

# Relevant Conduct Breakout

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## Annual National Seminar on the Federal Sentencing Guidelines

New Orleans, LA

Friday, June 15, 2012

10:30-11:30 a.m. & 1:00-2:30 p.m.

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# Relevant Conduct Discussion Topics

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- Recap of the analysis of relevant conduct (“RelCon”)
- Relevant conduct scenarios

# Relevant Conduct Recap

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1B1.3

# Relevant Conduct: The Gatekeeper

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## 1B1.3

- Sets the limits of information to be used in *application of the guidelines*
- Note, however, that in the ultimate *determination of the sentence to be imposed*, generally any and all information can be used
  - 18 U.S.C. § 3661
  - §1B1.4
  - *Witte, Watts, Pepper, etc.*

# Relevant Conduct in the Application of the Guidelines

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## §1B1.3(a)

- Relevant conduct does not create any new factors in guideline application; rather, it establishes what facts are relevant for the application of the existing factors, *e.g.*, BOLs, SOCs, cross references, Chapter Three Adjustments

# Relevant Conduct Is Keyed to the Offense of Conviction

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## §1B1.3

- (a)(1)(A): Defendant accountable for acts he/she did in furtherance of the **offense of conviction**
- (a)(1)(B): Defendant accountable for certain acts others did in furtherance of the **offense of conviction**

## Relevant Conduct Is Keyed to the Offense of Conviction (cont.)

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### §1B1.3

- (a)(2): *For certain offenses* defendant also accountable for his/her acts and certain acts of others in the same course of conduct or common scheme or plan as the **offense of conviction**

# (a)(1) & (a)(2): Analysis

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## WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others  
(3-part analysis)

## WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding  
detection

(a)(2):

Same course of conduct/  
Common scheme or plan



# Preliminary Determination:

## Does RelCon Include Same Course of Conduct / Common Scheme or Plan?

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### §1B1.3(a)(2)

- If the applicable Chapter Two guideline is on the “included” list at §3D1.2(d), relevant conduct **will** include same course of conduct or common scheme or plan
- If the applicable Chapter Two guideline is on the “excluded” list at §3D1.2(d) relevant conduct **will not** include the same course of conduct or common scheme or plan

# Offenses **Included** at §3D1.2(d):

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Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;

§§2C1.1, 2C1.2, 2C1.8;

§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;

§§2E4.1, 2E5.1;

§§2G2.2, 2G3.1;

§2K2.1;

§§2L1.1, 2L2.1;

§2N3.1;

§2Q2.1;

§2R1.1;

§§2S1.1, 2S1.3;

§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

# Examples of Chapter Two Guidelines on the Included List at §3D1.2(d)

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“Expanded Relevant Conduct” at §1B1.3(a)(2) Applies

- Drug trafficking
- Fraud, theft, & embezzlement
- Firearms
- Alien smuggling
- Trafficking/possession of child pornography
- Money laundering
- Tax violations
- Counterfeiting
- Bribery
- Other similar offenses

# Offenses Excluded at §3D1.2(d):

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Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);

§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;

§2C1.5;

§§2D2.1, 2D2.2, 2D2.3;

§§2E1.3, 2E1.4, 2E2.1;

§§2G1.1, 2G2.1;

§§2H1.1, 2H2.1, 2H4.1;

§§2L2.2, 2L2.5;

§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;

§§2P1.1, 2P1.2, 2P1.3;

§2X6.1.

# Examples of Chapter Two Guidelines in the Excluded List at §3D1.2(d)

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“Expanded Relevant Conduct” at §1B1.3(a)(2)  
Does Not Apply

- Robbery
- Assault
- Murder
- Kidnapping
- Criminal sexual abuse
- Production of child pornography
- Extortion
- Blackmail
- Burglary
- Other similar offenses

# §1B1.3(a)(1) & (a)(2): Analysis

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## WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others  
(3-part analysis)

## WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding  
detection

(a)(2):

~~Same course of conduct/  
Common scheme or plan~~

# Holding a Defendant Accountable for the Acts of Others

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1B1.3(a)(1)(B)

## 3-Part Analysis of (a)(1)(B)

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Determinations required for acts of others  
to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking <sup>16</sup>



# Determination of Scope of Undertaking

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## §1B1.3, App. Note 2

- An individualized determination based on each defendant's undertaking
- Can be established by either *explicit* agreements or *implicit* agreements
- Scope of criminal activity jointly undertaken by a defendant is not necessarily the same as the scope of the entire conspiracy

# Determining Scope in a Conspiracy

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“Bright Line Rule”  
of §1B1.3, App. Note 2

Relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct.

# “Reasonably Foreseeable”

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## §1B1.3(a)(1)(B), App. Note 2

- Only one part of the 3-part analysis regarding the conduct of others
- Defendant not accountable for acts of others that were not within the scope of the defendant’s undertaking, *even* if those acts were reasonably foreseeable or known to the defendant

**Impact of Terms  
“Offense” and “Defendant”  
Upon the Relevant Conduct  
Used in Application**

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# Definition of “Offense”

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## 1B1.1, App. Note 1(H)

- “Offense” means the offense of conviction and all relevant conduct (§1B1.3) .....  
unless a different meaning is specified or is otherwise clear from the context

# Use of Term “Defendant”

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## 1B1.3

- The use of the term “defendant” limits application from including the use of relevant conduct based on the acts of others under §1B1.3(a)(1)(B)
- Pursuant to §1B1.3(a)(1)(A), the “defendant” is accountable for acts he/she committed, aided, abetted, counseled, commanded, induced, procured, and willfully caused

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