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GUIDELINES MANUAL
Supplement to Appendix C

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This document contains amendments to the *Guidelines Manual* effective November 1, 2012, and November 1, 2013. For amendments effective November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; November 1, 2007; February 6, 2008; March 3, 2008; May 1, 2008; November 1, 2008; November 1, 2009; November 1, 2010; and November 1, 2011, see Appendix C, Volume III. For amendments effective November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; and November 5, 2003, see Appendix C, Volume II. For amendments effective November 1, 1997, and earlier, see Appendix C, Volume I.

SUPPLEMENT TO APPENDIX C - AMENDMENTS TO THE GUIDELINES MANUAL

This supplement to Appendix C presents amendments to the guidelines, policy statements, and official commentary effective November 1, 2012, and November 1, 2013.

For amendments to the guidelines, policy statements, and official commentary effective November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; November 1, 2007; February 6, 2008; March 3, 2008; May 1, 2008; November 1, 2008; November 1, 2009; November 1, 2010; and November 1, 2011, see Appendix C, Volume III. For amendments effective November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; and November 5, 2003, see Appendix C, Volume II. For amendments effective November 1, 1997, and earlier, see Appendix C, Volume I.

The format under which the amendments are presented in Appendix C, including this supplement, is designed to facilitate a comparison between previously existing and amended provisions, in the event it becomes necessary to reference the former guideline, policy statement, or commentary language.

AMENDMENTS

761. Amendment: The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3(E) by adding at the end the following:

"(iii) Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

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

in Note 3(F) by adding at the end the following:

"(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).";

in Note 12(A) by adding at the end the following:

- "(v) One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a 'bailout.'";

in Note 12(B)(ii) by adding at the end the following:

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

in Note 19(A)(iv) by inserting before the period at the end the following: ", such as a risk of a significant disruption of a national financial market";

and in Note 19(C) by adding after the first paragraph the following new paragraph:

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

Section 2B1.4(b) is amended by striking "Characteristic" and inserting "Characteristics"; and by adding at the end the following:

- "(2) If the offense involved an organized scheme to engage in insider trading and the offense level determined above is less than level 14, increase to level 14."

The Commentary to §2B1.4 captioned "Application Note" is amended in the caption by striking "Note" and inserting "Notes"; by redesignating Note 1 as Note 2 and inserting before Note 2 (as so redesignated) the following:

- "1. Application of Subsection (b)(2).—For purposes of subsection (b)(2), an 'organized scheme to engage in insider trading' means a scheme to engage in insider trading that involves considered, calculated, systematic, or repeated efforts to obtain and trade on inside information, as distinguished from fortuitous or opportunistic instances of insider trading.

The following is a non-exhaustive list of factors that the court may consider in determining whether the offense involved an organized scheme to engage in insider trading:

- (A) the number of transactions;
- (B) the dollar value of the transactions;
- (C) the number of securities involved;
- (D) the duration of the offense;
- (E) the number of participants in the scheme (although such a scheme may exist even in the absence of more than one participant);
- (F) the efforts undertaken to obtain material, nonpublic information;
- (G) the number of instances in which material, nonpublic information was obtained; and
- (H) the efforts undertaken to conceal the offense.";

in Note 2 (as so redesignated) by striking "only"; and by adding at the end the following new paragraph:

"Furthermore, §3B1.3 should be applied if the defendant's employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. It would apply, for example, to a hedge fund professional who regularly participates in securities transactions or to a lawyer who regularly provides professional assistance in securities transactions, if the defendant's employment in such a position was used to facilitate significantly the commission or concealment of the offense. It ordinarily would not apply to a position such as a clerical worker in an investment firm, because such a position ordinarily does not involve special skill. See §3B1.3, comment. (n. 4)."

The Commentary to §2B1.4 captioned "Background" is amended by adding at the end the following new paragraph:

" Subsection (b)(2) implements the directive to the Commission in section 1079A(a)(1)(A) of Public Law 111–203."

Reason for Amendment: This amendment responds to the two directives to the Commission in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L.

111–203 (the "Act"). The first directive relates to securities fraud and similar offenses, and the second directive relates to mortgage fraud and financial institution fraud.

Securities Fraud and Similar Offenses

Section 1079A(a)(1)(A) of the Act directs 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." Section 1079A(a)(1)(B) provides 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.

The amendment responds to this directive in two ways. First, the amendment amends the fraud guideline, §2B1.1 (Theft, Property Destruction, and Fraud), to provide 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. Case law and comments received by the Commission indicate that determinations of loss in cases involving securities fraud and similar offenses are complex and that a variety of different methods are in use, possibly resulting in unwarranted sentencing disparities.

The amendment amends §2B1.1 to provide a special rule regarding how to calculate actual loss in these types of cases. Specifically, the amendment creates a new Application Note 3(F)(ix) which establishes 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." The special rule further provides that, "[i]n 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)."

The special rule is based upon what is sometimes referred to as the "modified rescissory method" and should ordinarily provide a "reasonable estimate of the loss" as required by Application Note 3(C). This special rule is intended to provide courts a workable and consistent formula for calculating loss that "resulted from the offense." See §2B1.1, comment. (n.3(A)(i)). By averaging the stock price during the period in which the fraud occurred and a set 90-day period after the fraud was discovered, the special rule reduces the impact on the loss calculation of factors other than the fraud, such as overall growth or decline in the price of the stock. See, e.g., United States v. Bakhit, 218 F. Supp. 2d 1232 (C.D. Cal. 2002); United States v. Snyder, 291 F.3d 1291 (11th Cir. 2002); United States v. Brown, 595 F.3d 498 (3d Cir. 2010); see also 15 U.S.C. § 78u-4(e) (statutorily setting forth a similar method for loss calculation in the context of private securities litigation). Furthermore, applying this special rule could "eliminate[], or at least reduce[], the complexity, uncertainty, and expense inherent in attempting to determine out-of-pocket losses on a case-by-case basis." See United States v. Grabske, 260 F. Supp. 2d. 866, 873-74 (N.D. Cal. 2002).

By applying a rebuttable presumption, however, the amendment also provides sufficient flexibility for a court to consider the extent to which the amount determined under the special rule 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).

The amendment also responds to the first directive by amending the insider trading guideline, §2B1.4 (Insider Trading). First, it provides a new specific offense characteristic if the offense involved an "organized scheme to engage in insider trading." In such a case, the new specific offense characteristic provides a minimum offense level of 14. The commentary is also amended to provide factors the court may consider in determining whether the new minimum offense level applies.

The amendment reflects the Commission's view that a defendant who engages in considered, calculated, systematic, or repeated efforts to obtain and trade on inside information (as opposed to fortuitous or opportunistic instances of insider trading) warrants, at minimum, a short but definite period of incarceration. Sentencing data indicate that when a defendant engages in an organized insider trading scheme, the gain from the offense ordinarily triggers an enhancement under §2B1.4(b)(1) of sufficient magnitude to result in a guideline range that requires a period of imprisonment. The amendment, however, ensures that the guidelines require a period of incarceration even in such a case involving relatively little gain.

The amendment also amends the commentary to §2B1.4 to provide more guidance on the applicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in insider

trading cases. In particular, the new commentary in Application Note 2 provides that §3B1.3 should be applied if the defendant's employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. The commentary further provides examples of positions that may qualify for the adjustment, including a hedge fund professional who regularly participates in securities transactions or a lawyer who regularly provides professional assistance in securities transactions. Individuals who occupy such positions possess special knowledge regarding the financial markets and the rules prohibiting insider trading, and generally are viewed as more culpable. See §3B1.3, comment. (backg'd). The commentary also provides as an example of a position that would not qualify for the adjustment in §3B1.4 a clerical worker in an investment firm. Such a position ordinarily does not involve special skill and is not generally viewed as more culpable.

Mortgage Fraud and Financial Institution Fraud

Section 1079A(a)(2)(A) of the Act directs the Commission to "review and, if appropriate, amend" the guidelines and policy statements applicable to "persons convicted of fraud offenses relating to financial institutions or federally related mortgage loans and any other similar provisions of law, to reflect the intent of Congress that the penalties for the offenses under the guidelines and policy statements ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions." Section 1079A(a)(2)(B) of the Act provides that, in promulgating any such amendment, the Commission shall—

- (i) ensure that the guidelines and policy statements 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.

The amendment responds to this directive in two ways.

First, the amendment adds language to the credits against loss rule, found in Application Note 3(E) of the commentary to §2B1.1. Application Note 3(E)(i) generally provides that the determination of loss under subsection (b)(1) shall be reduced by the money returned

and the fair market value of the property returned and services rendered to the victim before the offense was detected. In the context of a case involving collateral pledged or otherwise provided by the defendant, Application Note 3(E)(ii) provides that the loss to the victim shall be reduced by either "the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing."

The Commission received comment that, in cases involving mortgage fraud where the collateral has not been disposed of by the time of sentencing, the fair market value of the collateral may be difficult to determine and may require frequent updating, especially in cases involving multiple properties. The comments further indicate that the lack of a uniform process may result in unwarranted sentencing disparities.

The amendment responds to these concerns by establishing a new Application Note 3(E)(iii) applicable to fraud cases involving a mortgage loan where the underlying collateral has not been disposed of by the time of sentencing. In such a case, new Application Note 3(E)(iii) makes two changes to the calculation of credits against loss. First, the note changes the date on which the fair market value of the collateral is determined, from the time of sentencing to the date on which the guilt of the defendant has been established. This change is intended to avoid the need to reassess the fair market value of such collateral on multiple occasions up to the date of sentencing. Second, it establishes a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the tax assessment is a reasonable estimate of fair market value, the note further provides that the court may consider the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value, among other factors.

