UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth a number of issues for comment, some of which are set forth together with the proposed amendments; some of which are set forth independent of any proposed amendment; and one of which (regarding retroactive application of proposed amendments) is set forth in the Supplementary Information portion of this notice.

The proposed amendments and issues for comment in this notice are as follows: (1) a proposed amendment to §2B1.1 (Theft, Property Destruction, and Fraud) regarding offenses involving pre-retail medical products to implement the directive in the SAFE DOSES Act, Pub. L. 112–186 (October 5, 2012), and a related issue for comment; (2) an issue for comment on the directive in section 3 of the Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. 112–___, relating to offenses involving stolen trade secrets or economic espionage; (3) proposed changes to the guidelines applicable to offenses involving counterfeit or adulterated drugs or counterfeit military parts, including (A) a proposed amendment on offenses involving counterfeit military goods and services, including options to amend §2B5.3 (Criminal Infringement of Copyright or Trademark) or Appendix A (Statutory Index) with respect to such offenses to address the statutory changes to 18 U.S.C. § 2320 made by section 818 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112–81 (December 31, 2011); (B) a proposed amendment on offenses involving counterfeit drugs, including options to amend §2B5.3 or Appendix A with respect to such offenses to address the statutory changes to 18 U.S.C. § 2320, and to implement the directive to the Commission, in section 717 of the Food and Drug Administration Safety and Innovation Act, Pub. L. 112–144 (July 9, 2012); and (C) a proposed amendment on offenses involving adulterated drugs, including options to amend §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product) or Appendix A with respect to such offenses to address the statutory changes to 21 U.S.C. § 333 in section 716 of such Act; and related issues for comment; (4) a proposed amendment to §2T1.1 (Tax Evasion;

Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents) to respond to a circuit conflict over whether a sentencing court, in calculating the tax loss in a tax case, may subtract the unclaimed deductions that the defendant legitimately could have claimed if he or she had filed an accurate tax return, and related issues for comment; (5) a proposed amendment and issues for comment in response to two circuit conflicts relating to the circumstances under which the defendant is eligible for a third level of reduction under subsection (b) of §3E1.1 (Acceptance of Responsibility), including (A) a proposed amendment to §3E1.1 to respond to a circuit conflict over whether the court has discretion to deny the third level of reduction when the government has filed the motion described in subsection (b), which would recognize that the court does have such discretion; and (B) an issue for comment on a circuit conflict over whether the government has discretion to withhold making a motion under subsection (b) when there is no evidence that the government was required to prepare for trial; (6) a proposed amendment to §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) to respond to Setser v. United States, __ U.S. __ (March 28, 2012), which held that a federal court in imposing sentence generally has discretion to order that the sentence run consecutive to (or concurrently with) an anticipated, but not yet imposed, term of imprisonment; and (7) a proposed amendment and related issue for comment in response to miscellaneous issues arising from legislation recently enacted and to address technical and stylistic issues in the guidelines, including (A) proposed changes to Appendix A (Statutory Index) to address certain criminal provisions in the Federal Aviation Administration Modernization and Reform Act of 2012, Pub. L. 112–95 (February 14, 2012); the Child Protection Act of 2012, Pub. L. 112–206 (December 7, 2012); the Federal

Restricted Buildings and Grounds Improvement Act of 2011, Pub. L. 112–98 (March 8, 2012); and the Ultralight Aircraft Smuggling Prevention Act of 2012, Pub. L. 112–93 (February 10, 2012); (B) a proposed change to Appendix A (Statutory Index) to address offenses under 18 U.S.C. § 554; (C) proposed changes to guidelines in Chapter Two, Part J (Offenses Involving the Administration of Justice) to address an application issue involving the interaction of those guidelines with adjustments in Chapter Three, Part C (Obstruction and Related Adjustments); and (D) technical and stylistic changes.

DATES: (1) Written Public Comment.—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 19, 2013.

