Amendments to the Sentencing Guidelines

April 30, 2012

This compilation contains unofficial text of amendments to the sentencing guidelines, policy statements, and commentary, and is provided only for the convenience of the user. Official text of the amendments can be found on the Commission's website at www.ussc.gov and will appear in a forthcoming edition of the Federal Register.

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1. DODD-FRANK/FRAUD

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.

Amendment:

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

(a) Base Offense Level:

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

(2) **6**, otherwise.

(b) Specific Offense Characteristics

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

level **14**.

(15) (Apply the greater) If—

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

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

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

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

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

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

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

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

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

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

(18) If the offense involved—

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

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

increase by **4** levels.

* * *

Commentary

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Application Notes:

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

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

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

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

(iii) Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) Rules of Construction in Certain Cases.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to

include the pecuniary harm specified for those cases as follows:

(I) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(II) Procurement Fraud Cases.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(B) Gain.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.

(ii) In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.

(iii) The cost of repairs to damaged property.

(iv) The approximate number of victims multiplied by the average loss to each victim.

(v) The reduction that resulted from the offense in the value of equity securities or other corporate assets.

(vi) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(D) Exclusions from Loss.—Loss shall not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

(E) Credits Against Loss.—Loss shall be reduced by the following:

(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.

(ii) In a case involving collateral pledged or otherwise provided by the defendant, 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.

(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.

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

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

(ii) *Government Benefits.—In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50.*

(iii) *Davis-Bacon Act Violations.—In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 3142, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.*

(iv) *Ponzi and Other Fraudulent Investment Schemes.—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).*

(v) *Certain Other Unlawful Misrepresentation Schemes.—In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.*

(vi) *Value of Controlled Substances.—In a case involving controlled substances, loss is the estimated street value of the controlled substances.*

(vii) *Value of Cultural Heritage Resources or Paleontological Resources.—In a case involving a cultural heritage resource or paleontological resource, loss attributable to that resource shall be determined in accordance with the rules*

for determining the "value of the resource" set forth in Application Note 2 of the Commentary to §2B1.5.

(viii) Federal Health Care Offenses Involving Government Health Care Programs.—In a case in which the defendant is convicted of a Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, i.e., is evidence sufficient to establish the amount of the intended loss, if not rebutted.

(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).

4. Application of Subsection (b)(2).—

(A) Definition.—For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.

(B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages.—For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was

convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.

(C) Undelivered United States Mail.—

(i) In General.—In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.

(ii) Special Rule.—A case described in subdivision (C)(i) of this note that involved—

(I) a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.

(II) a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.

(iii) Definition.—"Undelivered United States mail" means mail that has not actually been received by the addressee or the addressee's agent (e.g., mail taken from the addressee's mail box).

(D) Vulnerable Victims.—If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.

(E) Cases Involving Means of Identification.—For purposes of subsection (b)(2), in a case involving means of identification "victim" means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority.

* * *

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

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

(B) Definition.—"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

12. Application of Subsection (b)(15)(B).—

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

(i) The financial institution became insolvent.

(ii) The financial institution substantially reduced benefits to pensioners or insureds.

(iii) The financial institution was unable on demand to refund fully any deposit, payment, or investment.

(iv) The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.

(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".

(B) Application of Subsection (b)(15)(B)(ii).—

(i) Definition.—For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).

(ii) In General.—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:

(I) The organization became insolvent or suffered a substantial reduction in the value of its assets.

(II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).

(III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.

(IV) The organization substantially reduced its workforce.

(V) The organization substantially reduced its employee pension benefits.

(VI) The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.

(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".

* * *

19. Departure Considerations.—

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

(i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.

(ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.

(iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).

(iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.

(v) In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.

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

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

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

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

(B) Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(17)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.

(C) Downward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

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.

(D) Downward Departure for Major Disaster or Emergency Victims.—If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. § 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.

* * *

§2B1.4. Insider Trading

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

(b) Specific Offense Characteristics

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

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

Commentary

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Application Notes:

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.

