undertaken criminal activity” only when the defendant (1) was convicted of a conspiracy charge related to a co-conspirator’s conduct in furtherance of the jointly undertaken criminal activity; or (2) was convicted by a jury that was specifically instructed on Pinkerton liability regarding a substantive offense; or (3) admitted facts sufficient to constitute Pinkerton liability.

The Commission seeks specific comment on what the practical impact of such a change would be on charging and sentencing practices.

Does the current provision on “jointly undertaken criminal activity” appropriately further the purposes of sentencing? If not, what changes, if any, should the Commission make to “jointly undertaken criminal activity” to more appropriately further the purposes of sentencing? Do any of the options described above more appropriately further the purposes of sentencing? Are there other possible changes, whether or not identified in the options described above, that should be made to “jointly undertaken criminal activity” to more appropriately further the purposes of sentencing?

PROPOSED AMENDMENT: INFLATIONARY ADJUSTMENTS

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission’s work in examining the overall structure of the guidelines post-Booker. See United States Sentencing Commission, “Notice of Final Priorities,” 79 Fed. Reg. 49378 (Aug. 20, 2014). As part of that work, the Commission is considering whether to adjust monetary tables in the guidelines for inflation. Congress has generally mandated that agencies in the executive branch must, every four years, adjust the civil monetary penalties they impose to account for inflation. See Section 4 of the Federal Civil Penalties Inflationary Adjustment Act of 1990 (28 U.S.C. § 2461 note). The work of the Commission does not involve civil monetary penalties. It involves establishing appropriate criminal sentences for categories of offenses and offenders, including appropriate amounts for criminal fines. See, e.g., 28 U.S.C. § 994(b)(1), (a)(1)(B). While some of the monetary values in the Chapter Two offense guidelines have been revised since they were originally established in 1987 (e.g., the loss table in §2B1.1 was substantially amended in 2001), they have never been revised specifically to account for inflation. Other monetary values in the Chapter Two offense guidelines, as well as the monetary values in the fine tables for individual defendants and for organizational defendants, have never been revised.*

The proposed amendment, including the issues for comment set forth below, are intended to inform the Commission’s work across all the relevant guidelines and its examination of rulemaking practices generally. The proposed amendment illustrates one possible approach for implementing an inflationary adjustment during this amendment cycle. Specifically, it sets forth options for amending the monetary tables in the guidelines to adjust for inflation, i.e., the tables in §§2B1.1 (Theft, Property, Destruction, and Fraud), 2B2.1 (Burglary), 2B3.1 (Robbery), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 2T4.1 (Tax Table), 5E1.2 (Fines for Individual Defendants), and 8C2.4 (Base Fine). The options are based on changes to the Bureau of Labor Statistics’ Consumer Price Index and on different time frames (taking into consideration the year each monetary table was last amended). For each of the seven tables, two options are presented. They are as follows.

Option 1 *adjusts the amounts in the monetary tables using a specific multiplier derived from the Consumer Price Index, and then rounds the amounts using the rounding methodology applied when adjusting civil monetary penalties for inflation under section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note). In effect, this rounds—*

*amounts greater than \$200,000 to the nearest multiple of \$25,000;
amounts greater than \$100,000 to the nearest multiple of \$10,000;
amounts greater than \$10,000 to the nearest multiple of \$5,000;
amounts greater than \$1,000 to the nearest multiple of \$1,000;
amounts greater than \$100 to the nearest multiple of \$100; and
amounts less than or equal to \$100 to the nearest multiple of \$10.*

Option 2 *adjusts the amounts in the monetary tables using a specific multiplier derived from the Consumer Price Index, but then rounds the amounts using a different set of rounding rules extrapolated from the methodology used in Option 1. This “extrapolated” methodology provides rules that address a wider range of values than Option 1, such as by providing rounder numbers for amounts significantly greater than \$200,000. Specifically, this methodology rounds—*

amounts greater than \$100,000,000 to the nearest multiple of \$50,000,000;

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

For the loss table in §2B1.1(b)(1) and the tax table in §2B4.1, the options would adjust for inflation since 2001, the year both tables were last amended. According to the Consumer Price Index, \$1.00 in 2001 has the same buying power as \$1.34 in 2014. For the loss tables in §§2B2.1 (Burglary) and 2B3.1 (Robbery), and the fine table for individual defendants at §5E1.2(c)(3), the options would adjust for inflation since 1989, the year these tables were last amended. The adjustments would take into account that \$1.00 in 1989 has the same buying power as \$1.91 in 2014, according to the Consumer Price Index. The options for the antitrust table in §2R1.1(b)(2) would adjust for inflation since 2005, the year the table was last amended. According to the Consumer Price Index, \$1.00 in 2005 has the same buying power as \$1.22 in 2014. And, finally, for the fine table for organizational defendants at §8C2.4(d), the options would adjust for inflation since 1991, as the table has not been substantially amended since it was promulgated. The adjustments would take into account that, according to the Consumer Price Index, \$1.00 in 1991 has the same buying power as \$1.74 in 2014.

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

Finally, the proposed amendment sets forth a series of issues for comment related to additional changes to the monetary tables that could be considered instead of, or in conjunction with, the proposed amendment.

Proposed Amendment:

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

* * *

(b) Specific Offense Characteristics

- (1) If the loss exceeded \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase the offense level as follows:

Option 1: Adjusted for Inflation Using an initial 1.34 Multiplier, With Amounts Then Rounded Consistent With 28 U.S.C. § 2641 note

<u>[Multiplier in Comparison to Current Table]</u>	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
[1.40]	(A) \$5,000 \$7,000 or less	no increase
[1.40]	(B) More than \$5,000 \$7,000	add 2
[1.50]	(C) More than \$10,000 \$15,000	add 4
[1.33]	(D) More than \$30,000 \$40,000	add 6
[1.36]	(E) More than \$70,000 \$95,000	add 8
[1.33]	(F) More than \$120,000 \$160,000	add 10
[1.38]	(G) More than \$200,000 \$275,000	add 12
[1.31]	(H) More than \$400,000 \$525,000	add 14
[1.35]	(I) More than \$1,000,000 \$1,350,000	add 16
[1.34]	(J) More than \$2,500,000 \$3,350,000	add 18
[1.34]	(K) More than \$7,000,000 \$9,375,000	add 20
[1.34]	(L) More than \$20,000,000 \$26,800,000	add 22
[1.34]	(M) More than \$50,000,000 \$67,000,000	add 24
[1.34]	(N) More than \$100,000,000 \$134,000,000	add 26
[1.34]	(O) More than \$200,000,000 \$268,000,000	add 28
[1.34]	(P) More than \$400,000,000 \$536,000,000	add 30.

Option 2: Adjusted for Inflation Using an initial 1.34 Multiplier, With Amounts Then Rounded Under an Extrapolated Methodology

<u>[Multiplier Comparison to Current Table]</u>	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
[1.30]	(A) \$5,000 \$6,500 or less	no increase
[1.30]	(B) More than \$5,000 \$6,500	add 2
[1.50]	(C) More than \$10,000 \$15,000	add 4
[1.33]	(D) More than \$30,000 \$40,000	add 6
[1.36]	(E) More than \$70,000 \$95,000	add 8
[1.25]	(F) More than \$120,000 \$150,000	add 10
[1.25]	(G) More than \$200,000 \$250,000	add 12
[1.38]	(H) More than \$400,000 \$550,000	add 14
[1.50]	(I) More than \$1,000,000 \$1,500,000	add 16
[1.40]	(J) More than \$2,500,000 \$3,500,000	add 18
[1.36]	(K) More than \$7,000,000 \$9,500,000	add 20
[1.50]	(L) More than \$20,000,000 \$30,000,000	add 22
[1.40]	(M) More than \$50,000,000 \$70,000,000	add 24
[1.50]	(N) More than \$100,000,000 \$150,000,000	add 26
[1.50]	(O) More than \$200,000,000 \$300,000,000	add 28
[1.38]	(P) More than \$400,000,000 \$550,000,000	add 30.