(2) Public Hearing.—The Commission plans to hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding the public hearing, including requirements for testifying and providing written testimony, as well as the location, time, and scope of the hearing, will be provided by the Commission on its website at www.ussc.gov.

ADDRESS: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Jeanne Doherty, Public Affairs Officer, Telephone: (202) 502-4502.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

The Commission requests public comment regarding whether, pursuant to 18 U.S.C. §

3582(c)(2) and 28 U.S.C. § 994(u), any proposed amendment published in this notice should be included in subsection (c) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in §1B1.10(c) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. § 3582(c)(2). The background commentary to §1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(c). To the extent practicable, public comment should address each of these factors.

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's website at www.ussc.gov.

AUTHORITY: 28 U.S.C. § 994(a), (o), (p), (x); USSC Rules of Practice and Procedure, Rule 4.4.

Patti B. Saris,

Chair

1. Pre-Retail Medical Products

Synopsis of Proposed Amendment: This proposed amendment responds to the SAFE DOSES Act, Pub. L. 112–186 (October 5, 2012), which created a new criminal offense at 18 U.S.C. § 670 for theft of pre-retail medical products, increased statutory penalties for certain related offenses when a pre-retail medical product is involved, and contained a directive to the Commission to "review and, if appropriate, amend" the federal sentencing guidelines and policy statements applicable to the new offense and the related offenses "to reflect the intent of Congress that penalties for such offenses be sufficient to deter and punish such offenses, and appropriately account for the actual harm to the public from these offenses."

New Offense at 18 U.S.C. § 670

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

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

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

product;

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

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

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

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

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

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

(2) the violation—

(A) involves the use of violence, force, or a threat of violence or force;

(B) involves the use of a deadly weapon;

(C) results in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved; or

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

Specifically, the higher statutory maximum terms of imprisonment are:

(1) Five years, if—

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

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

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

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

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

The proposed amendment amends Appendix A (Statutory Index) to reference the new offense at 18 U.S.C. § 670 to §2B1.1 (Theft, Property Destruction, and Fraud). In addition, the possibility of providing an additional reference to §2A1.4 (Involuntary Manslaughter) is bracketed.

The proposed amendment also adds a new specific offense characteristic to §2B1.1. The new specific offense characteristic provides an enhancement of [2][4] levels if the offense involves a pre-retail medical product [and (A) the offense involved (i) the use of violence, force, or a threat of violence or force; or (ii) the use of a deadly weapon; (B) the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved; or (C) the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product]. It also provides a minimum offense level of level 14. It also amends the commentary to §2B1.1 to specify that the term "pre-retail medical product" has the meaning given that term in section 670(e).

Issue for Comment

A multi-part issue for comment is also included on whether any changes to the guidelines instead of, or in addition to, the changes in the proposed amendment should be made to respond to the

new offense, the statutory penalty increases made by the Act, and the directive to the Commission.

Proposed Amendment:

Section 2B1.1(b) is amended by redesignating paragraphs (14) through (18) as (15) through (19), respectively; by inserting after paragraph (13) the following:

"(14) If the offense involved a pre-retail medical product **[**and (A) the offense involved the use of (i) violence, force, or a threat of violence or force; or (ii) a deadly weapon; (B) the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved; or (C) the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product**]**, increase by **[2][4]** levels. If the resulting offense level is less than level **14**, increase to level **14**."; and

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

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

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

and by inserting after the paragraph beginning "'Publicly trade company' means" the following:

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

The Commentary to §2B1.1 captioned "Background" is amended by inserting after the paragraph beginning "Subsection (b)(12)" the following:

"Subsection (b)(14) implements the directive to the Commission in section 7 of Public Law 112–186.";

in the paragraph beginning "Subsection (b)(14)(B)" by striking "(b)(14)(B)" and inserting "(b)(15)(B)"; in the paragraph beginning "Subsection (b)(15)(A)" by striking "(b)(15)(A)" and inserting "(b)(16)(A)"; in the paragraph beginning "Subsection (b)(15)(B)(i)" by striking "(b)(15)(B)(i)" and inserting "(b)(16)(B)(i)"; in the paragraph beginning "Subsection (b)(16)" by striking "(b)(16)" and inserting "(b)(17)"; and in the paragraph beginning "Subsection (b)(17)" by striking "(b)(17)" and inserting "(b)(18)", and striking "(b)(17)(B)" and inserting "(b)(18)(B)".