By structuring the special rule in this manner, the amendment addresses the need to provide a uniform practicable method for determining fair market value of undisposed collateral while providing sufficient flexibility for courts to address differences among jurisdictions regarding how closely the most recent tax assessment correlates to fair market value. The Commission heard concerns, for example, that, in some jurisdictions, the most recent tax assessment may be outdated or based upon factors, such as the age or status of the homeowner, that have no correlation to fair market value.

The amendment also responds to the second directive by amending the commentary regarding the application of §2B1.1(b)(15)(B), which provides an enhancement of 4 levels if the offense involved specific types of financial harms (e.g., jeopardizing a financial institution or organization). This commentary, contained in Application Note 12 to §2B1.1, provides a non-exhaustive list of factors the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution or an organization that was a publicly traded company or that had more than 1,000 employees was substantially jeopardized. For example, in the context of financial institutions, the court shall consider whether the financial institution became insolvent, was forced to reduce benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment, or investment, or was so depleted of its assets as to be forced to merge with another institution. Similarly, in the context of a covered organization, the court shall consider whether the organization became insolvent or suffered a substantial reduction in the value of its assets, filed for bankruptcy, suffered a substantial reduction in the value of its equity securities or

its employee retirement accounts, or substantially reduced its workforce or employee pension benefits.

The amendment amends Application Note 12 to add as a new consideration whether one of the listed harms was likely to result from the offense, but did not result from the offense because of federal government intervention, such as a "bailout." This amendment reflects the Commission's intent that §2B1.1(b)(15)(B) account for the risk of harm from the defendant's conduct and its view that a defendant should not avoid the application of the enhancement because the harm that was otherwise likely to result from the offense conduct did not occur because of fortuitous federal government intervention.

Departure Provisions

Finally, the amendment also responds to the Act's directives by amending the departure provisions in §2B1.1 to provide two examples of cases in which a departure may be warranted.

First, the amendment amends Application Note 19(A)(iv), which provides that an upward departure may be warranted if the offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1). The amendment adds "risk of a significant disruption of a national financial market" as an example of such a risk. This part of the amendment responds to the requirement in the Act to consider whether the guidelines applicable to the offenses covered by the directives appropriately "account for the potential and actual harm to the public and the financial markets[.]"

The amendment also amends Application Note 19(C), which provides that a downward departure may be warranted if the offense level substantially overstates the seriousness of the offense, by adding an example of a case in which such a departure may be appropriate. The example provides that "a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims," and that, "in such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense." This part of the amendment responds to concerns raised in comment and case law that the cumulative impact of the loss table and the victims table may overstate the seriousness of the offense in certain cases.

Effective Date: The effective date of this amendment is November 1, 2012.

- 762. Amendment:** The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10(D) in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)" by inserting after the entry relating to N-N-Dimethylamphetamine the following new entry:

"1 gm of N-Benzylpiperazine = 100 gm of marihuana".

Reason for Amendment: This amendment responds to concerns raised by the Second Circuit Court of Appeals and others regarding the sentencing of offenders convicted of offenses involving BZP (N-Benzylpiperazine), which is a Schedule I stimulant. See United States v. Figueroa, 647 F.3d 466 (2d Cir. 2011). The amendment establishes a marijuana

equivalency for BZP offenses in the Drug Equivalency Table provided in Application Note 10(D) in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). The marijuana equivalency established by the amendment provides that 1 gram of BZP equals 100 grams of marijuana.

Prior to the amendment, the Drug Equivalency Table did not include a marijuana equivalency for BZP. As a result, in offenses involving BZP, the court determined the base offense level using the marijuana equivalency of "the most closely related controlled substance" referenced in §2D1.1. See §2D1.1, comment. (n. 5). In determining the most closely related controlled substance, the commentary directs the court to consider (1) whether the controlled substance not referenced in §2D1.1 has a chemical structure that is substantially similar to a controlled substance that is referenced in §2D1.1, (2) whether the controlled substance not referenced in §2D1.1 has a stimulant, depressant, or hallucinogenic effect similar to a controlled substance referenced in the guideline, and (3) whether a lesser or greater quantity of the controlled substance not referenced in §2D1.1 is needed to produce a substantially similar effect as a controlled substance that is referenced in §2D1.1.

In applying these factors, courts have reached different conclusions regarding which controlled substance referenced in §2D1.1 is most closely related to BZP and have therefore used different marijuana equivalencies in sentencing BZP offenders. The Commission's review of case law and sentencing data indicate that some district courts have found that the controlled substance most closely related to BZP is amphetamine and used the marijuana equivalency for amphetamine, see United States v. Major, 801 F. Supp. 2d 511, 514 (E.D. Va. 2011) (using the marijuana equivalency for amphetamine at full potency), while other district courts have found that the controlled substance most related to BZP is MDMA, but at varying potencies. See United States v. Bennett, 659 F.3d 711, 715-16 (8th Cir. 2011) (affirming a district court's use of the marijuana equivalency for MDMA at full potency); United States v. Rose, 722 F. Supp. 2d 1286, 1289 (M.D. Ala. 2010) (concluding that BZP is most closely related to MDMA, but imposing a variance to reflect BZP's reduced potency compared to MDMA). The different findings of which controlled substance is the most closely related to BZP, and the application of different potencies of those controlled substances, have resulted in courts imposing vastly different sentence lengths for the same conduct.

The Commission reviewed scientific literature and received expert testimony and comment relating to BZP and concluded that BZP is a stimulant with pharmacologic properties similar to that of amphetamine, but is only one-tenth to one-twentieth as potent as amphetamine, depending on the particular user's history of drug abuse. Accordingly, in order to promote uniformity in sentencing BZP offenders and to reflect the best available scientific evidence, the amendment establishes a marijuana equivalency of 1 gram of BZP equals 100 grams of marijuana. This corresponds to one-twentieth of the marijuana equivalency for amphetamine, which is 1 gram of amphetamine equals 2 kilograms (or 2,000 grams) of marijuana.

Effective Date: The effective date of this amendment is November 1, 2012.

763. Amendment: Section 2D1.11 is amended in subsection (b) by adding at the end the following:

- "(6) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels."

The Commentary to 2D1.11 captioned "Application Notes" is amended by adding at the end the following:

- "9. Applicability of Subsection (b)(6).—The applicability of subsection (b)(6) shall be determined without regard to the offense of conviction. If subsection (b)(6) applies, §5C1.2(b) does not apply. See §5C1.2(b)(2)(requiring a minimum offense level of level 17 if the 'statutorily required minimum sentence is at least five years')."

Reason for Amendment: This amendment adds a new specific offense characteristic at subsection (b)(6) of §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) that provides a 2-level decrease if the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) (commonly referred to as the "safety valve" criteria). The new specific offense characteristic in §2D1.11 parallels the existing 2-level decrease at subsection (b)(16) of §2D1.1(Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

The Commission in 1995 created the 2-level reduction in §2D1.1 for offenders who meet the safety valve criteria in response to a directive in section 80001 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322. Section 80001 provided an exception to otherwise applicable statutory minimum sentences for defendants convicted of specified drug offenses and who meet the criteria specified in 18 U.S.C. § 3553(f)(1)-(5), and directed the Commission to promulgate guidelines to carry out these purposes. The reduction in §2D1.1 initially was limited to defendants whose offense level was level 26 or greater, see USSG App. C, Amendment 515 (effective November 1, 1995), but was subsequently expanded to apply to offenders with an offense level lower than level 26 to address proportionality concerns. See USSG App. C, Amendment 624 (effective November 1, 2001). Specifically, the Commission determined that limiting the applicability of the reduction to defendants with an offense level of level 26 or greater "is inconsistent with the general principles underlying the two-level reduction . . . to provide lesser punishment for first time, nonviolent offenders." Id.

For similar reasons of proportionality, this amendment expands application of the 2-level reduction to offenses involving list I and list II chemicals sentenced under §2D1.11. List I chemicals are important to the manufacture of a controlled substance and usually become part of the final product, while list II chemicals are generally used as solvents, catalysts, and reagents. See USSG §2D1.11, comment. (backg'd.). Section 2D1.11 is generally structured to provide base offense levels that are tied to, but less severe than, the base offense levels in §2D1.1 for offenses involving the final product. The Commission determined that adding the 2-level reduction for meeting the safety valve criteria in §2D1.11 would promote the proportionality the Commission has intended to achieve between §§2D1.1 and 2D1.11.

The amendment also adds new commentary relating to the "safety valve" reduction in §2D1.11 that is consistent with the commentary relating to the "safety valve" reduction in §2D1.1. See USSG §2D1.1, comment. (n. 21). The commentary makes clear that the new

2-level reduction in §2D1.11 applies regardless of the offense of conviction, and that the minimum offense level of 17 in subsection (b) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) does not apply. Section 5C1.2(b) provides for an offense level not less than level 17 for defendants who meet the criteria of subdivisions (1)-(5) of section (a) in §5C1.2 and for whom the statutorily required minimum sentence is at least 5 years. See USSG App. C, Amendment 624 (effective November 1, 2001). Since none of the offenses referenced to §2D1.11 carries a statutory mandatory minimum, the minimum offense level of 17 at §5C1.2(b) does not affect application of the new 2-level reduction in §2D1.11.

Effective Date: The effective date of this amendment is November 1, 2012.

- 764. Amendment:** The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 1(B)(vii) by inserting before the period at the end the following: ", but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States".