~~1~~2. *Application of §3B1.3.—Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should be applied ~~only~~ if the defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary "tippee".*

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).

Background: This guideline applies to certain violations of Rule 10b-5 that are commonly referred to as "insider trading". Insider trading is treated essentially as a sophisticated fraud. Because the victims and their losses are difficult if not impossible to identify, the gain, i.e., the total increase in value realized through trading in securities by the defendant and persons acting in concert with the defendant or to whom the defendant provided inside information, is employed instead of the victims' losses.

Certain other offenses, e.g., 7 U.S.C. § 13(e), that involve misuse of inside information for personal gain also appropriately may be covered by this guideline.

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

2. BZP

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.

Amendment:

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

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Commentary

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Application Notes:

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10. Use of Drug Equivalency Tables.—

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

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

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

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

(See also Application Note 5.) For example, in the Drug Equivalency Tables set forth in this Note, 1 gm of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kg of marihuana. In a case involving 100 gm of oxymorphone, the equivalent quantity of marihuana would be 500 kg, which corresponds to a base offense level of 28 in the Drug Quantity Table.

* * *

(D) Drug Equivalency Tables.—

* * *

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylline =	40 gm of marihuana
1 gm of Amphetamine =	2 kg of marihuana
1 gm of Amphetamine (Actual) =	20 kg of marihuana
1 gm of Methamphetamine =	2 kg of marihuana
1 gm of Methamphetamine (Actual) =	20 kg of marihuana

1 gm of "Ice" =	20 kg of marihuana
1 gm of Khat =	.01 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria")=	100 gm of marihuana
1 gm of Methylphenidate (Ritalin)=	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P_2P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P_2P (in any other case) =	75 gm of marihuana
1 gm Cocaine Base ('Crack') =	3,571 gm of marihuana
1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana
1 gm of N-Benzylpiperazine =	100 gm of marihuana

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

* * *

3. SAFETY VALVE IN §2D1.11

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.

Amendment:

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

(a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate, except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (d) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.

(b) Specific Offense Characteristics

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

(2) If the defendant is convicted of violating 21 U.S.C. § 841(c)(2) or (f)(1), or § 960(d)(2), (d)(3), or (d)(4), decrease by **3** levels, unless the defendant knew or believed that the listed chemical was to be used to manufacture a controlled substance unlawfully.

(3) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(4) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a listed chemical through mass-marketing by means of an interactive computer service, increase by **2** levels.

(5) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.

(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.

(c) Cross Reference

(1) If the offense involved unlawfully manufacturing a controlled substance, or attempting to manufacture a controlled substance unlawfully, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, Trafficking) if the resulting offense level is greater than that determined above.

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Commentary

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Application Notes:

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8. Imposition of Consecutive Sentence for 21 U.S.C. § 865.—Section 865 of title 21, United States Code, requires the imposition of a mandatory consecutive term of imprisonment of not more than 15 years. In order to comply with the relevant statute, the court should determine the appropriate "total punishment" and, on the judgment form, divide the sentence between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 865. For example, if the applicable adjusted guideline range is 151-188 months and the court determines a "total punishment" of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 865 would achieve the "total punishment" in a manner that satisfies the statutory requirement of a consecutive sentence.

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").

Background: Offenses covered by this guideline involve list I chemicals (including ephedrine, pseudoephedrine, and pheylpropanolamine) and list II chemicals. List I chemicals are important to the manufacture of a controlled substance and usually become part of the final product. For example, ephedrine reacts with other chemicals to form methamphetamine. The amount of ephedrine directly affects the amount of methamphetamine produced. List II chemicals are generally used as solvents, catalysts, and reagents.

4. "SENTENCE IMPOSED" IN §2L1.2

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.