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

"18 U.S.C. § 670 [2A1.4,] 2B1.1".

Issue for Comment:

1. In addition to creating the new offense under section 670, the Act increased penalties for some related offenses when those offenses involve a pre-retail medical product. In particular, the Act added an increased penalty provision to each of the following statutes:

   (A) 18 U.S.C. § 659 (theft from interstate or foreign shipments by carrier), which is referenced to §2B1.1.

   (B) 18 U.S.C. § 1952 (travel in aid of racketeering), which is referenced to §2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise).

   (C) 18 U.S.C. § 1957 (money laundering in aid of racketeering), which is referenced to §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity).

   (D) 18 U.S.C. § 2117 (breaking or entering facilities of carriers in interstate or foreign commerce), which is referenced to §2B2.1 (Burglary of a Residence or a Structure Other than a Residence).

(E) 18 U.S.C. §§ 2314 (transportation of stolen goods) and 2315 (sale or receipt of stolen goods), each of which are referenced to both §§2B1.1 and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).

For each of these existing statutes, the Act amended the penalty provision to provide that if the offense involved a pre-retail medical product, the punishment for the offense shall be the same as the punishment for an offense under section 670, unless the punishment under the existing statute is greater.

An additional statutory provision identified in the directive to the Commission (but not amended by the Act) is 18 U.S.C. § 2118 (robberies and burglaries involving controlled substances), which contains several distinct offenses. The guidelines to which these various offenses are referenced include §§2A1.1, 2A2.1, 2A2.2, 2B2.1, 2B3.1 (Robbery), and 2X1.1.

The directive to the Commission provided that the Commission shall "review and, if appropriate, amend" the federal sentencing guidelines and policy statements applicable to offenses under section 670; under section 2118 of title 18, United States Code; or under any other section amended by the Act "to reflect the intent of Congress that penalties for

such offenses be sufficient to deter and punish such offenses, and appropriately account for the actual harm to the public from these offenses." The Act further states that, in carrying out the directive, the Commission shall—

(1) consider the extent to which the Federal sentencing guidelines and policy statements appropriately reflect—

(A) the serious nature of such offenses;

(B) the incidence of such offenses; and

(C) the need for an effective deterrent and appropriate punishment to prevent such offenses;

(2) consider establishing a minimum offense level under the Federal sentencing guidelines and policy statements for offenses covered by this Act;

(3) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;

(4) ensure reasonable consistency with other relevant directives, Federal sentencing guidelines and policy statements;

(5) make any necessary conforming changes to the Federal sentencing guidelines and policy statements; and

(6) ensure that the Federal sentencing guidelines and policy statements adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.

Issue for Comment

The Commission seeks comment on whether any changes to the guidelines instead of, or in addition to, the changes in the proposed amendment should be made to respond to the new offense, the statutory penalty increases made by the Act, and the directive to the Commission.

(1) First, the Commission seeks comment on the guideline or guidelines to which offenses under section 670, and other offenses covered by the directive, should be referenced. In particular:

(A) The proposed amendment would reference offenses under section 670 to §2B1.1, and brackets the possibility of an additional reference to §2A1.4. Should the Commission reference section 670 to one or more guidelines —

such as §2B5.3 (Criminal Infringement of Copyright or Trademark), §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury), or §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product) — instead of, or in addition to, the proposed reference(s) to §2A1.4 and §2B1.1? If so, which ones?

(B) Similarly, should the Commission reference any of the other offenses covered by the directive to one or more guidelines instead of, or in addition to, the guideline or guidelines to which they are currently referenced? If so, which ones?