* * *

§2B1.4. Insider Trading

* * *

(b) Specific Offense Characteristics

- (1) If the gain resulting from the offense exceeded \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

- (1) If the value of the cultural heritage resource or paleontological resource (A) exceeded \$2,000 ~~[\$3,000]~~ ~~[\$2,500]~~ but did not exceed \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase by 1 level; or (B) exceeded \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

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

Option 1: Adjusted for Inflation Using an 1.91 Multiplier, With Amounts Then Rounded Consistent With 28 U.S.C. § 2641 note

<u><i>[Multiplier Comparison to Current Table]</i></u>	<u>Loss</u> (Apply the Greatest)	<u>Increase in Level</u>
<i>[2.00]</i>	(A) \$2,500 \$5,000 or less	no increase
<i>[2.00]</i>	(B) More than \$2,500 \$5,000	add 1
<i>[2.00]</i>	(C) More than \$10,000 \$20,000	add 2
<i>[1.90]</i>	(D) More than \$50,000 \$95,000	add 3
<i>[1.90]</i>	(E) More than \$250,000 \$475,000	add 4

[1.91]	(F)	More than \$800,000 \$1,525,000	add 5
[1.92]	(G)	More than \$1,500,000 \$2,875,000	add 6
[1.91]	(H)	More than \$2,500,000 \$4,775,000	add 7
[1.91]	(I)	More than \$5,000,000 \$9,550,000	add 8.

Option 2: Adjusted for Inflation Using an initial 1.91 Multiplier, With Amounts Then Rounded Under an Extrapolated Methodology

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

* * *

§2B2.3. Trespass

* * *

(b) Specific Offense Characteristics

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- (3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded ~~\$2,000~~ \$3,000 \$2,500 but did not exceed ~~\$5,000~~ \$7,000 \$6,500, increase by 1 level; or (ii) exceeded ~~\$5,000~~ \$7,000 \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

§2B3.1. Robbery

* * *

(b) Specific Offense Characteristics

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

Option 1: Adjusted for Inflation Using an initial 1.91 Multiplier, With Amounts Then Rounded Consistent with 28 U.S.C. § 2641 note

<u>[Multiplier Comparison to Current Table]</u>	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
[2.00]	(A) \$10,000 \$20,000 or less	no increase
[2.00]	(B) More than \$10,000 \$20,000	add 1
[1.90]	(C) More than \$50,000 \$95,000	add 2
[1.90]	(D) More than \$250,000 \$475,000	add 3
[1.91]	(E) More than \$800,000 \$1,525,000	add 4
[1.92]	(F) More than \$1,500,000 \$2,875,000	add 5
[1.91]	(G) More than \$2,500,000 \$4,775,000	add 6
[1.91]	(H) More than \$5,000,000 \$9,550,000	add 7.

Option 2: Adjusted for Inflation Using an initial 1.91 Multiplier, With Amounts Then Rounded Under an Extrapolated Methodology

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

* * *

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

* * *

- (b) Specific Offense Characteristics

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

* * *

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

* * *

(b) Specific Offense Characteristic

- (1) If the greater of the amount obtained or demanded (A) exceeded \$2,000 ~~[\$3,000]~~ ~~[\$2,500]~~ but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

- (1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded \$2,000 ~~[\$3,000]~~ ~~[\$2,500]~~ but did not exceed \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase by 1 level; or (B) exceeded \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

- (1) If the face value of the counterfeit items (A) exceeded \$2,000 ~~[\$3,000]~~ ~~[\$2,500]~~ but did not exceed \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase by 1 level; or (B) exceeded \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

- (1) If the infringement amount (A) exceeded \$2,000[\$3,000]][\$2,500] but did not exceed \$5,000[\$7,000]][\$6,500], increase by 1 level; or (B) exceeded \$5,000[\$7,000]][\$6,500], increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

- (1) If the retail value of the motor vehicles or parts (A) exceeded \$2,000[\$3,000]][\$2,500] but did not exceed \$5,000[\$7,000]][\$6,500], increase by 1 level; or (B) exceeded \$5,000[\$7,000]][\$6,500], increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded \$5,000[\$7,000]][\$6,500], increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the value of the gratuity exceeded \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

- (1) If the value of the illegal transactions exceeded \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

- (2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded \$2,000 ~~[\$3,000]~~ ~~[\$2,500]~~ but did not exceed \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase by 1 level; or (B) exceeded \$5,000 ~~[\$7,000]~~ ~~[\$6,500]~~, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

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

(A) If the market value of the fish, wildlife, or plants (i) exceeded ~~\$2,000~~ ~~[\$3,000]~~ ~~[\$2,500]~~ but did not exceed ~~\$5,000~~ ~~[\$7,000]~~ ~~[\$6,500]~~, increase by **1** level; or (ii) exceeded ~~\$5,000~~ ~~[\$7,000]~~ ~~[\$6,500]~~, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount; or

* * *

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

* * *

(b) Specific Offense Characteristics

* * *

(2) If the volume of commerce attributable to the defendant was more than ~~\$1,000,000~~ ~~[\$1,225,000]~~ ~~[\$1,000,000]~~, adjust the offense level as follows:

Option 1: Adjusted for Inflation Using an initial 1.22 Multiplier, With Amounts Then Rounded Consistent with 28 U.S.C. § 2641 note

<u><i>[Multiplier Comparison to Current Table]</i></u>	<u>Volume of Commerce (Apply the Greatest)</u>	<u>Adjustment to Offense Level</u>
<i>[1.23]</i>	(A) More than \$1,000,000 \$1,225,000	add 2
<i>[1.22]</i>	(B) More than \$10,000,000 \$12,200,000	add 4
<i>[1.22]</i>	(C) More than \$40,000,000 \$48,800,000	add 6
<i>[1.22]</i>	(D) More than \$100,000,000 \$122,000,000	add 8
<i>[1.22]</i>	(E) More than \$250,000,000 \$305,000,000	add 10
<i>[1.22]</i>	(F) More than \$500,000,000 \$610,000,000	add 12
<i>[1.22]</i>	(G) More than \$1,000,000,000 \$1,220,000,000	add 14
<i>[1.22]</i>	(H) More than \$1,500,000,000 \$1,830,000,000	add 16 .

Option 2: Adjusted for Inflation Using an initial 1.22 Multiplier, With Amounts Then Rounded Under an Extrapolated Methodology

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

* * *

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

(a) Base Offense Level:

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

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

* * *

§2T4.1. Tax Table

Option 1: Adjusted for Inflation Using an initial 1.34 Multiplier, With Amounts Then Rounded Consistent with 28 U.S.C. § 2641 note

<u><i>[Multiplier Comparison to Current Table]</i></u>	<u>Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
<i>[1.50]</i>	(A) \$2,000 \$3,000 or less	6
<i>[1.50]</i>	(B) More than \$2,000 \$3,000	8
<i>[1.40]</i>	(C) More than \$5,000 \$7,000	10
<i>[1.20]</i>	(D) More than \$12,500 \$15,000	12
<i>[1.33]</i>	(E) More than \$30,000 \$40,000	14
<i>[1.38]</i>	(F) More than \$80,000 \$110,000	16

[1.38]	(G)	More than \$200,000 \$275,000	18
[1.31]	(H)	More than \$400,000 \$525,000	20
[1.35]	(I)	More than \$1,000,000 \$1,350,000	22
[1.34]	(J)	More than \$2,500,000 \$3,350,000	24
[1.34]	(K)	More than \$7,000,000 \$9,375,000	26
[1.34]	(L)	More than \$20,000,000 \$26,800,000	28
[1.34]	(M)	More than \$50,000,000 \$67,000,000	30
[1.34]	(N)	More than \$100,000,000 \$134,000,000	32
[1.34]	(O)	More than \$200,000,000 \$268,000,000	34
[1.34]	(P)	More than \$400,000,000 \$536,000,000	36.

Option 2: Adjusted for Inflation Using an initial 1.34 Multiplier, With Amounts Then Rounded Under an Extrapolated Methodology

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

* * *

§5E1.2. Fines for Individual Defendants

* * *

- (c) (1) The minimum of the fine guideline range is the amount shown in column A of the table below.