Reason for Amendment: This amendment responds to a circuit conflict over the application of the enhancements found at §2L1.2(b)(1)(A) and (B) to a defendant who was sentenced on two or more occasions for the same drug trafficking conviction (*e.g.*, because of a revocation of probation, parole, or supervised release), such that there was a sentence imposed before the defendant's deportation, then an additional sentence imposed after the deportation. The amendment resolves the conflict by amending the definition of "sentence imposed" in Application Note 1(B)(vii) to §2L1.2 (Unlawfully Entering or Remaining in the United States) to state that the length of the sentence imposed includes terms of imprisonment given upon revocation of probation, parole, or supervised release, but "only if the revocation occurred before the defendant was deported or unlawfully remained in the United States."

Section 2L1.2(b)(1) generally reflects the Commission's determination that both the seriousness and the timing of the prior offense for which the defendant was deported are relevant to assessing the defendant's culpability for the illegal reentry offense. A defendant who was deported after a conviction for a felony drug trafficking offense receives an enhancement under either prong (A) or (B) of subsection (b)(1), depending on the length of the sentence imposed. If the sentence imposed was more than 13 months, the defendant receives a 16-level enhancement to the base offense level under prong (A). If the sentence imposed was 13 months or less, the defendant receives a 12-level enhancement under prong (B). However, for defendants whose prior convictions are remote in time and thus do not receive criminal history points, these enhancements are reduced to 12 levels and 8 levels, respectively.

The majority of circuits that have considered the meaning of "sentence imposed" in this context have held that the later, additional sentence imposed after deportation does not lengthen the sentence imposed for purposes of the subsection (b)(1) enhancement. See *United States v. Bustillos-Pena*, 612 F.3d 863 (5th Cir. 2010); *United States v. Lopez*, 634 F.3d 948 (7th Cir. 2011); *United States v. Rosales-Garcia*, 667 F.3d 1348 (10th Cir. 2012); *United States v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000). Under the majority approach, if the sentence imposed was 13 months or less before the defendant was deported, and was only increased to more than 13 months after the deportation, the defendant is not subject to the enhancement in prong (A) because the "sentence imposed" includes only the

sentence imposed before the deportation. Under this approach, such a defendant receives the enhancement in prong (B) instead.

The Second Circuit has reached the contrary conclusion, holding that defendants who had their sentences increased to more than 13 months upon revocation after deportation are subject to the enhancement in prong (A) because the "sentence imposed" includes the additional revocation sentence imposed after deportation. See United States v. Compres-Paulino, 393 F.3d 116 (2d Cir. 2004).

The amendment adopts the approach taken by the majority of circuits, with the result that the term of imprisonment imposed upon revocation counts toward the calculation of the offense level in §2L1.2 only if it was imposed before the defendant was deported or unlawfully remained in the United States. According to public comment and testimony received by the Commission, and as courts have observed, the circumstances under which persons are found present in this country and have their probation, parole, or supervised release revoked for a prior offense vary widely. See Bustillos-Pena, 612 F.3d at 867-68 (describing differences among revocation proceedings). In some jurisdictions, the revocation is typically based on the offender's illegal return, while in others, the revocation is typically based on the offender's committing an additional crime. Furthermore, in some cases revocation proceedings commonly occur before the offender is sentenced on the illegal reentry offense, while in other cases the revocation occurs after the federal sentencing. See Rosales-Garcia, 667 F.3d at 1354 (observing that considering post-deportation revocation sentences could result in disparities based on the "happenstance" of whether that revocation occurred before or after the prosecution for the illegal reentry offense). Therefore, assessing the seriousness of the prior crime based on the sentence imposed before deportation should result in more consistent application of the enhancements in §2L1.2(b)(1)(A) and (B) and promote uniformity in sentencing.

Effective Date: The effective date of this amendment is November 1, 2012.

765. Amendment: Section 2L2.2 is amended in subsection (b) by adding at the end the following:

"(4) (Apply the Greater):

- (A) If the defendant committed any part of the instant offense to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense during the period in which the defendant was such a member or had such authority, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.
- (B) If the defendant committed any part of the instant offense to conceal the defendant's participation in (i) the offense of incitement to genocide, increase by 6 levels; or (ii) any other serious human rights offense, increase by 10 levels. If clause (ii) applies and the resulting offense level is less than level 25, increase to level 25."

The Commentary to 2L2.2 captioned "Application Notes" is amended by redesignating Notes 4 and 5 as Notes 5 and 6, respectively; and by inserting after Note 3 the following:

"4. Application of Subsection (b)(4).—For purposes of subsection (b)(4):

'Serious human rights offense' means (A) violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code, see 28 U.S.C. § 509B(e); and (B) conduct that would have been a violation of any such law if the offense had occurred within the jurisdiction of the United States or if the defendant or the victim had been a national of the United States.

'The offense of incitement to genocide' means (A) violations of 18 U.S.C. § 1091(c); and (B) conduct that would have been a violation of such section if the offense had occurred within the jurisdiction of the United States or if the defendant or the victim had been a national of the United States."

Chapter Three, Part A is amended by adding at the end the following new guideline and accompanying commentary:

"§3A1.5. Serious Human Rights Offense

If the defendant was convicted of a serious human rights offense, increase the offense level as follows:

- (a) If the defendant was convicted of an offense under 18 U.S.C. § 1091(c), increase by 2 levels.
- (b) If the defendant was convicted of any other serious human rights offense, increase by 4 levels. If (1) death resulted, and (2) the resulting offense level is less than level 37, increase to level 37.

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, 'serious human rights offense' means violations of federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code. See 28 U.S.C. § 509B(e).
2. Application of Minimum Offense Level in Subsection (b).—The minimum offense level in subsection (b) is cumulative with any other provision in the guidelines. For example, if death resulted and this factor was specifically incorporated into the Chapter Two offense guideline, the minimum offense level in subsection (b) may also apply.

Background: This guideline covers a range of conduct considered to be serious human rights offenses, including genocide, war crimes, torture, and the recruitment or use of child soldiers. See generally 28 U.S.C. § 509B(e).

Serious human rights offenses generally have a statutory maximum term of imprisonment of 20 years, but if death resulted, a higher statutory maximum term of

imprisonment of any term of years or life applies. See 18 U.S.C. §§ 1091(b), 2340A(a), 2442(b). For the offense of war crimes, a statutory maximum term of imprisonment of any term of years or life always applies. See 18 U.S.C. § 2441(a). For the offense of incitement to genocide, the statutory maximum term of imprisonment is five years. See 18 U.S.C. § 1091(c)."

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 2425 the following:

"18 U.S.C. § 2441 2X5.1".

Reason for Amendment: This amendment results from the Commission's multi-year review to ensure that the guidelines provide appropriate guidelines penalties for cases involving human rights violations. This amendment addresses human rights violators in two areas: defendants who are convicted of a human rights offense, and defendants who are convicted of immigration or naturalization fraud to conceal the defendant's involvement, or possible involvement, in a human rights offense.

Serious Human Rights Offenses

First, the amendment addresses defendants whose instant offense of conviction is a "serious human rights offense." In the Human Rights Enforcement Act of 2009, Pub. L. 111–122 (Dec. 22, 2009), Congress defined "serious human rights offenses" as "violations of Federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code." In that legislation, Congress authorized a new section within the Department of Justice "with responsibility for the enforcement of laws against suspected participants in [such] offenses." That section was established the following year, when the Human Rights and Special Prosecutions Section was created in the Justice Department's Criminal Division. Serious human rights offenses generally have a statutory maximum term of imprisonment of 20 years, but if death resulted, a higher statutory maximum term of imprisonment of any term of years or life applies. See 18 U.S.C. §§ 1091(b), 2340A(a), 2442(b). For the offense of war crimes, a statutory maximum term of imprisonment of any term of years or life always applies. See 18 U.S.C. § 2441(a). For the offense of incitement to genocide, the statutory maximum term of imprisonment is five years. See 18 U.S.C. § 1091(c).

Serious human rights offenses can be committed in a variety of ways, including, for example, assault, kidnapping, and murder. As a result, the guidelines generally have addressed these offenses by referencing them to a number of different Chapter Two offense guidelines, such as §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), 2A2.2 (Aggravated Assault) and 2A4.1 (Kidnapping, Abduction, Unlawful Restraint). In addition, certain of these Chapter Two offense guidelines use as a base offense level the offense level from another guideline applicable to the underlying conduct (e.g., §2H1.1 (Offenses Involving Individual Rights), which is the guideline to which genocide offenses are referenced). The offense of committing a war crime in violation of 18 U.S.C. § 2441, however, has not been referenced to any guideline prior to this amendment. The amendment amends Appendix A (Statutory Index) to reference these offenses to §2X5.1 (Other Felony Offenses). Section 2X5.1 addresses the variety of ways in which a war crimes offense may be committed by generally directing the court to apply the most analogous offense guideline.

The amendment also establishes a new Chapter Three adjustment at §3A1.5 (Serious Human Rights Offense) if the defendant was convicted of a serious human rights offense. The new guideline provides two tiers of adjustments, corresponding to the differing statutory penalties that apply to such offenses. The adjustment generally provides a 4-level increase if the defendant was convicted of a serious human rights offense, and a minimum offense level of 37 if death resulted. If the defendant was convicted of an offense under 18 U.S.C. § 1091(c) for inciting genocide, however, the adjustment provides a 2-level increase in light of the lesser statutory maximum penalty such offenses carry compared to the other offenses covered by this adjustment.

The new Chapter Three adjustment accounts for the particularly egregious nature of serious human rights offenses while generally maintaining the proportionality provided by the various Chapter Two guidelines that cover such offenses.

Immigration Fraud

Second, the amendment addresses cases in which the offense of conviction is for immigration or naturalization fraud and the defendant committed any part of the instant offense to conceal the defendant's involvement, or possible involvement, in a serious human rights offense. These offenders are sentenced under §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport). The offenders covered by this amendment fall into two categories. In the first category are defendants who concealed their connection to a military, paramilitary, or police organization that was involved in a serious human rights offense. In the second category are defendants who concealed having participated in a serious human rights offense.