(2) Second, the Commission seeks comment on the proposed amendment to §2B1.1, which would provide a new specific offense characteristic if the offense involves a pre-retail medical product [and (A) the offense involved the use of (i) violence, force, or a threat of violence or force; or (ii) a deadly weapon; (B) the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the medical product involved; or (C) the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product]. In particular:

(A) If the Commission were to promulgate the proposed amendment, how

should the new specific offense characteristic interact with other specific offense characteristics in §2B1.1? In particular, how should it interact with—

(i) the specific offense characteristic at §2B1.1(b)(13)(B), which provides a 2-level enhancement and a minimum offense level of 14 if the offense involved an organized scheme to steal or to receive stolen goods or chattels that are part of a cargo shipment; and

(ii) the specific offense characteristic currently at §2B1.1(b)(14), which provides a 2-level enhancement and a minimum offense level 14 if the offense involved a risk of death or serious bodily injury or possession of a dangerous weapon?

Should the new specific offense characteristic be fully cumulative with these current specific offense characteristics, or should the impact be less than fully cumulative in cases where more than one apply?

(B) Does the proposed amendment adequately respond to requirement (2) of the directive that the Commission consider establishing a minimum offense level for offenses covered by the Act? If not, what minimum offense level, if any, should the Commission provide for offenses covered

by the Act, and under what circumstances should it apply?

(C) Does the proposed amendment adequately respond to requirement (3) of the directive that the Commission account for the aggravating and mitigating circumstances involved in the offenses covered by the Act? If not, what aggravating and mitigating circumstances should be accounted for, and what new provisions, or changes to existing provisions should be made to account for them?

(D) Does the proposed amendment adequately respond to the other requirements of the directive, in paragraphs (1), (4), (5), and (6)? If not, what other changes, if any, should the Commission make to the guidelines to respond to the directive?

(3) Section 670(e) defines the term "pre-retail medical product" to mean "a medical product that has not yet been made available for retail purchase by a consumer." The proposed amendment would adopt this statutory definition. The Commission seeks comment on this definition. Is this definition adequately clear? If not, in what situations is this definition likely to be unclear and what guidance, if any, should the Commission provide to address such situations? Does the definition of the term "supply chain" (see 18 U.S.C. § 670(e) (stating that the term "supply chain" includes "manufacturer, wholesaler, repacker, own-labeled distributor,

private-label distributor, jobber, broker, drug trader, transportation company, hospital, pharmacy, or security company")) inform the determination of whether the medical product has been made available for retail purchase by a consumer?

(4) The Commission seeks comment on how, if at all, the guidelines should be amended to account for the aggravating factor in section 670 that increases the statutory maximum term of imprisonment if the defendant is employed by, or is an agent of, an organization in the supply chain for the pre-retail medical product. Is this factor already adequately addressed by existing provisions in the guidelines, such as the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill)? If not, how, if at all, should the Commission amend the guidelines to account for this factor?

(5) Finally, the Commission seeks comment on what changes, if any, it should make to the guidelines to which the other offenses covered by the directive are referenced to account for the statutory changes or the directive, or both. For example, if the Commission were to promulgate the proposed amendment to §2B1.1, adding a new specific offense characteristic to that guideline, should the Commission provide a similar specific offense characteristic in the other guidelines to which the other offenses covered by the directive are referenced?

2. Trade Secrets

Issue for Comment:

1. Section 3 of the Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. 112–___, contains a directive to the Commission on offenses involving stolen trade secrets or economic espionage. The Commission seeks comment on what, if any, changes to the guidelines are appropriate to respond to the directive.

The Directive

Section 3(a) of the Act directs the Commission to "review and, if appropriate, amend" the guidelines "applicable to persons convicted of offenses relating to the transmission or attempted transmission of a stolen trade secret outside of the United States or economic espionage, in order to reflect the intent of Congress that penalties for such offenses under the Federal sentencing guidelines and policy statements appropriately, reflect the seriousness of these offenses, account for the potential and actual harm caused by these offenses, and provide adequate deterrence against such offenses."