* * *

- (3) Fine Table

Option 1: Adjusted for Inflation Using an initial 1.91 Multiplier, With Amounts Then Rounded Consistent with 28 U.S.C. § 2641 note

Offense Level	A Minimum	<u>[Multiplier Comparison to Current Table]</u>	B Maximum	<u>[Multiplier Comparison to Current Table]</u>
3 and below	\$100\$200	[2.00]	\$5,000\$10,000	[2.00]
4-5	\$250\$500	[2.00]	\$5,000\$10,000	[2.00]
6-7	\$500\$1,000	[2.00]	\$5,000\$10,000	[2.00]
8-9	\$1,000\$2,000	[2.00]	\$10,000\$20,000	[2.00]
10-11	\$2,000\$4,000	[2.00]	\$20,000\$40,000	[2.00]
12-13	\$3,000\$6,000	[2.00]	\$30,000\$55,000	[1.83]
14-15	\$4,000\$8,000	[2.00]	\$40,000\$75,000	[1.88]
16-17	\$5,000\$10,000	[2.00]	\$50,000\$95,000	[1.90]
18-19	\$6,000\$10,000	[1.67]	\$60,000\$110,000	[1.83]
20-22	\$7,500\$15,000	[2.00]	\$75,000\$140,000	[1.87]
23-25	\$10,000\$20,000	[2.00]	\$100,000\$190,000	[1.90]
26-28	\$12,500\$25,000	[2.00]	\$125,000\$250,000	[2.00]
29-31	\$15,000\$30,000	[2.00]	\$150,000\$275,000	[1.83]
32-34	\$17,500\$35,000	[2.00]	\$175,000\$325,000	[1.86]
35-37	\$20,000\$40,000	[2.00]	\$200,000\$375,000	[1.88]
38 and above	\$25,000\$50,000	[2.00]	\$250,000\$475,000.	[1.90]

Option 2: Adjusted for Inflation Using an initial 1.91 Multiplier, With Amounts Then Rounded Under an Extrapolated Methodology

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

* * *

§8C2.4. Base Fine

* * *

(d) Offense Level Fine Table

Option 1: Adjusted for Inflation Using an initial 1.74 Multiplier, With Amounts Then Rounded Consistent with 28 U.S.C. § 2641 note

<u>[Multiplier Comparison to Current Table]</u>	<u>Offense Level</u>	<u>Amount</u>
[1.80]	6 or less	\$5,000\$9,000
[2.00]	7	\$7,500\$15,000
[1.50]	8	\$10,000\$15,000
[1.67]	9	\$15,000\$25,000
[1.75]	10	\$20,000\$35,000
[1.67]	11	\$30,000\$50,000
[1.75]	12	\$40,000\$70,000
[1.67]	13	\$60,000\$100,000
[1.76]	14	\$85,000\$150,000
[1.80]	15	\$125,000\$225,000
[1.71]	16	\$175,000\$300,000
[1.70]	17	\$250,000\$425,000
[1.71]	18	\$350,000\$600,000
[1.75]	19	\$500,000\$875,000
[1.73]	20	\$650,000\$1,125,000
[1.73]	21	\$910,000\$1,575,000
[1.75]	22	\$1,200,000\$2,100,000
[1.73]	23	\$1,600,000\$2,775,000
[1.74]	24	\$2,100,000\$3,650,000
[1.74]	25	\$2,800,000\$4,875,000
[1.74]	26	\$3,700,000\$6,450,000
[1.74]	27	\$4,800,000\$8,350,000
[1.74]	28	\$6,300,000\$10,950,000
[1.74]	29	\$8,100,000\$14,100,000
[1.74]	30	\$10,500,000\$18,275,000
[1.74]	31	\$13,500,000\$23,500,000
[1.74]	32	\$17,500,000\$30,450,000
[1.74]	33	\$22,000,000\$38,275,000
[1.74]	34	\$28,500,000\$49,600,000
[1.74]	35	\$36,000,000\$62,650,000
[1.74]	36	\$45,500,000\$79,175,000
[1.74]	37	\$57,500,000\$100,050,000
[1.74]	38 or more	\$72,500,000\$126,150,000.

Option 2: Adjusted for Inflation Using an initial 1.74 Multiplier, With Amounts Then Rounded Under an Extrapolated Methodology

<u>[Multiplier Comparison to Current Table]</u>	<u>Offense Level</u>	<u>Amount</u>
[1.70]	6 or less	\$5,000 \$8,500
[2.00]	7	\$7,500 \$15,000
[1.50]	8	\$10,000 \$15,000
[1.67]	9	\$15,000 \$25,000
[1.75]	10	\$20,000 \$35,000
[1.67]	11	\$30,000 \$50,000
[1.75]	12	\$40,000 \$70,000
[1.67]	13	\$60,000 \$100,000
[1.76]	14	\$85,000 \$150,000
[1.60]	15	\$125,000 \$200,000
[1.71]	16	\$175,000 \$300,000
[1.80]	17	\$250,000 \$450,000
[1.71]	18	\$350,000 \$600,000
[1.70]	19	\$500,000 \$850,000
[1.54]	20	\$650,000 \$1,000,000
[1.65]	21	\$910,000 \$1,500,000
[1.67]	22	\$1,200,000 \$2,000,000
[1.88]	23	\$1,600,000 \$3,000,000
[1.67]	24	\$2,100,000 \$3,500,000
[1.79]	25	\$2,800,000 \$5,000,000
[1.76]	26	\$3,700,000 \$6,500,000
[1.77]	27	\$4,800,000 \$8,500,000
[1.59]	28	\$6,300,000 \$10,000,000
[1.85]	29	\$8,100,000 \$15,000,000
[1.90]	30	\$10,500,000 \$20,000,000
[1.85]	31	\$13,500,000 \$25,000,000
[1.71]	32	\$17,500,000 \$30,000,000
[1.81]	33	\$22,000,000 \$40,000,000
[1.75]	34	\$28,500,000 \$50,000,000
[1.81]	35	\$36,000,000 \$65,000,000
[1.76]	36	\$45,500,000 \$80,000,000
[1.74]	37	\$57,500,000 \$100,000,000
[2.07]	38 or more	\$72,500,000 \$150,000,000.

* * *

Issues for Comment:

1. *The Commission seeks comment on whether the monetary tables in the guidelines should be adjusted for inflation. The monetary tables set forth in the proposed amendment relate to a variety of different offenses and apply to a number of different criminal statutes. Given the*

difference between the types of offenses, should all monetary tables be adjusted for inflation in the same way? Does the type of offenses or statutory provisions related to any of the monetary tables suggest that it should not be adjusted for inflation?

2. *As set forth in the proposed amendment, should an adjustment for inflation be made during the 2014-2015 amendment cycle? Should the Commission make it a practice to make, or consider making, an inflationary adjustment at periodic intervals, such as every four or ten years, or at particular inflationary measures, such as when \$1.00 in the year the table was last adjusted has the same buying power as \$1.25 or \$1.33 or \$1.50 in the current year? Should the Commission incorporate directly into the guidelines a mechanism for automatically adjusting for inflation?*
3. *In each of the options presented above, the amounts associated with the offense level increases in the monetary tables would be adjusted for inflation. The Commission seeks comment on whether the changes, if any, to account for inflation should be made using a different methodology than the options presented above. Should the changes be based on a different indicator than the changes to the Consumer Price Index? Should the changes be based on different time frames than the ones provided? Should the changes be rounded using a different method than presented in the options above?*
4. *The Commission seeks comment on whether, in addition to or instead of any of the options above, the Commission should consider any other changes to the monetary tables, such as to promote proportionality or to reduce complexity.*
5. *There are 18 other Chapter Two guidelines that refer to the loss table at §2B1.1(b)(1) (see §§2B1.4, 2B1.5, 2B2.3, 2B3.3, 2B4.1, 2B5.1, 2B5.3, 2B6.1, 2C1.1, 2C1.2, 2C1.8, 2E5.1, 2G2.2, 2G3.1, 2G3.2, 2Q2.1, 2S1.1, 2S1.3); 1 other Chapter Two guideline that refers to the loss table at §2B3.1(b)(7) (see §2B3.2); and 8 other Chapter Two guidelines that refer to the tax table at §2T4.1 (see §§2E4.1, 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1). If the Commission were to adjust the monetary tables in the guidelines, should the revised tables apply to these other guidelines as well? In the alternative, should the Commission provide separate, alternative monetary tables specifically for these other guidelines? If so, which ones?*
6. *Are there other places in the guidelines that refer to monetary values that should be adjusted, if the Commission were to adjust the tables in the guidelines?*

PROPOSED AMENDMENT: MITIGATING ROLE

Synopsis of Proposed Amendment: *This proposed amendment is a result of the Commission’s study of the operation of §3B1.2 (Mitigating Role) and related provisions in the Guidelines Manual. See United States Sentencing Commission, “Notice of Final Priorities,” 79 Fed. Reg. 49378 (Aug. 20, 2014).*

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

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

Third, the proposed amendment provides a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment.