The amendment adds a new specific offense characteristic to §2L2.2 at subsection (b)(4) that contains two subparagraphs. Subparagraph (A) applies if the defendant committed any part of the instant offense to conceal the defendant's membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense during the period in which the defendant was such a member or had such authority, and provides a 2-level increase and a minimum offense level of 13. Subparagraph (B) applies if the defendant committed any part of the instant offense to conceal the defendant's participation in a serious human rights offense, and provides a 6-level increase if the offense was incitement to genocide, or a 10-level increase and minimum offense level of 25 if the offense was any other serious human rights offense. The amendment also adds an application note defining the terms "serious human rights offense" and "the offense of incitement to genocide."

The new enhancement reflects the impact that such immigration fraud offenses can have on the ability of immigration and naturalization authorities to make fully informed decisions regarding the defendant's immigration petition, application or other request and is intended to ensure that the United States is not a safe haven for those who have committed serious human rights offenses.

Effective Date: The effective date of this amendment is November 1, 2012.

- 766. Amendment:** The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 5 by striking "counted. Such offenses are not minor traffic infractions within the meaning of §4A1.2(c)." and inserting "always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply."

Reason for Amendment: This amendment resolves differences among circuits regarding when prior sentences for the misdemeanor offenses of driving while intoxicated and driving under the influence (and any similar offenses by whatever name they are known) are counted toward the defendant's criminal history score.

Convictions for driving while intoxicated and similar offenses encompass a range of offense conduct. For example, convictions for driving while intoxicated and similar offenses can be classified as anything from traffic infractions to misdemeanors and felonies, and they are subject to a broad spectrum of penalties (ranging from a fine to years in custody for habitual offenders). When the prior offense is a felony, the sentence clearly counts toward the defendant's criminal history score because "[s]entences for all felony offenses are counted." See subsection (c) of §4A1.2 (Definitions and Instructions for Computing Criminal History). However, when the prior sentence is for a misdemeanor or petty offense, circuits have taken different approaches, in part because of language added to §4A1.2(c)(1). See USSG App. C, Amendment 352 (effective November 1, 1990) (adding "careless or reckless driving" to the offenses listed in §4A1.2(c)(1)).

When the prior sentence is a misdemeanor or petty offense, §4A1.2(c) specifies that the offense is counted, but with two exceptions, limited to cases in which the prior offense is on (or similar to an offense that is on) either of two lists. On the first list are offenses from "careless or reckless driving" to "trespassing." In such a case, the sentence is counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least 30 days, or (B) the prior offense was similar to the instant offense. See §4A1.2(c)(1). On the second list are offenses from "fish and game violations" to "vagrancy." In such a case, the sentence is never counted. See §4A1.2(c)(2).

Most circuits have held that driving while intoxicated convictions, including misdemeanors and petty offenses, always count toward the criminal history score, without exception, even if the offense met the criteria for either of the two lists. These circuits have relied on Application Note 5 to §4A1.2, which has provided:

Sentences for Driving While Intoxicated or Under the Influence.—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are counted. Such offenses are not minor traffic infractions within the meaning of §4A1.2(c).

See United States v. Pando, 545 F.3d 682, 683-85 (8th Cir. 2008) (holding that a conviction for driving while ability impaired was properly included in defendant's criminal history, and rejecting defendant's argument that his offense was similar to careless or reckless driving); United States v. Thornton, 444 F.3d 1163, 1165-67 (9th Cir. 2006) (holding that driving with high blood alcohol level was properly included in defendant's criminal history, and rejecting defendant's argument that his conviction was "similar" to minor traffic infraction or public intoxication). See also United States v. LeBlanc, 45 F.3d 192, 195 (7th Cir. 1995) ("[A]pplication note [5] reflects the Sentencing Commission's conclusion 'that driving while

intoxicated offenses are of sufficient gravity to merit inclusion in the defendant's criminal history, however they might be classified under state law."); United States v. Deigert, 916 F.2d 916, 918 (4th Cir. 1990) (holding that defendant's alcohol-related traffic offenses are counted under Application Note 5).

The Second Circuit took a different approach in United States v. Potes-Castillo, 638 F.3d 106 (2d Cir. 2011), holding that Application Note 5 could be read either (1) to "mean that, like felonies, driving while ability impaired sentences are always counted, without possibility of exception" or (2) "as setting forth the direction that driving while ability impaired sentences must not be treated as minor traffic infractions or local ordinance violations and excluded under section 4A1.2(c)(2)." Id. at 110-11. The Second Circuit adopted the second reading and, accordingly, held that a prior sentence for driving while ability impaired "should be treated like any other misdemeanor or petty offense, except that they cannot be exempted under section 4A1.2(c)(2)." Id. at 113. According to the Second Circuit, such a sentence can qualify for an exception, and therefore not be counted, under the first list (e.g., if it was similar to "careless or reckless driving" and the other criteria for a first-list exception were met).

The amendment resolves the issue by amending Application Note 5 to clarify that convictions for driving while intoxicated and similar offenses are always counted, without regard to how the offenses are classified. Further, the amendment states plainly that paragraphs (1) and (2) of §4A1.2(c) do not apply.

This amendment reflects the Commission's view that convictions for driving while intoxicated and other similar offenses are sufficiently serious to always count toward a defendant's criminal history score. The amendment clarifies the Commission's intent and should result in more consistent calculation of criminal history scores among the circuits.

Effective Date: The effective date of this amendment is November 1, 2012.

- 767. Amendment:** Section 5G1.2 is amended in subsection (b) by striking "Except as otherwise required by law (see §5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter." and inserting "For all counts not covered by subsection (a), the court shall determine the total punishment and shall impose that total punishment on each such count, except to the extent otherwise required by law."

The Commentary to §5G1.2 captioned "Application Notes" is amended in Note 1, in the first paragraph, by inserting before the period at the end of the first sentence the following: "and determining the defendant's guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table)"; and

after the first paragraph, by inserting the following new paragraph:

"Note that the defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, see §5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. See Note 3, below."; and

by redesignating Note 3 as Note 4 and inserting after Note 2 the following:

"3. Application of Subsection (b).—

- (A) In General.—Subsection (b) provides that, for all counts not covered by subsection (a), the court shall determine the total punishment (i.e., the combined length of the sentences to be imposed) and shall impose that total punishment on each such count, except to the extent otherwise required by law (such as where a statutorily required minimum sentence or a statutorily authorized maximum sentence otherwise requires).
- (B) Effect on Guidelines Range of Mandatory Minimum or Statutory Maximum.—The defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, see §5G1.1, but also in a multiple-count case.

In particular, where a statutorily required minimum sentence on any count is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence on that count shall be the guideline sentence on all counts. See §5G1.1(b). Similarly, where a statutorily required minimum sentence on any count is greater than the minimum of the applicable guideline range, the guideline range for all counts is restricted by that statutorily required minimum sentence. See §5G1.1(c)(2) and accompanying Commentary.

However, where a statutorily authorized maximum sentence on a particular count is less than the minimum of the applicable guideline range, the

sentence imposed on that count shall not be greater than the statutorily authorized maximum sentence on that count. See §5G1.1(a).

- (C) Examples.—The following examples illustrate how subsection (b) applies, and how the restrictions in subparagraph (B) operate, when a statutorily required minimum sentence is involved.

Defendant A and Defendant B are each convicted of the same four counts. Counts 1, 3, and 4 have statutory maximums of 10 years, 20 years, and 2 years, respectively. Count 2 has a statutory maximum of 30 years and a mandatory minimum of 10 years.

For Defendant A, the court determines that the final offense level is 19 and the defendant is in Criminal History Category I, which yields a guideline range on the Sentencing Table of 30 to 37 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant A's guideline sentence is 120 months. See subparagraph (B), above. After considering that guideline sentence, the court determines that the appropriate 'total punishment' to be imposed on Defendant A is 120 months. Therefore, subsection (b) requires that the total punishment of 120 months be imposed on each of Counts 1, 2, and 3. The sentence imposed on Count 4 is limited to 24 months, because a statutory maximum of 2 years applies to that particular count.

For Defendant B, in contrast, the court determines that the final offense level is 30 and the defendant is in Criminal History Category II, which yields a guideline range on the Sentencing Table of 108 to 135 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant B's guideline range is restricted to 120 to 135 months. See subparagraph (B), above. After considering that restricted guideline range, the court determines that the appropriate 'total punishment' to be imposed on Defendant B is 130 months. Therefore, subsection (b) requires that the total punishment of 130 months be imposed on each of Counts 2 and 3. The sentences imposed on Counts 1 and 4 are limited to 120 months (10 years) and 24 months (2 years), respectively, because of the applicable statutory maximums.

- (D) Special Rule on Resentencing.—In a case in which (i) the defendant's guideline range on the Sentencing Table was affected or restricted by a statutorily required minimum sentence (as described in subparagraph (B)), (ii) the court is resentencing the defendant, and (iii) the statutorily required minimum sentence no longer applies, the defendant's guideline range for purposes of the remaining counts shall be redetermined without regard to the previous effect or restriction of the statutorily required minimum sentence."

Reason for Amendment: This amendment responds to an application issue regarding the applicable guideline range in a case in which the defendant is sentenced on multiple counts of conviction, at least one of which involves a mandatory minimum sentence that is greater than the minimum of the otherwise applicable guideline range. The issue arises under §5G1.2 (Sentencing on Multiple Counts of Conviction) when at least one count in a multiple-count case involves a mandatory minimum sentence that affects the otherwise applicable guideline range. In such cases, circuits differ over whether the guideline range is affected only for the count involving the mandatory minimum or for all counts in the case.