Section 3(b) of the Act states that, in carrying out the directive, the Commission shall—

"(1) consider the extent to which the Federal sentencing guidelines and policy statements appropriately account for the simple misappropriation of a trade secret,

including the sufficiency of the existing enhancement for these offenses to address the seriousness of this conduct;

"(2) consider whether additional enhancements in the Federal sentencing guidelines and policy statements are appropriate to account for—

"(A) the transmission or attempted transmission of a stolen trade secret outside of the United States; and

"(B) the transmission or attempted transmission of a stolen trade secret outside of the United States that is committed or attempted to be committed for the benefit of a foreign government, foreign instrumentality, or foreign agent;

"(3) ensure the Federal sentencing guidelines and policy statements reflect the seriousness of these offenses and the need to deter such conduct;

"(4) ensure reasonable consistency with other relevant directives, Federal sentencing guidelines and policy statements, and related Federal statutes;

"(5) make any necessary conforming changes to the Federal sentencing guidelines and policy statements; and

"(6) ensure that the Federal sentencing guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.".

The Offenses Described in the Directive

Offenses described in the directive ― the transmission or attempted transmission of a stolen trade secret outside the United States; and economic espionage ― may be punished under 18 U.S.C. § 1831 (Economic espionage), which requires as an element of the offense that the defendant specifically intend or know that the offense "will benefit any foreign government, foreign instrumentality, or foreign agent". Offenses described in the directive may also be punished under 18 U.S.C. § 1832 (Trade secrets), which does not require such specific intent or knowledge, but does require that the trade secret relate to a product in interstate or foreign commerce.

Section 2 of the Act amended section 1831 to raise the maximum fine imposable for such an offense. The maximum fine for an individual was raised from $500,000 to $5,000,000, and the maximum fine for an organization was raised from $10,000,000 to either $10,000,000 or "3 times the value of the stolen trade secret to the organization, including expenses for research and design and other costs of reproducing the trade secret that the organization has thereby avoided", whichever is greater.

The statutory maximum terms of imprisonment are 15 years for a section 1831 offense and 10 years for a section 1832 offense. Offenses under sections 1831 and 1832 are referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud).

Offenses described in the directive may also be punished under other criminal statutes relating to trade secrets under specific circumstances. Examples of two such statutes are 18 U.S.C. § 1905 (class A misdemeanor for disclosure of confidential information, including trade secrets, by public employees) and 7 U.S.C. § 136h (class A misdemeanor for disclosure of trade secrets involving insecticides, by Environmental Protection Agency employees). Section 1905 is referenced in Appendix A (Statutory Index) to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information). Section 136h is not referenced in Appendix A (Statutory Index).

Applicable Provisions in the Guidelines

The following provisions in the guidelines, among others, address offenses involving trade secrets:

(1) Section 2B1.1(b)(5) contains a 2-level enhancement that applies "[i]f the offense involved misappropriation of a trade secret and the defendant knew or intended

that the offense would benefit a foreign government, foreign instrumentality, or foreign agent".

(2) Application Note 3(C)(ii) of the Commentary to §2B1.1 provides that, in a case involving trade secrets or other proprietary information, the court when estimating loss for purposes of the loss enhancement in §2B1.1(b)(1) should consider, among other factors, "the cost of developing that information or the reduction in the value of that information that resulted from the offense."

Request for Comment

The Commission seeks comment on what, if any, changes to the guidelines should be made to respond to the directive. In particular, the Commission seeks comment on the following:

(1) What offenses, if any, other than sections 1831 and 1832 should the Commission consider in responding to the directive? What guidelines, if any, other than §2B1.1 should the Commission consider amending in response to the directive?

(2) What should the Commission consider in reviewing the seriousness of the offenses described in the directive, the potential and actual harm caused by these offenses, and the need to provide adequate deterrence against such offenses?