An issue for comment is also included.

Proposed Amendment:

§3B1.2. Mitigating Role

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

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4

levels.

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

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

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, “participant” has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).
2. Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.
3. Applicability of Adjustment.—

- (A) Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.

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

Likewise, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant’s personal gain from a fraud offense and/or who had limited knowledge of the scope of the scheme is not precluded from consideration for may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose role participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, is not precluded from consideration for may receive an adjustment under this guideline.

- (B) Conviction of Significantly Less Serious Offense.—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this

section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 12 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

- (C) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

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

- (i) the degree to which the defendant understood the scope and structure of the criminal activity;
- (ii) the degree to which the defendant participated in planning or organizing the criminal activity; and
- (iii) the degree to which the defendant stood to benefit from the criminal activity.

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

* * *

Issue for Comment:

1. *The Commission seeks comment on the application of the mitigating role adjustment. Are there application issues relating to this adjustment that the Commission should address and, if so, how should the Commission address them?*

The proposed amendment would provide additional guidance on applying the mitigating role adjustment. Is the additional guidance in the proposed amendment appropriate? What additional or different guidance should the Commission provide on applying mitigating role adjustments?

ISSUE FOR COMMENT:

FLAVORED DRUGS

1. *The Commission seeks comment on offenses in which controlled substances are colored, packaged, or flavored in ways that appear to be designed to attract use by children. How prevalent are these offenses, and do the guidelines adequately address these offenses?*

The Commission has received comment, for example, that drugs are being flavored with additives to make them taste like candy, with flavors such as strawberry, lemon, coconut, cinnamon and chocolate, and are being marketed in smaller amounts, making them cheaper and more accessible to children. The Commission has also received comment about incidents in which candy and soft drinks were laced with marijuana and packaged to look like well-known, brand-name products.

Under the Controlled Substances Act, a person who distributes a controlled substance to a person under 21 years of age is generally subject to twice the statutory maximum term of imprisonment that would otherwise apply, and a statutory minimum term of imprisonment of one year, unless a higher statutory minimum applies. See 21 U.S.C. § 859(a). If such a person already has a prior conviction under section 859, he or she is generally subject to three times the statutory maximum term of imprisonment that would otherwise apply. See 21 U.S.C. § 859(b). Notably, these provisions apply only to the distribution of the controlled substance, not to the manufacture of the controlled substance.

The Commission seeks comment on whether the guidelines provide appropriate penalties for offenders who manufacture or create drugs that are packaged or modified by coloring or flavoring with the intent of appealing to children, or who combine drugs with candy or soft drinks with the intent of appealing to children. If not, how should the Commission revise the guidelines to provide appropriate penalties in such cases? Should the Commission provide new departure provisions, enhancements, adjustments, or minimum offense levels to account for such offenses? If so, what provision or provisions should the Commission provide, and what penalty increase should be provided?

If the Commission were to provide such a provision, what specific offense conduct, harm, or other factor should be the basis for applying the provision? For example, should the provision apply to any type of manufacturing conduct as long as the defendant had the specific intent to appeal to children? Or should the provision apply without regard to specific intent, as long as a specific type of offense conduct was involved, such as (1) combining with soft drinks or candy, (2) marketing or packaging to look like soft drinks or candy, or (3) flavoring or coloring?

Should the provision take the form of a specific instruction to apply a vulnerable victim adjustment under subsection (b) of §3A1.1 (Hate Crime Motivation or Vulnerable Victim)? For example, should the Commission provide a specific instruction at §2D1.1(d)(2) stating that, if a specific objective of the offense was to manufacture a controlled substance product for marketing to, or use by, minors, an adjustment under §3A1.1(b) would apply?

PROPOSED AMENDMENT: HYDROCODONE

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

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

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

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

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

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

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

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

C. The Statutory and Guideline Penalty Structures

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

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

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

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

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

Second, the proposed amendment provides a single marijuana equivalency for hydrocodone offenses, whether single-entity or in combination, that is based on the actual weight of the hydrocodone involved rather than the number of pills involved or the weight of an entire pill. Specifically, a marijuana equivalency under which 1 gram of “hydrocodone (actual)” equates to [4,467]/[6,700] grams of marijuana is proposed.

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

Such proportionality issues may also arise with offenses involving hydrocodone products, to the extent those products come in different pill sizes, formulations, or dosages. The proposed use of an “actual”

approach for hydrocodone would address these proportionality issues by providing sentences for hydrocodone offenses using the weight of the actual hydrocodone instead of the number of pills or the weight of an entire pill.

The rescheduling of hydrocodone combination products also raises severity issues, and the proposed amendment addresses the severity issues by bracketing two possible severity levels, one that assigns hydrocodone (actual) the same marijuana equivalency as oxycodone (actual), and one that assigns a lower marijuana equivalency. The higher severity level (6,700 gm) is based on a 1:1 ratio of hydrocodone to oxycodone in marijuana equivalency, which would reflect a view that equivalent amounts of hydrocodone and oxycodone cause the same pharmacological effects on the body. The lower severity level (4,467 gm) is based on a 3:2 ratio of hydrocodone to oxycodone in marijuana equivalency, which would reflect a view that it takes more hydrocodone than oxycodone to achieve the same pharmacological effects on the body. Compare “Dosing Data for Clinically Employed Opioid Analgesics” in *Goodman and Gilman’s The Pharmacological Basis of Therapeutics*, 12th edition (2011), p. 496 (recommending equivalent amounts of hydrocodone and oxycodone) with University of Chicago Department of Palliative Care, Opioid Analgesic Chart, available at <http://champ.bsd.uchicago.edu/documents/Pallpaincard2009update.pdf> (recommending 15 milligrams of hydrocodone as equivalent to 10 milligrams of oxycodone).

A multi-part issue for comment is also provided, seeking comment on hydrocodone offenses and offenders and how the proportionality and severity issues raised by the administrative actions should be addressed, either by the approach taken in the proposed amendment or some other manner.

Proposed Amendment:

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

* * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

* * *

- | | | |
|-----|---|-----------------|
| (5) | <ul style="list-style-type: none">● At least 1 KG but less than 3 KG of Heroin;● At least 5 KG but less than 15 KG of Cocaine;● At least 280 G but less than 840 G of Cocaine Base;● At least 1 KG but less than 3 KG of PCP, or
at least 100 G but less than 300 G of PCP (actual);● At least 500 G but less than 1.5 KG of Methamphetamine, or
at least 50 G but less than 150 G of Methamphetamine (actual), or
at least 50 G but less than 150 G of “Ice”;● At least 500 G but less than 1.5 KG of Amphetamine, or
at least 50 G but less than 150 G of Amphetamine (actual);● At least 10 G but less than 30 G of LSD; | Level 30 |
|-----|---|-----------------|

- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- ~~● At least 1,000,000 units or more of Schedule III Hydrocodone;~~
- At least 62,500 but less than 187,500 units of Flunitrazepam.