Amendment:

§2L1.2. Unlawfully Entering or Remaining in the United States

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

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by **16** levels if the conviction receives criminal history points under Chapter Four or by **12** levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by **12** levels if the conviction receives criminal history points under Chapter Four or by **8** levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by **8** levels;

(D) a conviction for any other felony, increase by **4** levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by **4** levels.

Commentary

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Application Notes:

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(B) Definitions.—For purposes of subsection (b)(1):

(i) "Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).

(ii) "Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) "Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(iv) "Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(v) "Firearms offense" means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).

(III) A violation of 18 U.S.C. § 844(h).

(IV) A violation of 18 U.S.C. § 924(c).

(V) A violation of 18 U.S.C. § 929(a).

(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vi) "Human trafficking offense" means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vii) "Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term 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.

(viii) "Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).

* * *

5. HUMAN RIGHTS

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.

Amendment:

(A) Human Rights Offenses

§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).

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APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 2425	2G1.3
18 U.S.C. § 2441	2X5.1

(B) Immigration and Naturalization Offenses Involving Serious Human Rights Offenses

§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

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

(b) Specific Offense Characteristics

(1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by **2** levels.

(2) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by **2** levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by **4** levels.

(3) If the defendant fraudulently obtained or used (A) a United States passport, increase by **4** levels; or (B) a foreign passport, increase by **2** levels.

(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**.

(c) Cross Reference

(1) If the defendant used a passport or visa in the commission or attempted commission of a felony offense, other than an offense involving violation of the immigration laws, apply --

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

* * *

Application Notes:

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3. Application of Subsection (b)(3).—The term "used" is to be construed broadly and includes the attempted renewal of previously-issued passports.

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.

~~4~~5. Multiple Counts.—For the purposes of Chapter Three, Part D (Multiple Counts), a count of conviction for unlawfully entering or remaining in the United States covered by §2L1.2 (Unlawfully Entering or Remaining in the United States) arising from the same course of conduct as the count of conviction covered by this guideline shall be considered a closely related count to the count of conviction covered by this guideline, and therefore is to be grouped with the count of conviction covered by this guideline.

~~5~~6. Upward Departure Provision.—If the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity, an upward departure may be warranted. See Application Note 4 of the Commentary to §3A1.4 (Terrorism).

* * *

6. DRIVING WHILE INTOXICATED

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.

Amendment:

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

* * *

(c) Sentences Counted and Excluded

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

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

Careless or reckless driving
Contempt of court
Disorderly conduct or disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Gambling
Hindering or failure to obey a police officer
Insufficient funds check

Leaving the scene of an accident
Non-support
Prostitution
Resisting arrest
Trespassing.

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

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

* * *

Commentary

Application Notes:

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

5. Sentences for Driving While Intoxicated or Under the Influence.—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply. ~~Such offenses are not minor traffic infractions within the meaning of §4A1.2(c).~~

* * *

7. MULTIPLE COUNTS (§5G1.2)

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.

Amendment:

§5G1.2. Sentencing on Multiple Counts of Conviction

(a) Except as provided in subsection (e), the sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.

(b) ~~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.~~ 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.

(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(e) In a case in which subsection (c) of §4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the sentence to be imposed on the 18 U.S.C. § 924(c) or § 929(a)

count shall be imposed to run consecutively to any other count.

* * *

Commentary

Application Notes:

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.

* * *

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.

~~*3*~~*4. Career Offenders Covered under Subsection (e).—*

* * *

8. REHABILITATION

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.*

Amendment:

~~**§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.*~~

9. MISCELLANEOUS

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 imprisonment 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.

Amendment:

§2P1.2. Providing or Possessing Contraband in Prison

(a) Base Offense Level:

(1) **23**, if the object was a firearm or destructive device.

(2) **13**, if the object was a weapon (other than a firearm or a destructive device), any object that might be used as a weapon or as a means of facilitating escape, ammunition, LSD, PCP, methamphetamine, or a narcotic drug.