(3) Do the guidelines appropriately account for the simple misappropriation of a trade secret? Is the existing enhancement at §2B1.1(b)(5), which provides a 2-level enhancement "[i]f the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent," sufficient to address the seriousness of the conduct involved in the offenses described in the directive?

(4) Should the Commission provide one or more additional enhancements to account for (A) the transmission or attempted transmission of a stolen trade secret outside of the United States; and (B) the transmission or attempted transmission of a stolen trade secret outside of the United States that is committed or attempted to be committed for the benefit of a foreign government, foreign instrumentality, or foreign agent? If so, under what circumstances should such an enhancement apply, and what level of enhancement should apply?

(5) Should the Commission restructure the existing 2-level enhancement in subsection (b)(5) into a tiered enhancement that directs the court to apply the greatest of the following:

(A) an enhancement of 2 levels if the offense involved the simple misappropriation of a trade secret;

(B) an enhancement of 4 levels if the defendant transmitted or attempted to transmit the stolen trade secret outside of the United States; and

(C) an enhancement of [5][6] levels if the defendant committed economic espionage, i.e., the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent?

(6) Should the Commission provide a minimum offense level of [14][16] if the defendant transmitted or attempted to transmit stolen trade secrets outside of the United States or committed economic espionage?

3. Counterfeit and Adulterated Drugs; Counterfeit Military Parts

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

A&B. 18 U.S.C. § 2320 and Offenses Involving Counterfeit Military Goods and Services and Counterfeit Drugs

In general, section 2320 prohibits trafficking in goods or services using a counterfeit mark, and provides a statutory maximum term of imprisonment of 10 years (or, for a repeat offender, 20 years). If the offender knowingly or recklessly causes or attempts to cause serious bodily injury or death, the statutory maximum is increased to 20 years (if serious bodily injury) or to any term of years or life (if death). Offenses under section 2320 are referenced in Appendix A (Statutory Index) to §2B5.3 (Criminal Infringement of Copyright or Trademark).

Two recent Acts made changes to section 2320. First, section 818 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112–81 (December 31, 2011), amended section 2320 to add a new subsection (a)(3) that prohibits trafficking in counterfeit military goods and services, the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or national security. A "counterfeit military good or service" is a good or service that uses a counterfeit mark and that (A) is falsely identified or labeled as meeting military specifications, or (B) is intended for use in a military or national security application. See 18 U.S.C. § 2320(f)(4). An individual who commits an offense under subsection (a)(3) involving a counterfeit military good or service is subject to a statutory maximum term of imprisonment of 20 years, or 30 years for a second or subsequent offense. See 18 U.S.C. § 2320(b)(3).

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

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

> (A) ensure that the sentencing guidelines and policy statements reflect the intent of Congress that the guidelines and policy statements reflect the serious nature of offenses under section 2320(a)(4) and the need for an effective deterrent and appropriate punishment to prevent such offenses;

(B) consider the extent to which the guidelines may or may not appropriately account for the potential and actual harm to the public resulting from the offense;

(C) assure reasonable consistency with other relevant directives and with other sentencing guidelines;

(D) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;

(E) make any necessary conforming changes to the sentencing guidelines; and

(F) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

Parts A and B of the proposed amendment respond to the statutory changes to section 2320 made by these Acts and implement the directive.

A. Counterfeit Military Goods and Services

Part A addresses the issue of counterfeit military goods and services and contains four options. The first three options each add a new specific offense characteristic to §2B5.3. Each of these three options provides an enhancement of [2][4] levels and a minimum offense level of level 14, but they apply to different circumstances.

Option 1 closely tracks the statutory language. It applies only if the offense involves a counterfeit military good or service "the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security."

Option 2 applies to any offense that involves a counterfeit military good or service.

Option 3 is not limited to counterfeit military goods or services. It applies if the defendant knew the offense involved (A) a critical infrastructure; or (B) a product sold for use in national defense or national security or by law enforcement.