- (6)
- At least 700 G but less than 1 KG of Heroin;
 - At least 3.5 KG but less than 5 KG of Cocaine;
 - At least 196 G but less than 280 G of Cocaine Base;
 - At least 700 G but less than 1 KG of PCP, or
at least 70 G but less than 100 G of PCP (actual);
 - At least 350 G but less than 500 G of Methamphetamine, or
at least 35 G but less than 50 G of Methamphetamine (actual), or
at least 35 G but less than 50 G of “Ice”;
 - At least 350 G but less than 500 G of Amphetamine, or
at least 35 G but less than 50 G of Amphetamine (actual);
 - At least 7 G but less than 10 G of LSD;
 - At least 280 G but less than 400 G of Fentanyl;
 - At least 70 G but less than 100 G of a Fentanyl Analogue;
 - At least 700 KG but less than 1,000 KG of Marihuana;
 - At least 140 KG but less than 200 KG of Hashish;
 - At least 14 KG but less than 20 KG of Hashish Oil;
 - At least 700,000 but less than 1,000,000 units of Ketamine;
 - At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
 - ~~● At least 700,000 but less than 1,000,000 units of Schedule III Hydrocodone;~~
 - At least 43,750 but less than 62,500 units of Flunitrazepam.

Level 28

- (7)
- At least 400 G but less than 700 G of Heroin;
 - At least 2 KG but less than 3.5 KG of Cocaine;
 - At least 112 G but less than 196 G of Cocaine Base;
 - At least 400 G but less than 700 G of PCP, or
at least 40 G but less than 70 G of PCP (actual);
 - At least 200 G but less than 350 G of Methamphetamine, or
at least 20 G but less than 35 G of Methamphetamine (actual), or
at least 20 G but less than 35 G of “Ice”;
 - At least 200 G but less than 350 G of Amphetamine, or
at least 20 G but less than 35 G of Amphetamine (actual);
 - At least 4 G but less than 7 G of LSD;
 - At least 160 G but less than 280 G of Fentanyl;
 - At least 40 G but less than 70 G of a Fentanyl Analogue;
 - At least 400 KG but less than 700 KG of Marihuana;
 - At least 80 KG but less than 140 KG of Hashish;
 - At least 8 KG but less than 14 KG of Hashish Oil;

Level 26

- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- ~~● At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;~~
- At least 25,000 but less than 43,750 units of Flunitrazepam.

(8)

- At least 100 G but less than 400 G of Heroin;
- At least 500 G but less than 2 KG of Cocaine;
- At least 28 G but less than 112 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or
at least 10 G but less than 40 G of PCP (actual);
- At least 50 G but less than 200 G of Methamphetamine, or
at least 5 G but less than 20 G of Methamphetamine (actual), or
at least 5 G but less than 20 G of “Ice”;
- At least 50 G but less than 200 G of Amphetamine, or
at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD;
- At least 40 G but less than 160 G of Fentanyl;
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Ketamine;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- ~~● At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;~~
- At least 6,250 but less than 25,000 units of Flunitrazepam.

Level 24

(9)

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

Level 22

- (10)
- At least 60 G but less than 80 G of Heroin;
 - At least 300 G but less than 400 G of Cocaine;
 - At least 16.8 G but less than 22.4 G of Cocaine Base;
 - At least 60 G but less than 80 G of PCP, or
at least 6 G but less than 8 G of PCP (actual);
 - At least 30 G but less than 40 G of Methamphetamine, or
at least 3 G but less than 4 G of Methamphetamine (actual), or
at least 3 G but less than 4 G of “Ice”;
 - At least 30 G but less than 40 G of Amphetamine, or
at least 3 G but less than 4 G of Amphetamine (actual);
 - At least 600 MG but less than 800 MG of LSD;
 - At least 24 G but less than 32 G of Fentanyl;
 - At least 6 G but less than 8 G of a Fentanyl Analogue;
 - At least 60 KG but less than 80 KG of Marihuana;
 - At least 12 KG but less than 16 KG of Hashish;
 - At least 1.2 KG but less than 1.6 KG of Hashish Oil;
 - At least 60,000 but less than 80,000 units of Ketamine;
 - At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
 - ~~At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;~~
 - 60,000 units or more of Schedule III substances (except Ketamine
or Hydrocodone);
 - At least 3,750 but less than 5,000 units of Flunitrazepam.

Level 20

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

Level 18

- (12)
- At least 20 G but less than 40 G of Heroin;

Level 16

- At least 100 G but less than 200 G of Cocaine;
- At least 5.6 G but less than 11.2 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or
at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or
at least 1 G but less than 2 G of Methamphetamine (actual), or
at least 1 G but less than 2 G of “Ice”;
- At least 10 G but less than 20 G of Amphetamine, or
at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD;
- At least 8 G but less than 16 G of Fentanyl;
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- ~~● At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;~~
- At least 20,000 but less than 40,000 units of Schedule III substances (except
Ketamine or Hydrocodone);
- At least 1,250 but less than 2,500 units of Flunitrazepam.

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

Level 14

- (14)
- Less than 10 G of Heroin;
 - Less than 50 G of Cocaine;

Level 12

- Less than 2.8 G of Cocaine Base;
- Less than 10 G of PCP, or
less than 1 G of PCP (actual);
- Less than 5 G of Methamphetamine, or
less than 500 MG of Methamphetamine (actual), or
less than 500 MG of “Ice”;
- Less than 5 G of Amphetamine, or
less than 500 MG of Amphetamine (actual);
- Less than 100 MG of LSD;
- Less than 4 G of Fentanyl;
- Less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- ~~● At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;~~
- At least 5,000 but less than 10,000 units of Schedule III substances (except
Ketamine or Hydrocodone);
- At least 312 but less than 625 units of Flunitrazepam;
- 80,000 units or more of Schedule IV substances (except Flunitrazepam).

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

Level 10

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

Level 8

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

***Notes to Drug Quantity Table:**

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

reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 milligrams of an anabolic steroid is one “unit”.

* * *

Commentary

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

Application Notes:

1. “Mixture or Substance”.—“Mixture or substance” as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

2. “Plant”.—For purposes of the guidelines, a “plant” is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).
3. Classification of Controlled Substances.—Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13-15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13-15 is the appropriate classification.
4. Applicability to “Counterfeit” Substances.—The statute and guideline also apply to “counterfeit” substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.

5. Determining Drug Types and Drug Quantities.—Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.

6. Analogues and Controlled Substances Not Referenced in this Guideline.—Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline “analogue” has the meaning given the term “controlled substance analogue” in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marijuana equivalency of the most closely related controlled substance referenced in this guideline. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

- (A) *Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.*
- (B) *Whether the controlled substance not referenced in this guideline has a stimulant,*

depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.

(C) *Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.*

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

8. Use of Drug Equivalency Tables.—

(A) Controlled Substances Not Referenced in Drug Quantity Table.—*The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, i.e., heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:*

(i) *Use the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its equivalent quantity of marihuana.*

(ii) *Find the equivalent quantity of marihuana in the Drug Quantity Table.*

(iii) *Use the offense level that corresponds to the equivalent quantity of marihuana as the base offense level for the controlled substance involved in the offense.*

(See also Application Note 6.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gram of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kilograms of marihuana. In a case involving 100 grams of oxymorphone, the equivalent quantity of marihuana would be 500 kilograms, which corresponds to a base offense level of 26 in the Drug Quantity Table.

(B) Combining Differing Controlled Substances.—*The Drug Equivalency Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.*

For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are “capped” at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of marihuana). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance),

determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts).

Note: Because of the statutory equivalences, the ratios in the Drug Equivalency Tables do not necessarily reflect dosages based on pharmacological equivalents.