(3) **6**, if the object was an alcoholic beverage, United States or foreign currency, a mobile phone or similar device, or a controlled substance (other than LSD, PCP, methamphetamine, or a narcotic drug).

(4) **4**, if the object was any other object that threatened the order, discipline, or security of the institution or the life, health, or safety of an individual.

(b) Specific Offense Characteristic

(1) If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by **2** levels.

(c) Cross Reference

(1) If the object of the offense was the distribution of a controlled substance, apply the offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy). *Provided*, that if the defendant is convicted under 18 U.S.C. § 1791(a)(1) and is punishable under 18 U.S.C. § 1791(b)(1), and the resulting offense level is less than level **26**, increase to level **26**.

Commentary

Statutory Provision: 18 U.S.C. § 1791.

Application Notes:

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).

~~*1*~~*2. If the adjustment in §2P1.2(b)(1) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

~~*2*~~*3. In a case in which the defendant is convicted of the underlying offense and an offense involving providing or possessing a controlled substance in prison, group the offenses together under §3D1.2(c). (Note that 18 U.S.C. § 1791(b) does not require a sentence of imprisonment, although if a sentence of imprisonment is imposed on a count involving providing or possessing a controlled substance in prison, section 1791(c) requires that the sentence be imposed to run consecutively to any other sentence of imprisonment for the controlled substance. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b)(1), comment. (n.1),*

and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 1791(c). For example, if the combined applicable guideline range for both counts is 30-37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the providing or possessing a controlled substance in prison count would satisfy these requirements.

Pursuant to 18 U.S.C. § 1791(c), a sentence imposed upon an inmate for a violation of 18 U.S.C. § 1791 shall be consecutive to the sentence being served by the inmate at the time of the violation.

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2. ALCOHOL AND TOBACCO TAXES

Introductory Commentary

This subpart deals with offenses contained in Parts I-IV of Subchapter J of Chapter 51 of Subtitle E of Title 26, chiefly 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, and 5762, where the essence of the conduct is tax evasion or a regulatory violation. Because these offenses are no longer a major enforcement priority, no effort has been made to provide a section-by-section set of guidelines. Rather, the conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.

§2T2.1. Non-Payment of Taxes

(a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the amount of taxes that the taxpayer failed to pay or attempted not to pay.

Commentary

Statutory Provisions: 15 U.S.C. § 377, 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, 5762, provided the conduct constitutes non-payment, evasion or attempted evasion of taxes. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The tax loss is the total amount of unpaid taxes that were due on the alcohol and/or tobacco, or that the defendant was attempting to evade.

2. Offense conduct directed at more than tax evasion (e.g., theft or fraud) may warrant an upward departure.

Background: The most frequently prosecuted conduct violating this section is operating an illegal still. 26 U.S.C. § 5601(a)(1).

§2T2.2. Regulatory Offenses

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

Commentary

Statutory Provisions: 15 U.S.C. § 377, 26 U.S.C. §§ 5601, 5603-5605, 5661, 5671, 5762, provided the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes. For additional statutory provision(s), see Appendix A (Statutory Index).

Background: Prosecutions of this type are infrequent.

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APPENDIX A - STATUTORY INDEX

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15 U.S.C. § 158	2B1.1
15 U.S.C. § 377	2T2.1, 2T2.2

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18 U.S.C. § 43	2B1.1
18 U.S.C. § 48	2G3.1

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18 U.S.C. § 1153	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.2, 2A3.3, 2A3.4, 2A4.1, 2B1.1, 2B1.4, 2B2.1, 2B3.1, 2K1.4
18 U.S.C. § 1158	2B1.1, 2B5.3
18 U.S.C. § 1159	2B1.1

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18 U.S.C. § 1716D	2Q2.1
18 U.S.C. § 1716E	2T2.2

* * *

~~41 U.S.C. § 53~~	~~2B4.1~~
~~41 U.S.C. § 54~~	~~2B4.1~~
~~41 U.S.C. § 423(e)~~	~~2B1.1, 2C1.1~~
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