The Fifth Circuit has held that, in such a case, the effect on the guideline range applies to all counts in the case. See United States v. Salter, 241 F.3d 392, 395-96 (5th Cir. 2001). In that case, the guideline range on the Sentencing Table was 87 to 108 months, but one of the three counts carried a mandatory minimum sentence of 10 years (120 months), which resulted in a guideline sentence of 120 months. The Fifth Circuit instructed the district court that the appropriate guideline sentence was 120 months on each of the three counts.

The Ninth Circuit took a different approach in United States v. Evans-Martinez, 611 F.3d 635 (9th Cir. 2010), holding that, in such a case, "a mandatory minimum sentence becomes the starting point for any count that carries a mandatory minimum sentence higher than what would otherwise be the Guidelines sentencing range," but "[a]ll other counts . . . are sentenced based on the Guidelines sentencing range, regardless [of] the mandatory minimum sentences that apply to other counts." See id. at 637. The Ninth Circuit stated that it would be more "logical" to follow the Fifth Circuit's approach but "such logic is overcome by the precise language of the Sentencing Guidelines". See id.

The District of Columbia Circuit appears to follow an approach similar to the Ninth Circuit. See United States v. Kennedy, 133 F.3d 53, 60-61 (D.C. Cir. 1998) (one of two counts carried a mandatory sentence of life imprisonment; district court treated life imprisonment

as the guidelines sentence for both counts; Court of Appeals reversed, holding that the appropriate guidelines range for the other count was 262 to 327 months).

The amendment adopts the approach followed by the Fifth Circuit and makes three changes to §5G1.2. First, it amends §5G1.2(b) to clarify that the court is to determine the total punishment and impose that total punishment on each count, except to the extent otherwise required by law.

Second, it amends the Commentary to clarify that the defendant's guideline range in a multiple-count case may be restricted by a mandatory minimum penalty or statutory maximum penalty (i.e., a mandatory minimum may increase the bottom of the otherwise applicable guideline range and a statutory maximum may decrease the top of the otherwise applicable guideline range) in a manner similar to how the guideline range in a single-count case may be restricted by a minimum or maximum penalty under §5G1.1 (Sentencing on a Single Count of Conviction). Specifically, it clarifies that when any count involves a mandatory minimum that restricts the defendant's guideline range, the guideline range is restricted as to all counts. It also provides examples of how these restrictions operate.

Third, it amends the commentary to clarify that in a case in which (1) a defendant's guideline range was affected or restricted by a mandatory minimum penalty, (2) the court is resentencing the defendant, and (3) the mandatory minimum sentence no longer applies, the court shall redetermine the defendant's guideline range for purposes of the remaining counts without regard to the mandatory minimum penalty.

These changes resolve the application issue by clarifying the manner in which the Commission intended this guideline to operate, and by providing examples similar to those used in training probation officers and judges. When there is only one count, the guidelines provide a single guideline range, and that range may be restricted if a mandatory minimum is involved, as described in §5G1.1 (Sentencing on a Single Count of Conviction). When there is more than one count, the guidelines also provide a single guideline range, and that range also may be restricted if a mandatory minimum is involved. These changes provide clarity and consistency for cases in which a mandatory minimum is present and are intended to ensure that sentencing courts resolve multiple-count cases in a straightforward, logical manner, with a single guideline range, a single set of findings and reasons, and a single set of departure and variance considerations.

Effective Date: The effective date of this amendment is November 1, 2012.

768. Amendment: Chapter Five, Part K, Subpart 2 is amended by striking §5K2.19 and its accompanying commentary as follows:

"§5K2.19. Post-Sentencing Rehabilitative Efforts (Policy Statement)

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. § 3583(e)(1).)

Commentary

Background: The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. § 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resentenced de novo."

Reason for Amendment: The Commission's policy statement at §5K2.19 (Post-Sentencing Rehabilitative Efforts) (Policy Statement) prohibits the consideration of post-sentencing rehabilitative efforts as a basis for downward departure when resentencing a defendant. Section 5K2.19 was promulgated in 2000 in response to a circuit conflict regarding whether sentencing courts may consider such rehabilitative efforts while in prison or on probation as a basis for downward departure at resentencing following an appeal. See USSG App. C, Amendment 602 (effective November 1, 2000). This amendment repeals §5K2.19. The amendment responds to the Supreme Court's decision in Pepper v. United States, 131 S. Ct. 1229 (2011), which, in part relying on 18 U.S.C. § 3661, held among other things that "when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation." The amendment repeals the policy statement in light of the Pepper decision.

Effective Date: The effective date of this amendment is November 1, 2012.

- 769. Amendment:** Section 2P1.2 is amended in subsection (a)(3) by inserting after "currency," the following: "a mobile phone or similar device,".

The Commentary to §2P1.2 captioned "Application Notes" is amended by redesignating Notes 1 and 2 as Notes 2 and 3, respectively, and by inserting at the beginning the following:

- "1. In this guideline, the term 'mobile phone or similar device' means a phone or other device as described in 18 U.S.C. § 1791(d)(1)(F)."

The Commentary to §2T2.1 captioned "Statutory Provisions" is amended by inserting "15 U.S.C. § 377," before "26 U.S.C.".

The Commentary to §2T2.2 captioned "Statutory Provisions" is amended by inserting "15 U.S.C. § 377," before "26 U.S.C.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 15 U.S.C. § 158 the following:

"15 U.S.C. § 377 2T2.1, 2T2.2";

by inserting after the line referenced to 18 U.S.C. § 43 the following:

"18 U.S.C. § 48 2G3.1";

by inserting after the line referenced to 18 U.S.C. § 1153 the following:

"18 U.S.C. § 1158 2B1.1, 2B5.3

18 U.S.C. § 1159 2B1.1";

by inserting after the line referenced to 18 U.S.C. § 1716D the following:

"18 U.S.C. § 1716E 2T2.2"; and

by striking the lines referenced to 41 U.S.C. § 53, 54, and 423(e) as follows:

"41 U.S.C. § 53 2B4.1

41 U.S.C. § 54 2B4.1

41 U.S.C. § 423(e) 2B1.1, 2C1.1"; and by inserting the following:

"41 U.S.C. § 2102 2B1.1, 2C1.1

41 U.S.C. § 2105 2B1.1, 2C1.1

41 U.S.C. § 8702 2B4.1

41 U.S.C. § 8707 2B4.1".

Reason for Amendment: This amendment responds to miscellaneous issues arising from recently enacted legislation.

Cell Phone Contraband Act of 2010

First, the amendment responds to the Cell Phone Contraband Act of 2010, Pub. L. 111–225 (enacted August 10, 2010), which amended 18 U.S.C. § 1791 (Providing or possessing contraband in prison) to make it a class A misdemeanor to provide a mobile phone or similar device to an inmate, or for an inmate to possess a mobile phone or similar device. Offenses under section 1791 are referenced in Appendix A (Statutory Index) to §2P1.2 (Providing or Possessing Contraband in Prison). The penalty structure of section 1791 is based on the type of contraband involved, and the other class A misdemeanors in section 1791 receive a base offense level of 6 in §2P1.2. Under the amendment, the class A misdemeanor in section 1791 that applies when the contraband is a cell phone will also receive a base offense level of 6 in §2P1.2. This change maintains the relationship between the penalty structures of the statute and the guideline.

Prevent All Cigarette Trafficking Act of 2009

Second, the amendment responds to the Prevent All Cigarette Trafficking Act of 2009 (PACT Act), Pub. L. 111–154 (enacted March 31, 2010). The PACT Act made a series of revisions to the Jenkins Act, 15 U.S.C. § 375 *et seq.*, which is one of several laws governing the sale, shipment and taxation of cigarettes and smokeless tobacco.

The PACT Act raised the criminal penalty at 15 U.S.C. § 377 for a knowing violation of the Jenkins Act from a misdemeanor to a felony with a statutory maximum term of imprison-

ment of 3 years. The amendment amends Appendix A (Statutory Index) to reference section 377 offenses to §2T2.1 (Non-Payment of Taxes) and §2T2.2 (Regulatory Offenses). These two guidelines are the most analogous guidelines for a section 377 offense because the offense may involve either non-payment of taxes or regulatory offenses. Accordingly, the amendment also amends the Commentary to §§2T2.1 and 2T2.2 to add section 377 to their lists of statutory provisions. These lists indicate that §2T2.1 applies if the conduct constitutes non-payment, evasion, or attempted evasion of taxes, and §2T2.2 applies if the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes.

The PACT Act also created a new class A misdemeanor at 18 U.S.C. § 1716E, prohibiting the knowing shipment of cigarettes and smokeless tobacco through the United States mail. The amendment amends Appendix A (Statutory Index) to reference section 1716E offenses to §2T2.2. Section 2T2.2 is the most analogous guideline because offenses under section 1716E are regulatory offenses.

Animal Crush Video Prohibition Act of 2010

Third, the amendment responds to the Animal Crush Video Prohibition Act of 2010, Pub. L. 111–294 (enacted December 9, 2010), which substantially revised the criminal offense at 18 U.S.C. § 48 (Animal crush videos). Section 48 makes it a crime to create or distribute an "animal crush video," which is defined by the statute in a manner that requires, among other things, that the depiction be obscene. The maximum term of imprisonment for a section 48 offense is 7 years. The amendment amends Appendix A (Statutory Index) to reference section 48 offenses to §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names). Section 2G3.1 is the most analogous guideline because obscenity is an element of section 48 offenses.