(C) Examples for Combining Differing Controlled Substances.—

- (i) *The defendant is convicted of selling 70 grams of a substance containing PCP (Level 20) and 250 milligrams of a substance containing LSD (Level 16). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 22.*
- (ii) *The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The diazepam, a Schedule IV drug, is equivalent to 625 grams of marihuana. The total, 1.125 kilograms of marihuana, has an offense level of 8 in the Drug Quantity Table.*
- (iii) *The defendant is convicted of selling 80 grams of cocaine (Level 14) and 2 grams of cocaine base (Level 12). The cocaine is equivalent to 16 kilograms of marihuana, and the cocaine base is equivalent to 7.142 kilograms of marihuana. The total is therefore equivalent to 23.142 kilograms of marihuana, which has an offense level of 16 in the Drug Quantity Table.*
- (iv) *The defendant is convicted of selling 76,000 units of a Schedule III substance, 200,000 units of a Schedule IV substance, and 600,000 units of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 76 kilograms of marihuana (below the cap of 79.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 9.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 12.5 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 2.49 kilograms of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 3.75 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 79.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 88.48 (76 + 9.99 + 2.49) kilograms.*

(D) Drug Equivalency Tables.—

Schedule I or II Opiates*

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/ PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone (actual) =	6700 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Hydrocodone (actual) =	[4467]/[6700] gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM) =	3 kg of marihuana

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

* * *

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

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

***Provided, that the combined equivalent weight of all Schedule III substances (except ketamine and hydrocodone), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of marihuana.

~~Schedule III Hydrocodone***~~

~~1 unit of Schedule III hydrocodone = 1 gm of marihuana~~

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

* * *

27. Departure Considerations.—

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

* * *

Issue for Comment:

1. The Commission seeks comment on how, if at all, the guidelines for hydrocodone trafficking should be changed, such as to address the administrative actions described in the synopsis above, and the severity and proportionality issues that may result from those actions.

- A. Proportionality

The proposed amendment would provide a marijuana equivalency for hydrocodone based on the actual weight of the controlled substance rather than on the number of pills or the weight of an entire pill. As discussed in the synopsis above, the Commission has used such an “actual” approach for offenses involving oxycodone. Is the use of an “actual” approach for hydrocodone offenses appropriate to address the proportionality issues that arise from differing pill sizes, formulations, and dosages?

In the alternative, should the Commission continue to provide a marijuana equivalency for hydrocodone based on the entire weight of the pill? If so, how, if at all, should the Commission address the proportionality issues that arise to the extent there are differing pill sizes, formulations, or dosages? For example, should the guidelines continue to distinguish between single-entity hydrocodone products and hydrocodone combination products? What distinctions, if any, should be made?

B. Severity

Whether the Commission continues to provide a marijuana equivalency for hydrocodone based on the entire weight of the pill or provides a marijuana equivalency using an “actual” approach (as proposed by the proposed amendment), the Commission seeks comment on what marijuana equivalency or equivalencies should be provided for hydrocodone trafficking, in light of the first-ever approval of a hydrocodone single-entity product and the rescheduling of hydrocodone combination products from schedule III to schedule II.

Under the current guidelines, a schedule III hydrocodone product has a marijuana equivalency based on the number of pills, at 1 unit = 1 gram marijuana, and a schedule II hydrocodone product has a marijuana equivalency based on the weight of the entire pill, at 1 gram = 500 grams marijuana. In light of the rescheduling, the entry for schedule III hydrocodone products is obsolete, and all hydrocodone combination products are schedule II controlled substances, with a marijuana equivalency based on the weight of the entire pill, at 1 gram = 500 grams marijuana.

If the Commission were to continue to use the entire weight of the pill for all hydrocodone offenses, is this severity level (1 gram = 500 grams marijuana) appropriate? Should the Commission establish a different equivalency for all hydrocodone offenses, or several equivalencies, such as one equivalency for single-entity products and another for combination products? If so, what equivalency or equivalencies should the Commission provide?

In the alternative, if the Commission were to use the “actual” approach in the proposed amendment, what marijuana equivalency should be used? Should 1 gram of hydrocodone (actual) equate to [4,467] grams of marijuana, or to [6,700] grams of marijuana? Or should the Commission establish a different equivalency than either of these? If so, what equivalency should the Commission provide?

C. General Comment on Hydrocodone Offenses and Offenders

In determining the marijuana equivalencies for controlled substances, the Commission has considered, among other things, the chemical structure, the pharmacological effects, the potential for addiction and abuse, the patterns of abuse and harms associated with abuse, and the patterns of trafficking and harms associated with trafficking.

The Commission invites general comment on hydrocodone offenses and hydrocodone offenders and how these offenses and offenders compare with other drug offenses and drug offenders. For example, how is hydrocodone manufactured, distributed, and marketed? How is it diverted? Once diverted, how is it distributed, possessed, and used? What are the characteristics of the

offenders involved in these various activities? What harms are posed by these activities?

Is the chemical structure of hydrocodone substantially similar to the chemical structure of any other controlled substance referenced in §2D1.1? If so, to what substance?

Is the effect on the central nervous system of hydrocodone substantially similar to the effect of any other controlled substance referenced in §2D1.1? If so, to what substance? Is the quantity of hydrocodone needed to produce that effect lesser or greater than the quantity needed of the other such substance? If so, what is the difference in relative potency?

The Commission specifically invites comment on whether hydrocodone is similar to oxycodone. If so, should the Commission provide a marijuana equivalency for hydrocodone on this basis, e.g., by specifying a marijuana equivalency for hydrocodone (actual) equal to the marijuana equivalency for oxycodone (actual), which is 1 gram oxycodone (actual) = 6700 grams of marijuana?

PROPOSED AMENDMENT: ECONOMIC CRIME

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

The proposed amendment contains four parts. The Commission is considering whether to promulgate any one or more of these parts, as they are not necessarily mutually exclusive. They are as follows:

Part A *revises the definition of “intended loss” at §2B1.1, comment. (n.3(A)(ii)). Two options are presented, one of which would reflect certain principles discussed in the Tenth Circuit’s decision in United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011). Issues for comment on intended loss are also provided.*

Part B *addresses the impact of the victims table in §2B1.1(b)(2). It proposes to establish a new enhancement for cases where one or more victims suffered substantial [financial] hardship and to reduce the levels of enhancement that apply based solely on the number of victims. Two options are provided. It includes issues for comment on the victims table and other provisions relating to victims.*

Part C *revises the specific offense characteristic for sophisticated means in subsection (b)(10)(C) in several ways. An issue for comment is also included.*

Part D *addresses offenses involving fraud on the market and related offenses. Issues for comment are also included.*

(A) Intended Loss

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

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

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

The Commission is publishing this proposed amendment and issues for comment to inform the Commission’s consideration of these issues. Two options are bracketed for comment. They are as follows:

Option 1 *would state that intended loss means the pecuniary harm “that the defendant purposely sought to inflict” and that the defendant’s purpose may be inferred from all available facts. This would reflect certain principles discussed in the Tenth Circuit’s decision in United States v. Manatau, 647 F.3d 1048 (10th Cir. 2011). In Manatau, the defendant was convicted of bank fraud and aggravated identity theft. The district court determined that the intended loss should be determined by adding up the credit limits of the stolen convenience checks, because a loss up to those credit limits was “both possible and potentially contemplated by the defendant’s scheme.” 647 F.3d at 1049-1050. On appeal, the Tenth Circuit reversed, holding that “intended loss” contemplates “a loss the defendant purposely sought to*

inflict,” and that the appropriate standard was one of “subjective intent to cause the loss.” 647 F.3d at 1055. Such an intent, the court held, may be based on making “reasonable inferences about the defendant’s mental state from the available facts.” 647 F.3d at 1056.

Option 2 is similar to Option 1, but would also encompass the pecuniary harm that any other participant purposely sought to inflict, if the defendant was accountable under §1B1.3(a)(1)(A) for the other participant.

Issues for comment on intended loss are also provided.

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

* * *

Commentary

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Application Notes:

* * *

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

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

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

[Option 1: (ii) Intended Loss.—“Intended loss” (I) means the pecuniary harm that ~~was~~ intended to result from the offense the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

The defendant’s purpose may be inferred from all available facts, including the defendant’s actions, the actions and intentions of other participants, and the natural and probable consequences of those actions.]

[Option 2: (ii) Intended Loss.—“Intended loss” (I) means (a) the pecuniary harm that was intended to result from the offense the defendant purposely sought to inflict and (b) the pecuniary harm that any other participant purposely sought to inflict, if the defendant was accountable under §1B1.3(a)(1)(A) for the other participant;

and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

An individual's purpose may be inferred from all available facts, including the individual's actions, the actions and intentions of other participants, and the natural and probable consequences of those actions.