Option 4 takes a different approach than the first three options. It references offenses under section 2320(a)(3) to §2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities), with the possibility of an additional reference to §2M2.1

(Destruction of, or Production of Defective, War Material, Premises, or Utilities) also bracketed.

B. Counterfeit Drugs

Part B addresses the issue of counterfeit drugs and contains three options.

Option 1 adds a new specific offense characteristic to §2B5.3. It provides an enhancement of [2][4] levels and a minimum offense level of level 14 if the offense involves a counterfeit drug.

Option 2 revises the specific offense characteristic currently at §2B5.3(b)(5), which provides an enhancement of 2 levels, and a minimum offense level of level 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. As revised, this specific offense characteristic would have three tiers and an instruction to apply the greatest. The first tier would provide an enhancement of 2 levels, and a minimum offense level of 12, if the offense involved a counterfeit drug. The second tier would provide an enhancement of 2 levels, and a minimum offense level of 14, if the offense involved possession of a dangerous weapon in connection with the offense. The third tier would provide an enhancement of 4 levels, and a minimum offense level of 14, if the offense involved the conscious or reckless risk of death or serious bodily injury.

Options 1 and 2 each would also amend the Commentary to §2B5.3 to indicate that a departure

may be warranted it the offense resulted in death or serious bodily injury.

Option 3 takes a different approach than the first two options. It references offenses under section 2320(a)(4) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury).

C. 21 U.S.C. § 333 and Offenses Involving Intentionally Adulterated Drugs

In general, section 333(b) involves prescription drug marketing violations under the Federal Food, Drug, and Cosmetic Act and provides a statutory maximum term of imprisonment of 10 years. Offenses under section 333(b) are referenced in Appendix A (Statutory Index) to §2N2.1 (Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product).

Section 716 of the Food and Drug Administration Safety and Innovation Act, Pub. L. 112–144 (July 9, 2012), amended 21 U.S.C. § 333 to add a new penalty provision at subsection (b)(7). Subsection (b)(7) applies to any person who knowingly and intentionally adulterates a drug such that the drug is adulterated under certain provisions of 21 U.S.C. § 351 and has a reasonable probability of causing serious adverse health consequences or death to humans or animals. It provides a statutory maximum term of imprisonment of 20 years.

Part C of the proposed amendment presents two options for addressing the offense under section

333(b)(7). Option 1 establishes a new alternative base offense level of level 14 in §2N2.1 for cases in which the defendant is convicted under section 333(b)(7). Option 2 amends Appendix A (Statutory Index) to reference offenses under section 333(b)(7) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury).

Issues for Comment

Finally, the proposed amendment provides a series of issues for comment on offenses involving counterfeit military goods and services under section 2320, counterfeit drugs under section 2320, and intentionally adulterated drugs under section 333(b)(7).

Proposed Amendment:

(A) Offenses Under Section 2320 Involving Counterfeit Military Goods and Services

Option 1:

Section 2B5.3(b) is amended by redesignating paragraph (5) as (6) and inserting after paragraph (4) the following:

"(5) If the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause serious bodily injury or death, the disclosure

of classified information, impairment of combat operations, or other significant harm to a combat operation, a member of the Armed Forces, or to national security, increase by **[2][4]** levels. If the resulting offense level is less than level **14**, increase to level **14**.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph beginning "'Commercial advantage" the following:

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

Option 2:

Section 2B5.3(b) is amended by redesignating paragraph (5) as (6) and inserting after paragraph (4) the following:

"(5) If the offense involved a counterfeit military good or service, increase by **[2][4]** levels. If the resulting offense level is less than level **14**, increase to level **14**.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph beginning "'Commercial advantage" the following:

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

Option 3:

Section 2B5.3(b) is amended by redesignating paragraph (5) as (6) and inserting after paragraph (4) the following:

"(5) If **[**the defendant knew**]** the offense involved a good or service 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][4]** levels. If the resulting offense level is less than level **14**, increase to level **14**.".