Indian Arts and Crafts Amendments Act of 2010

Fourth, the amendment responds to the Indian Arts and Crafts Amendments Act of 2010, Pub. L. 111–211 (enacted July 29, 2010), which amended the criminal offense at 18 U.S.C. § 1159 (Misrepresentation of Indian produced goods and services) to reduce penalties for first offenders when the value of the goods involved is less than \$1,000. The maximum term of imprisonment under section 1159 had been 5 years for a first offender and 15 years for a repeat offender. The Act retained this penalty structure, except that the statutory maximum term of imprisonment for a first offender was reduced to 1 year in a case in which the value of the goods involved is less than \$1,000. The amendment amends Appendix A (Statutory Index) to reference section 1159 offenses to §2B1.1 (Theft, Property Destruction, and Fraud). Section 2B1.1 is the most analogous guideline because an offense under section 1159 has elements of fraud and deceit.

The amendment also addresses an existing offense, 18 U.S.C. § 1158 (Counterfeiting Indian Arts and Crafts Board trade mark), which makes it a crime to counterfeit or unlawfully affix a Government trademark used or devised by the Indian Arts and Crafts Board or to make any false statement for the purpose of obtaining the use of any such mark. The maximum term of imprisonment under section 1158 is 5 years for a first offender and 15 years for a repeat offender. The amendment amends Appendix A (Statutory Index) to reference section 1158 offenses to both §§2B1.1 and 2B5.3 (Criminal Infringement of Copyright or Trademark).

These two guidelines are the most analogous guidelines because an offense under section 1158 contains alternative sets of elements, one of which involves trademark infringement and one of which involves false statements.

Public Contracting Offenses

Finally, the amendment responds to Public Law 111–350 (enacted January 4, 2011), which enacted certain laws relating to public contracts as a new positive-law title of the Code — title 41, "Public Contracts". As part of this codification, two criminal offenses, 41 U.S.C. §§ 53 and 423(a)–(b), and their respective penalty provisions, 41 U.S.C. §§ 54 and 423(e), were given new title 41 section numbers: sections 8702 and 8707 for sections 53 and 54, respectively, and sections 2102 and 2105 for sections 423(a)–(b) and 423(e), respectively. The substantive offenses and their related penalties did not change. The amendment makes changes to Appendix A (Statutory Index) to reflect the renumbering and includes a reference for the new section 2102, whose predecessor section 423(a)–(b) was not referenced in Appendix A. The changes are technical.

Effective Date: The effective date of this amendment is November 1, 2012.

- 770. Amendment:** The Commentary to §1B1.10 captioned "Application Notes" is amended in Note 4 by striking "Application Note 10 to §2D1.1" and inserting "the Drug Equivalency Tables in the Commentary to §2D1.1 (see §2D1.1, comment. (n.8))".

The Commentary to §2D1.1 captioned "Application Notes" is amended by renumbering Notes 1 through 29 according to the following table:

<u>Before Amendment</u>	<u>After Amendment</u>
1	1
17	2
13	3
2	4
12	5
5	6
6	7
10	8
11	9
15	10
3	11

18	12
23	13
25	14
26	15
27	16
28	17
19	18(A)
20	18(B)
29	19
21	20
24	21
8	22
7	23
22	24
4	25
14	26(A)
16	26(B)
9	26(C);

and by rearranging those Notes, as so renumbered, to place them in proper numerical order.

The Commentary to §2D1.1 captioned "Application Notes", as so renumbered and rearranged, is further amended by inserting headings at the beginning of certain notes, as follows (with Notes referred to by their new numbers):

<u>Note</u>	<u>Heading to Be Inserted at the Beginning</u>
1	"Mixture or Substance".—
2	"Plant".—
3	Classification of Controlled Substances.—

- 4 Applicability to "Counterfeit" Substances.—
- 5 Determining Drug Types and Drug Quantities.—
- 7 Multiple Transactions or Multiple Drug Types.—
- 9 Determining Quantity Based on Doses, Pills, or Capsules.—
- 10 Determining Quantity of LSD.—
- 12 Application of Subsection (b)(5).—
- 18 Application of Subsection (b)(13).—
- 23 Cases Involving Mandatory Minimum Penalties.—
- 25 Cases Involving "Small Amount of Marihuana for No Remuneration".—
- 26 Departure Considerations.—
- 26(A) Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations.—
- 26(B) Upward Departure Based on Drug Quantity.—
- 26(C) Upward Departure Based on Unusually High Purity.—

The Commentary to §2D1.1 captioned "Application Notes", as so renumbered and rearranged and amended, is further amended as follows (with Notes referred to by their new numbers):

in Note 8(A) by striking "Note 5" and inserting "Note 6";

in Note 15 by redesignating (i), (ii), and (iii) as (A), (B), and (C), respectively;

in Note 18(A) by inserting before the period at the end of the heading the following: "(Subsection (b)(13)(A))"; and

in Note 18(B) by inserting before the period at the end of the heading the following: "(Subsection (b)(13)(C)B(D))", by redesignating its component subdivision (A) (beginning "Factors to Consider") as (i), and that subdivision's component subdivisions (i) through (iv) as (I) through (IV), respectively, and by redesignating its component subdivision (B) (beginning "Definitions") as (ii).

The Commentary to §2D1.1 captioned "Background" is amended by striking the fifth through eighth undesignated paragraphs as follows:

" The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

Subsection (b)(3) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).";

in the paragraph beginning "The dosage weight" by striking "111 S.Ct. 1919" and inserting "500 U.S. 453"; and

by inserting before the paragraph beginning "Subsection (b)(11)" the following:

" Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

Subsection (b)(3) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.".

The Commentary to §2D1.6 captioned "Application Note" is amended in Note 1 by striking "Note 12" and inserting "Note 5".

The Commentary to §2D1.11 captioned "Application Notes", as amended by Amendment 763, is further amended by renumbering Notes 1 through 9 according to the following table:

<u>Before Amendment</u>	<u>After Amendment</u>
4	1
1	2
5	3
6	4
7	5
8	6
9	7
2	8

3 9;

and by rearranging those Notes, as so renumbered, to place them in proper numerical order.

The Commentary to §2D1.11 captioned "Application Notes", as so renumbered and rearranged, is further amended by inserting headings at the beginning of certain notes, as follows (with Notes referred to by their new numbers):

<u>Note</u>	<u>Heading to Be Inserted at the Beginning</u>
2	Application of Subsection (b)(1).—
3	Application of Subsection (b)(2).—
4	Application of Subsection (b)(3).—
8	Application of Subsection (c)(1).—
9	Offenses Involving Immediate Precursors or Other Controlled Substances Covered Under §2D1.1.—

The Commentary to §2D1.11 captioned "Application Notes", as so renumbered and rearranged and amended, is further amended in Note 9 (as so renumbered) by striking "Note 12" and inserting "Note 5".

The Commentary to §5G1.2 captioned "Application Notes", as amended by Note 767, is further amended by amending Note 1 to read as follows:

- "1. In General.—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ('total punishment') is determined by the court after determining the adjusted combined offense level and the Criminal History Category and determining the defendant's guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table).

Note that the defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, see §5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. See Note 3, below.

Except as otherwise required by subsection (e) or any other law, the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.

This section applies to multiple counts of conviction (A) contained in the same indictment or information, or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence. If no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment."

Section 5K2.0 is amended in subsection (d)(1) by striking "the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts)" and inserting "and the last sentence of 5K2.12 (Coercion and Duress)".

Reason for Amendment: This proposed amendment makes certain technical and conforming changes to commentary in the Guidelines Manual.

First, it reorganizes the commentary to the drug trafficking guideline, §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), so that the order of the application notes better reflects the order of the guidelines provisions to which they relate. The proposed amendment also makes stylistic changes to the Commentary to §2D1.1, such as by adding headings to certain application notes. To reflect the renumbering of application notes in §2D1.1, conforming changes are also made to the Commentary to §1B1.10 and §2D1.6.

Second, it makes certain clerical and stylistic changes in connection with certain recently promulgated amendments. See 77 Fed. Reg. 28226 (May 11, 2012). The clerical and stylistic changes are as follows:

- (1) Amendment 763 made revisions to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy). This proposed amendment reorganizes the commentary to §2D1.11 so that the order of the application notes better reflects the order of the guidelines provisions to which they relate. The proposed amendment also makes stylistic changes to the Commentary to §2D1.11 by adding headings to certain application notes.
- (2) Amendment 767 made revisions to §5G1.2 (Sentencing on Multiple Counts of Conviction), including a revision to Application Note 1. However, the amendatory instructions published in the Federal Register to implement those revisions included an erroneous instruction. This proposed amendment restates Application Note 1 in its entirety to ensure that it conforms with the version of Application Note 1 that appears in the unofficial, "reader-friendly" version of Amendment 7 that the Commission made available in May 2012.
- (3) Amendment 768 repealed the policy statement at §5K2.19 (Post-Sentencing Rehabilitative Efforts). However, a reference to that policy statement is contained in §5K2.0 (Grounds for Departure). This proposed amendment revises §5K2.0 to reflect the repeal of §5K2.19.

Effective Date: The effective date of this amendment is November 1, 2012.