- (iii) *Pecuniary Harm.—“Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.*
- (iv) *Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, “reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.*

* * *

Issues for Comment:

1. *The Commission seeks comment on whether the definition of “intended loss” should be revised or refined, in the manner contemplated by the proposed amendment or in some other manner, to clarify or simplify guideline operation or for other reasons consistent with the purposes of sentencing. What changes, if any, should the Commission make to the definition of “intended loss”?*

How should the definition of “intended loss” interact with other parts of the guidelines? For example:

- (A) *Should intended loss be limited to the amount the defendant personally intended, or should it also include amounts intended by other participants, such as participants (i) that the defendant aided and abetted, and/or (ii) that were in a jointly undertaken criminal activity with the defendant?*
 - (B) *How should intended loss interact with the commentary relating to partially completed offenses in §2B1.1, Application Note 18 (providing that, in the case of a partially completed offense, the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy))?*
2. *Section 2B1.1 provides that for the determination of loss under subsection (b)(1), the court shall use the greater of “actual loss” or “intended loss.” Should intended loss be limited in some manner?*

(B) Victims Table

Synopsis of Proposed Amendment: *This part of the proposed amendment addresses issues relating to the impact of the victims table in §2B1.1(b)(2) as well as other provisions relating to victims in §2B1.1.*

The victims table provides a tiered enhancement based on the number of victims. It provides an enhancement of 2 levels if the offense involved 10 or more victims or was committed through mass-marketing; 4 levels if the offense involved 50 or more victims; and 6 levels if the offense involved 250 or more victims.

*First, the proposed amendment provides a new enhancement at subsection (b)(3)(A) that applies if the offense resulted in substantial [financial] hardship to one or more victims. Two options are presented. Under **Option 1**, the enhancement applies if there are one or more such victims and the amount of the enhancement is bracketed at [2][3][4] levels. **Option 2** provides a tiered enhancement based on the number of such victims. Specifically, if there is at least [one] such victim, the enhancement is [1][2] levels; if there are at least [five] such victims, the enhancement is [2][4] levels; and if there are at least [25] such victims, the enhancement is [3][6] levels. The proposed amendment also provides factors for the court to consider in determining whether substantial [financial] hardship resulted. Several of those factors, bracketed in the proposed amendment, are non-monetary and are derived from the upward departure provision at Application Note 20(A)(vi). The proposed amendment also brackets the possibility of deleting Application Note 20(A)(vi).*

Both options also bracket the possibility of a “cap” that limits the cumulative impact of subsection (b)(2) and the new (b)(3)(A) to [6] levels.

Second, the proposed amendment revises the impact of the victims table by reducing the enhancements in the table from 2, 4, and 6 levels to 1, 2, and 3 levels, respectively.

Third, the proposed amendment deletes prong (iii) of subsection (b)(16)(B), relating to an offense that substantially endangered the solvency or financial security of 100 or more victims.

Finally, the proposed amendment includes issues for comment on other possible changes to the operation and impact of the victims table and other provisions relating to victims in §2B1.1.

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

* * *

(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 **1** level;
- (B) involved 50 or more victims, increase by ~~4~~ **2** levels; or
- (C) involved 250 or more victims, increase by ~~6~~ **3** levels.

[Insert the following as (3) and renumber other provisions accordingly:

[Option 1: (3) (A) If the offense resulted in substantial [financial] hardship to one or more victims, increase by ~~2~~**3**~~4~~ levels.

~~[(B) The cumulative adjustments from application of both subsections (b)(2) and (b)(3)(A) shall not exceed **6** levels.]~~

[Option 2: (3) (A) (Apply the greatest) If the offense resulted in substantial [financial] hardship to—

(i) [one] or more victims, increase by ~~1~~**2** levels;

(ii) [five] or more victims, increase by ~~2~~**4** levels; or

(iii) [25] or more victims, increase by ~~3~~**6** levels.

~~[(B) The cumulative adjustments from application of both subsections (b)(2) and (b)(3)(A) shall not exceed **6** levels.]~~

* * *

~~(16)~~**17** (Apply the greater) If—

- (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or
- (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; ~~or~~ (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had

1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by 4 levels.

- (C) The cumulative adjustments from application of both subsections (b)(2) and (b)(+617)(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.

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Commentary

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Application Notes:

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[Insert the following and renumber other notes accordingly:

5. *Enhancement for Substantial [Financial] Hardship (Subsection (b)(3)).—In determining whether the offense resulted in substantial [financial] hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—*

(A) *becoming insolvent;*

(B) *filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);*

(C) *suffering substantial loss of a retirement, education, or other savings or investment fund;*

(D) *making substantial changes to his or her employment, such as postponing his or her retirement plans;*

(E) *making substantial changes to his or her living arrangements, such as relocating to a less expensive home;*

(F) *suffering substantial harm to his or her reputation or credit record, or a substantial inconvenience related to repairing his or her reputation or a damaged credit record;*

(G) *being erroneously arrested or denied a job because an arrest record has been made in his or her name;*

(H) *having his or her identity assumed by someone else.]*

* * *

20. Departure Considerations.—

(A) Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

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

~~(vi) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:~~

~~(I) The offense caused substantial harm to the victim’s reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim’s reputation or a damaged credit record.~~

~~(II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual’s name.~~

~~(III) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.]~~

* * *

Issues for Comment:

1. *The Commission seeks comment on whether the victims table and other parts of §2B1.1 adequately address the harms to victims. If not, what if any additional enhancements or other provisions should the Commission provide to address those harms?*

Alternatively, should the Commission amend §2B1.1 to limit the impact of the victims table if no victims were substantially harmed by the offense? For example, should the Commission provide that the 4-level and 6-level prongs of the victim table apply only if the offense substantially endangered the solvency or financial security of at least one victim?

2. *The proposed amendment would establish a new enhancement if the offense resulted in substantial [financial] hardship to one or more victims, and provides factors for the court to consider in determining whether the enhancement applies.*

The Commission seeks comment on the scope of the enhancement and the factors provided. Should the new enhancement encompass non-monetary harms? If so, what non-monetary harms should it encompass? Should any factors be deleted or changed? Should any additional factors be added? If so, what factors?

How should this new enhancement interact with other provisions in §2B1.1 that account for harm to victims? For example, how should this new enhancement interact with the victims table in subsection (b)(2), the enhancement for theft from the person of another in subsection (b)(3), the enhancement for means of identification in subsection (b)(11), and the enhancement for unauthorized public dissemination of personal information in subsection (b)(17)(B)? Should this new enhancement be fully cumulative with the victims table and the other enhancements, or should the Commission reduce the cumulative impact of these various provisions?

3. *Section 2B1.1(b)(16)(B)(iii) provides a 4-level enhancement if the offense “substantially endangered the solvency or financial security of 100 or more victims.” The Commission seeks comment on whether subsection (b)(16)(B)(iii) should be eliminated (as reflected in the proposed amendment) or, in the alternative, whether the number of victims required by subsection (b)(16)(B)(iii) should be reduced. If the number of victims should be reduced, what number of victims should be required?*

(C) Sophisticated Means

Synopsis of the Proposed Amendment: *As part of its overall examination of §2B1.1, the Commission is considering issues relating to the application of the sophisticated means enhancement set forth in subsection (b)(10)(C). In doing so, the Commission identified two issues that are the subject of this part of the proposed amendment.*

First, the existing enhancement applies if “the offense otherwise involved sophisticated means.” Applying this language, courts have applied this enhancement without a determination of whether the defendant’s own conduct was “sophisticated.” See, e.g., United States v. Bishop-Oyedepo, 480 Fed. App’x 431, 433-34 (7th Cir. 2012) (affirming enhancement for mortgage loan officer who submitted three fraudulent applications because the other schemer’s actions were “reasonably foreseeable”; stating that “because [the defendant] knew of the scheme and the scheme as a whole was sophisticated, the adjustment was appropriate regardless of the sophistication of her individual actions”). Relatedly, courts have varied in their analysis as to whether a scheme must be “sophisticated” in comparison to any fraud that could be sentenced under §2B1.1 or if, instead, the scheme must be sophisticated in comparison to a scheme of the type at issue. Compare United States v. Jones, 530 F.3d 1292, 1307 (10th Cir. 2008) (affirming application of enhancement because scheme at issue was “readily distinguishable from less sophisticated means by which the myriad crimes within the ambit of §2B1.1 may be committed”), with United States v. Wayland, 549 F.3d 526, 529 (7th Cir. 2008) (affirming application of enhancement because the “scheme required a greater level of planning or concealment than the typical health care fraud case”) and United States v. Hance, 501 F.3d 900, 909 (8th Cir. 2007) (stating that the sophisticated means enhancement is appropriate when the “mail fraud, viewed as a whole, was notably more intricate than that of the garden-variety mail fraud scheme”).