771. Amendment: Section 2B1.1(b) is amended by striking paragraph (5) as follows:

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

by renumbering paragraphs (6) through (8) as (5) through (7); by renumbering paragraphs (13) through (18) as (14) through (19); by inserting after paragraph (12) the following:

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

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

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

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

in paragraph (16) (as so renumbered) by striking "(b)(15)(B)" and inserting "(b)(16)(B)".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 6 by striking "(b)(7)" both places it appears and inserting "(b)(6)"; in Note 10 by striking "(b)(13)" both places it appears and inserting "(b)(14)"; in Note 11 by striking "(b)(15)(A)" both places it appears and inserting "(b)(16)(A)"; in Note 12 by striking "(b)(15)(B)" and inserting "(b)(16)(B)"; in Note 12(A) by striking "(b)(15)(B)(i)" and inserting "(b)(16)(B)(i)"; in Note 12(B) by striking "(b)(15)(B)(ii)" and inserting "(b)(16)(B)(ii)"; in Note 13 by striking "(b)(17)" both places it appears and inserting "(b)(18)"; in Note 13(B) by striking "(b)(17)(A)(iii)" both places it appears and inserting "(b)(18)(A)(iii)", and by striking "(b)(15)(B)" both places it appears and inserting "(b)(16)(B)"; in Note 14 by striking "(b)(18)" each place it appears and inserting "(b)(19)"; and in Note 19(B) by striking "(b)(17)(A)(iii)" and inserting "(b)(18)(A)(iii)".

The Commentary to §2B1.1 captioned "Background" is amended by striking "(b)(6)", "(b)(8)", "(b)(14)(B)", "(b)(15)(A)", "(b)(15)(B)(i)", "(b)(16)", "(b)(17)", and "(b)(17)(B)" and inserting "(b)(5)", "(b)(7)", "(b)(15)(B)", "(b)(16)(A)", "(b)(16)(B)(i)", "(b)(17)", "(b)(18)", and "(b)(18)(B)", respectively; and by inserting before the paragraph that begins "Subsection (b)(15)(B)" (as so amended) the following:

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

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

Section 3(a) of the Act directs the Commission to "review and, if appropriate, amend" the guidelines "applicable to persons convicted of offenses relating to the transmission or

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

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

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

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

The Commission received public comment and testimony that the transmission of stolen trade secrets outside of the United States creates significant obstacles to effective investigation and prosecution and causes both increased harm to victims and more general harms to the nation. With respect to the victim, civil remedies may not be readily available or effective, and the transmission of a stolen trade secret outside of the United States substantially increases the risk that the trade secret will be exploited by a foreign competitor. In contrast, the simple movement of a stolen trade secret within a domestic multinational company (e.g., from a United States office to an overseas office of the same company) may not pose the same risks or harms. More generally, the Commission heard that foreign actors increasingly target United States companies for trade secret theft and that such offenses pose a growing threat to the nation's global competitiveness, economic growth, and national

security. Accordingly, the Commission determined that a 2-level enhancement is warranted for cases in which the defendant knew or intended that a stolen trade secret would be transported or transmitted outside of the United States.

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

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

Effective Date: The effective date of this amendment is November 1, 2013.

772. Amendment: Section 2B1.1 is amended by inserting before paragraph (9) the following new paragraph:

- "(8) (Apply the greater) If—
- (A) the offense involved conduct described in 18 U.S.C. § 670, increase by 2 levels; or
 - (B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by 4 levels.";

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'Personal information' means" the following:

"'Pre-retail medical product' has the meaning given that term in 18 U.S.C. § 670(e)."; and by inserting after the paragraph that begins "'Publicly traded company' means" the following:

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

in Note 3(F)(i) by striking "Note 9(A)" and inserting "Note 10(A)"; and

by renumbering Notes 7 through 19 as 8 through 20; by inserting after Note 6 the following:

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

in Note 20 (as so renumbered) by adding at the end of subparagraph (A)(ii) as the last sentence the following: "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."

The Commentary to §2B1.1 captioned "Background" is amended by inserting before the paragraph that begins "Subsection (b)(9)(D)" the following:

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

However, if §2B1.1(b) already contains a paragraph (8) because the renumbering of paragraphs by Amendment 771 has not taken effect, renumber the new paragraph inserted into §2B1.1(b) as paragraph (8A) rather than paragraph (8), and revise the Commentary so that the new Note 7 inserted into the Application Notes and the new paragraph inserted into the Background refer to subsection (b)(8A) rather than subsection (b)(8).

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 669 the following:

"18 U.S.C. § 670 2B1.1".

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

New Offense at 18 U.S.C. § 670

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

- (1) embezzle, steal, or by fraud or deception obtain, or knowingly and unlawfully take, carry away, or conceal a pre-retail medical product;
- (2) knowingly and falsely make, alter, forge, or counterfeit the labeling or documentation (including documentation

- relating to origination or shipping) of a pre-retail medical product;
- (3) knowingly possess, transport, or traffic in a pre-retail medical product that was involved in a violation of paragraph (1) or (2);
 - (4) with intent to defraud, buy, or otherwise obtain, a pre-retail medical product that has expired or been stolen;
 - (5) with intent to defraud, sell, or distribute, a pre-retail medical product that is expired or stolen; or
 - (6) attempt or conspire to violate any of paragraphs (1) through (5).

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

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

Specifically, the higher statutory maximum terms of imprisonment are:

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

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

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

Response to Directive

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

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

Based on public comment, testimony and sentencing data, the Commission concluded that an enhancement differentiating fraud and theft offenses involving medical products from those involving other products is warranted by the additional risk such offenses pose to public health and safety. In addition, such offenses undermine the public's confidence in the medical regulatory and distribution system. The Commission also concluded that the risks and harms it identified would be present in any theft or fraud offense involving a pre-retail medical product, regardless of the offense of conviction. Therefore application of the new specific offense characteristic is not limited to offenses charged under 18 U.S.C. § 670.

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

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

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

Effective Date: The effective date of this amendment is November 1, 2013.

773. Amendment: Section 2B5.3(b) is amended by renumbering paragraph (5) as (6); by inserting after paragraph (4) the following:

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

by inserting after paragraph (6) (as so renumbered) the following:

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

The Commentary to §2B5.3 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "Commercial advantage" the following:

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

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

by renumbering Notes 3 and 4 as 4 and 5; by inserting after Note 2 the following:

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

in Note 5 (as so renumbered) by adding at the end the following:

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

The Commentary to §2B5.3 captioned "Background" is amended by inserting after the paragraph that begins "Subsection (b)(1)" the following:

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

Appendix A (Statutory Index) is amended by striking the line referenced to 21 U.S.C. § 333(b) as follows:

"21 U.S.C. § 333(b) 2N2.1";

and inserting the following:

"21 U.S.C. § 333(b)(1)–(6) 2N2.1

21 U.S.C. § 333(b)(7) 2N1.1".

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

Section 2320 and Counterfeit Military Goods and Services

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

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

imprisonment of 20 years, or 30 years for a second or subsequent offense. See 18 U.S.C. § 2320(b)(3).

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

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

Although section 2320(a)(3) includes offenses that are likely to cause "serious bodily injury or death," the new specific offense characteristic does not because the Commission determined that such risk of harm is adequately addressed by the existing enhancement for offenses involving the "conscious or reckless risk of death or serious bodily injury." Consistent with that approach, the amendment includes commentary providing that the "other significant harm" specified in subsection (b)(7) does not include death or serious bodily injury and that §2B5.3(b)(6)(A) would apply if the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death.

Section 2320 and Counterfeit Drugs

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

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

of section 2320(a)(4) offenses and consider the extent to which the guidelines account for the potential and actual harm to the public resulting from such offenses.

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

Offenses Resulting in Death or Serious Bodily Injury

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

Section 333 and Offenses Involving Intentionally Adulterated Drugs

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

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

Effective Date: The effective date of this amendment is November 1, 2013.

774. Amendment: The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 1 by inserting "Tax Loss.—" at the beginning;

in Note 2 by inserting "Total Tax Loss Attributable to the Offense.—" at the beginning, and by redesignating subdivisions (a) through (e) as (A) through (E);

by inserting after Note 2 the following:

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

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

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

by striking "3. 'Criminal activity' means" and inserting the following:

"4. Application of Subsection (b)(1) (Criminal Activity).—'Criminal activity' means";

by striking "4. Sophisticated Means Enhancement.—" and inserting the following:

"5. Application of Subsection (b)(2) (Sophisticated Means).—";

by striking Notes 5 and 6 as follows:

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

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

and inserting the following:

"6. Other Definitions.—For purposes of this section:

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

'Gross income' has the same meaning as it has in 26 U.S.C. § 61 and 26 C.F.R. § 1.61."; and

in Note 7 by inserting "Aggregation of Individual and Corporate Tax Loss.—" at the beginning.

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

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

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

he actually used; "[t]he district court did not err in computing the tax loss based on the fraudulent return Clarke actually filed, and not on the tax return Clarke could have filed but did not.").

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

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

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

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

Third, the defendant must present information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy. Consistent with the principles set forth in §6A1.3 (Resolution of Disputed Factors) (Policy Statement), this condition ensures that the parties have an adequate opportunity to present information relevant to the court's consideration of any unclaimed credits, deductions, or exemptions raised at sentencing.

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

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

Effective Date: The effective date of this amendment is November 1, 2013.

- 775. Amendment:** The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 6 by adding at the end of the paragraph that begins "Because the Government" the following as the last sentence: "The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."; and

by adding after the paragraph that begins "Because the Government" the following new paragraph:

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

The Commentary to §3E1.1 captioned "Background" is amended in the paragraph that begins "Section 401(g)" by striking "the last paragraph" and inserting "the first sentence of the second paragraph".

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

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

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

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

The Government's Discretion to Withhold the Motion

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

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

In contrast, the Fourth Circuit has held that a defendant's refusal to sign an appellate waiver is not a legitimate reason for the government to withhold a §3E1.1(b) motion. See United States v. Divens, 650 F.3d 343, 348 (4th Cir. 2011) (stating that "the text of §3E1.1(b) reveals a concern for the efficient allocation of trial resources, not appellate resources" [emphasis in original]); see also United States v. Davis, No. 12-3552, slip op. at 5, ___ F.3d

___ (7th Cir., April 9, 2013) (Rovner, J., concurring) ("insisting that [the defendant] waive his right to appeal before he may receive the maximum credit under the Guidelines for accepting responsibility serves none of the interests identified in section 3E1.1"). The majority in Davis called for the conflict to be resolved, stating: "Resolution of this conflict is the province of the Supreme Court or the Sentencing Commission." Davis, slip op. at 3, ___ F.3d at ___ (per curiam). The Second Circuit, stating that the Fourth Circuit's reasoning in Divens applies "with equal force" to the defendant's request for an evidentiary hearing on sentencing issues, held that the government may not withhold a §3E1.1 motion based upon such a request. See United States v. Lee, 653 F.3d 170, 175 (2d Cir. 2011).

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

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

The Court's Discretion to Deny the Motion

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

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

In contrast, the Fifth Circuit has held that the district court retains discretion to deny the motion. See United States v. Williamson, 598 F.3d 227, 230 (5th Cir. 2010). In Williamson, the defendant was convicted after jury trial but successfully appealed. After remand, he pled guilty to a lesser offense. The government moved for the third level of reduction, but the court declined to grant it because "regardless of however much additional trial preparation the government avoided through Williamson's guilty plea following remand, the preparation for the initial trial and the use of the court's resources for that trial meant that the § 3E1.1(b) benefits to the government and the court were not obtained". *Id.* at 231. The Fifth Circuit affirmed, holding that the decision whether to grant the third level of reduction "is the district court's — not the government's — even though the court may only do so on the government's motion". *Id.* at 230.

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

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

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

Effective Date: The effective date of this amendment is November 1, 2013.

776. **Amendment:** The Commentary to §5G1.3 captioned "Background" is amended by striking the following: "In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S.C. § 3584(a). Exercise of that authority,";

and inserting the following: "Federal courts generally 'have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings.' *See Setser v. United States*, 132 S. Ct. 1463, 1468 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. *See Setser*, 132 S. Ct. at 1468. Exercise of that discretion,".

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

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

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

Effective Date: The effective date of this amendment is November 1, 2013.

777. **Amendment:** The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 15 (as renumbered by Amendment 772) by striking "1a(5)" both places it appears and inserting "1a(11)"; by striking "1a(6)" both places it appears and inserting "1a(12)"; by striking "1a(20)" both places it appears and inserting "1a(28)"; and by striking "1a(23)" both places it appears and inserting "1a(31)".

Section 2B2.3(b) is amended by striking paragraph (1) as follows:

- "(1) If the trespass occurred (A) at a secure government facility; (B) at a nuclear energy facility; (C) on a vessel or aircraft of the United States; (D) in a secure area of an airport or a seaport; (E) at a residence; (F) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration; or (G) on a computer system used (i) to maintain or operate a critical infrastructure; or (ii) by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels.";

and inserting the following:

- "(1) (Apply the greater) If—
- (A) the trespass occurred (i) at a secure government facility; (ii) at a nuclear energy facility; (iii) on a vessel or aircraft of the United States; (iv) in a secure area of an airport or a seaport; (v) at a residence; (vi) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration; (vii) at any restricted building or grounds; or (viii) on a computer system used (I) to maintain or operate a critical

infrastructure; or (II) by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels; or

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

The Commentary to §2B2.3 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'Protected computer' means" the following:

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

in Note 2 by inserting "Application of Subsection (b)(3).—" at the beginning.

The Notes to the Drug Quantity Table in §2D1.1(c) are amended in each of Notes (H) and (I) by striking "1308.11(d)(30)" and inserting "1308.11(d)(31)".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 2(A) by striking "Chapter Three, Part C" in the heading and inserting "§3C1.1"; and by striking "Chapter Three, Part C (Obstruction and Related Adjustments)" and inserting "§3C1.1 (Obstructing or Impeding the Administration of Justice)".

The Commentary to §2J1.3 captioned "Application Notes" is amended in Note 2 by striking "Chapter Three, Part C (Obstruction and Related Adjustments)" and inserting "§3C1.1 (Obstructing or Impeding the Administration of Justice)"; and in Note 3 by striking "Chapter Three, Part C (Obstruction and Related Adjustments)" and inserting "§3C1.1".

The Commentary to §2J1.6 captioned "Application Notes" is amended in Note 2 by striking "Chapter Three, Part C (Obstruction and Related Adjustments)" and inserting "§3C1.1 (Obstructing or Impeding the Administration of Justice)".

The Commentary to §2J1.9 captioned "Application Notes" is amended in Note 1 by striking "Chapter Three, Part C (Obstruction and Related Adjustments)" and inserting "§3C1.1 (Obstructing or Impeding the Administration of Justice)"; and in Note 2 by striking "Chapter Three, Part C (Obstruction and Related Adjustments)" and inserting "§3C1.1".

The Commentary to §4A1.1 captioned "Application Notes" is amended in each of Notes 2 and 3 by striking "court martial" and inserting "court-martial".

Section 4A1.2(g) is amended by striking "court martial" both places it appears and inserting "court-martial".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. § 38 the following:

"18 U.S.C. § 39A 2A5.2";

in the line referenced to 18 U.S.C. § 554 by inserting "2M5.1," after "2B1.5,";

by inserting after the line referenced to 18 U.S.C. § 1513 the following:

"18 U.S.C. § 1514(c) 2J1.2";

by inserting after the line referenced to 18 U.S.C. § 1751(e) the following:

"18 U.S.C. § 1752 2A2.4, 2B2.3"; and

by inserting after the line referenced to 19 U.S.C. § 1586(e) the following:

"19 U.S.C. § 1590(d)(1) 2T3.1

19 U.S.C. § 1590(d)(2) 2D1.1".

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

Aiming a Laser Pointer at an Aircraft

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

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

Restraining the Harassment of a Victim or Witness

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

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

Restricted Buildings and Grounds

Third, the amendment responds to the Federal Restricted Buildings and Grounds Improvement Act of 2011, Pub. L. 112–98 (enacted March 8, 2012), which amended the criminal offense at 18 U.S.C. § 1752 (Restricted building or grounds). As so amended, the statute defines "restricted buildings or grounds" to mean any restricted area (A) of the White House or its grounds, or the Vice President's official residence or its grounds; (B) of a building or grounds where the President or other person protected by the United States

Secret Service is or will be temporarily visiting; or (C) of a building or grounds restricted in conjunction with an event designated as a special event of national significance. The statute makes it a crime to enter or remain; to impede or disrupt the orderly conduct of business or official functions; to obstruct or impede ingress or egress; or to engage in any physical violence against any person or property. The Act did not change the statutory maximum term of imprisonment, which is ten years if the person used or carried a deadly or dangerous weapon or firearm or if the offense results in significant bodily injury, and one year in any other case.

The amendment amends Appendix A (Statutory Index) to reference section 1752 offenses to §2A2.4 (Obstructing or Impeding Officers) and §2B2.3 (Trespass). These guidelines are most analogous because the elements of offenses under section 1752 involve either trespass at certain locations (i.e., locations permanently or temporarily protected by the Secret Service) or interference with official business at such locations, or both.

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

Aviation Smuggling

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

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

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

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

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

Export Offenses Under 18 U.S.C. § 554

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

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

Technical and Stylistic Changes

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

Effective Date: The effective date of this amendment is November 1, 2013.

778. Amendment: The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 3 by striking "(Inadmissibility of Pleas" and inserting "Pleas".

The Commentary to §2M3.1 captioned "Application Notes" is amended in Note 1 by striking "12958" and inserting "13526".

The Commentary to §8B2.1 captioned "Background" is amended by striking "805(a)(2)(5)" and inserting "805(a)(5)".

The Commentary to §8D1.2 captioned "Application Note" is amended in Note 1 by striking "3561(b)" and inserting "3561(c)".

Reason for Amendment: This amendment makes certain technical changes to Commentary in the Guidelines Manual. The changes amend—

- (1) Application Note 3 to §1B1.8 (Use of Certain Information) to reflect a change to the heading of Rule 410 of the Federal Rules of Evidence;
- (2) Application Note 1 to §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government) to ensure that the Executive Order to which it refers is the most recent Executive Order; and
- (3) the Background Commentary to §8B2.1 (Effective Compliance and Ethics Program) and Application Note 1 to §8D1.2 (Term of Probation - Organizations) to correct typographical errors in citations to certain statutes.

Effective Date: The effective date of this amendment is November 1, 2013.

779. Amendment: The Commentary to §1B1.11 captioned "Background" is amended in the first paragraph by striking the following:

"Although aware of possible ex post facto clause challenges to application of the guidelines in effect at the time of sentencing, Congress did not believe that the ex post facto clause would apply to amended sentencing guidelines. S. Rep. No. 225, 98th Cong., 1st Sess. 77-78 (1983). While the Commission concurs in the policy expressed by Congress, courts to

date have generally held that the ex post facto clause does apply to sentencing guideline amendments that subject the defendant to increased punishment.";

and inserting the following:

"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')."; and

in the paragraph that begins "Subsection (b)(3)" by striking ", cert. denied, 493 U.S. 1062 (1990)".

Reason for Amendment: The Commission's policy statement at §1B1.11 (Use of Guidelines in Effect on Date of Sentencing) provides 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 which case the court shall apply the Guidelines Manual in effect on the date the offense of conviction was committed. See §1B1.11(a), (b)(1).

This amendment updates the Background Commentary to 1B1.11 to reflect the Supreme Court's decision in Peugh v. United States, 133 S. Ct. 2072 (2013), which held 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." Id. at 2078. The amendment inserts new language to refer to the Supreme Court's decision in Peugh and deletes obsolete language.

Effective Date: The effective date of this amendment is November 1, 2013.