The Commission is publishing this part of the proposed amendment to inform its consideration of whether the enhancement should be revised such that it applies based only on the defendant’s conduct rather than offense as a whole, and whether the conduct should be compared only to similar frauds or to all frauds that could fall within the scope of §2B1.1.

The proposed amendment revises the specific offense characteristic for sophisticated means in subsection (b)(10)(C) in several ways.

Specifically, it specifies that sophisticated means is determined relative to offenses of the same kind, and it narrows the scope of the specific offense characteristic to cases in which the defendant used (rather than the offense involved) sophisticated means.

An issue for comment is also included.

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

* * *

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

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Commentary

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Application Notes:

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

- (A) Definition of United States.—For purposes of subsection (b)(10)(B), “United States” means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.
- (B) Sophisticated Means Enhancement under Subsection (b)(10)(C).—For purposes of subsection (b)(10)(C), “sophisticated means” means especially complex or especially intricate offense conduct that displays a significantly greater level of planning or employs significantly more advanced methods in executing or concealing the offense than a typical offense of the same kind. pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means. Conduct that is common to offenses of the same kind ordinarily does not constitute sophisticated means.

In addition, application of subsection (b)(10)(C) requires not only that the offense involve conduct constituting sophisticated means but also that the defendant engaged in or caused such conduct, i.e., the defendant committed such conduct or the defendant aided, abetted, counseled, commanded, induced, procured, or willfully caused such conduct. See §1B1.3(a)(1)(A).

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

* * *

Issue for Comment:

1. *The proposed amendment would specify that “sophisticated means” is determined relative to other offenses of the same kind. What guidance, if any, should the Commission provide for determining what offenses are of the same kind, for purposes of determining sophisticated means? For example, are all telemarketing fraud offenses of the same kind, or should distinctions be made among different kinds of telemarketing fraud offenses, or — conversely — are all telemarketing fraud offenses in fact a subset of a broader category? Similarly, are all theft offenses of the same kind, or are there broader or narrower distinctions that should be made?*

(D) Fraud on the Market and Related Offenses

Synopsis of Proposed Amendment: *This part of the proposed amendment addresses offenses involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. The proposed new guideline is a result of the Commission’s continued work on fraud offenses and, in particular, in the area of securities fraud and “fraud on the market” offenses. See 79 FR 49379 (August 20, 2014) (identifying as a Commission priority for the current amendment cycle the continuation of its work on economic crimes, including among other things a study of offenses involving fraud on the market).*

The proposed amendment also involves the Commission’s past work in implementing the directive in section 1079A(a)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203.

Specifically, section 1079A(a)(1)(A) directed the Commission to “review and, if appropriate, amend” the guidelines and policy statements applicable to “persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses.”

In addition, section 1079A(a)(1)(B) provided that, in promulgating any such amendment, the Commission shall—

- (i) ensure that the guidelines and policy statements, particularly section 2B1.1(b)(14) and section 2B1.1(b)(17) (and any successors thereto), reflect—*
 - (I) the serious nature of the offenses described in subparagraph (A);*
 - (II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and*
 - (III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);*
- (ii) consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;*
- (iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;*
- (iv) make any necessary conforming changes to guidelines; and*
- (v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.*

Securities fraud is prosecuted under 18 U.S.C. § 1348 (Securities and commodities fraud), which makes it unlawful to knowingly execute, or attempt to execute, a scheme or artifice (1) to defraud any person in connection with a security or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of a security. The statutory

maximum term of imprisonment for an offense under section 1348 is 25 years. Offenses under section 1348 are referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud).

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

Under the proposed amendment, the court is directed to use gain, rather than loss, for purposes of subsection (b)(1) if the offense involved (i) the fraudulent inflation or deflation in the value of a publicly traded security or commodity and (ii) the submission of false information in a public filing with the Securities and Exchange Commission or similar regulator. However, the enhancement under subsection (b)(1) shall be not less than [14]-[22] levels. While cases involving this conduct occur infrequently (the Commission identified seven such cases in fiscal years 2012 and 2013), the Commission has received comment that these cases are complex, resulting in courts applying a variety of methods to determine the appropriate enhancement under subsection (b)(1). In such cases in fiscal years 2012 and 2013, the median enhancement under subsection (b)(1) was 14 levels and the average sentence was 48 months.

As a conforming change, the special rule at Application Note 3(F)(ix), relating to the calculation of loss in cases involving the fraudulent inflation in the value of a publicly traded security or commodity, is deleted.

Issues for comment are also included.

Proposed Amendment:

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

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

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

Provided, that if the offense involved (i) the fraudulent inflation or deflation in the value of a publicly traded security or commodity and (ii) the submission of false information in a public filing with the Securities and Exchange Commission or similar regulator, the enhancement determined above shall be based on the gain that resulted from the offense rather than the loss. However, the enhancement under subsection (b)(1) shall be not less than [14]-[22] levels.

* * *

Commentary

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Application Notes:

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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:*

* * *

(ix) —~~Fraudulent Inflation or Deflation in Value of Securities or Commodities.—*In a case involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, there shall be a rebuttable presumption that the actual loss attributable to the change in value of the security or commodity is the amount determined by—*~~

~~(I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and~~

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

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

* * *

Issues for Comment:

1. *In 2012, the Commission responded to directives in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, by providing, among other things, a special rule for determining actual loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity, see §2B1.1, comment. (n.3(F)(ix)), and departure provisions for cases in which there was risk of a significant disruption of a national financial market, see §2B1.1, comment. (n.20(A)(iv)), and cases in which there was a securities fraud involving a fraudulent statement made publicly to the market, see §2B1.1, comment. (n.20(C)).*

The Commission seeks comment on the operation of these provisions and whether they adequately address “fraud on the market” cases and similar types of cases involving the financial markets. Should the Commission revise these provisions to better address these types of cases? If so, how? Should the Commission make any other changes to the guidelines to address these types of cases? If so, what changes should the Commission make? For example, should the Commission provide a separate guideline for these cases? In the alternative, should these cases be sentenced under §2B1.4 (Insider Trading) instead of §2B1.1, and if so, what if any changes should be made to §2B1.4 to address these cases?

2. *The Commission seeks comment on whether gain, rather than loss, is a more appropriate method for determining the harm accountable to the defendant in “fraud on the market” cases. What are the advantages and disadvantages of using gain to measure harm in such cases? Are there application issues that would arise in determining gain in such cases? If so, what are the issues and how, if at all, should the Commission address them?*
3. *The Commission has heard concerns that gain and loss are difficult to measure in “fraud on the market” cases and may not effectively address the role of market forces and other factors. Accordingly, it has been argued, the use of gain or loss may over-punish some defendants and under-punish others. How, if at all, should the Commission address this issue?*

In particular, the Commission seeks comment on whether “fraud on the market” offenses should be structured to include a minimum level of enhancement of [14]-[22] levels (as bracketed in the proposed amendment) under subsection (b)(1). Would such an approach be consistent with the purposes of sentencing and the directives to the Commission in the Dodd-Frank Wall Street Reform and Consumer Protection Act? Should the Commission consider such an approach? If so, what minimum level of enhancement should be provided?

If the Commission were to provide such a minimum enhancement for such cases, should the Commission also specify that certain other specific offense characteristics in the guideline should not apply in such cases?