The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 3 and 4 as 4 and 5, respectively; and by inserting after Note 2 the following:

"3. Application of Subsection (b)(5).—

(A) Definitions.—In subsection (b)(5):

'Critical infrastructure' means systems and assets vital to national defense, national

security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.

'Government entity' has the meaning given that term in 18 U.S.C. § 1030(e)(9).

(B) Application.—Subsection (b)(5) applies to offenses in which the good or service was important in furthering the administration of justice, national defense, national security, economic security, or public health or safety. The enhancement ordinarily would apply, for example, in a case in which the defendant sold counterfeit semiconductors for use in a military system. But it ordinarily would not apply in a case in which the defendant sold counterfeit toner cartridges for use in printers at military headquarters.".

Option 4:

Appendix A (Statutory Index) is amended by striking the line referenced to 18 U.S.C. § 2320 and

inserting the following:

"18 U.S.C. § 2320(a)(1),(2) 2B5.3

18 U.S.C. § 2320(a)(3) [2M2.1,] 2M2.3".

(B) Offenses Under Section 2320 Involving Counterfeit Drugs

Option 1:

Section 2B5.3(b) is amended by redesignating paragraph (5) as (6) and inserting after paragraph (4) the following:

"(5) If the offense involved a counterfeit drug, increase by **[2][4]** levels. If the resulting offense level is less than level **14**, increase to level **14**.".

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

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

and in Note 4 by adding at the end the following:

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

Option 2:

Section 2B5.3(b) is amended by amending paragraph (5) to read as follows:

"(5) (Apply the Greatest):

(A) If the offense involved a counterfeit drug, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(B) If the offense involved 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**.

(C) If the offense involved the conscious or reckless risk of death or serious bodily injury, increase by **4** levels. If the resulting offense level is less than level **14**, increase to level **14**.".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph beginning '"Commercial advantage" the following:

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

and in Note 4 by adding at the end the following:

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

Option 3:

Appendix A (Statutory Index) is amended by striking the line referenced to 18 U.S.C. § 2320 and inserting the following:

"18 U.S.C. § 2320(a)(1),(2) 2B5.3

18 U.S.C. § 2320(a)(4) 2N1.1".

(C) Offenses Under Section 333(b)(7) Involving Intentionally Adulterated Drugs

Section 2N2.1 is amended by amending subsection (a) to read as follows:

"(a) Base Offense Level: (Apply the Greater)

(1) **14**, if the defendant was convicted under 21 U.S.C. § 333(b)(7); or

(2) **6**, otherwise."; and

in subsection (c)(1) by inserting "**[**, if the resulting offense level is greater than that determined above**]**" before the period at the end.

Option 2:

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

"21 U.S.C. § 333(b)(1)–(6) 2N2.1

21 U.S.C. § 333(b)(7) 2N1.1".

Issues for Comment:

1. Offenses Under 18 U.S.C. § 2320 Involving Counterfeit Military Goods and Services

Options 1, 2, and 3 of the proposed amendment would provide a new specific offense characteristic in §2B5.3 for offenses involving counterfeit military goods and services. If the Commission were to adopt Option 1, 2, or 3, how should this new specific offense

characteristic interact with other specific offense characteristics in §2B5.3? In particular, how should it interact with the specific offense characteristic currently at §2B5.3(b)(5), which provides a 2-level enhancement and a minimum offense level 14 if the offense involved a risk of death or serious bodily injury or possession of a dangerous weapon? Should the new specific offense characteristic be fully cumulative with the current one, or should they be less than fully cumulative in cases where both apply?

Option 2 of the proposed amendment would apply to any case in which the offense involved a counterfeit military good or service. Is the scope of this option overly broad? Are there types of cases involving a counterfeit military good or service that should not be covered by Option 2? If so, what types of cases? For example, should the Commission provide an application note for Option 2 similar to the proposed application note 3(B) contained in Option 3, requiring that the counterfeit military good or service be important in furthering national security?

Option 3 of the proposed amendment would apply to any case in which the offense involved a good or service 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. The language used in this option parallels the language regarding critical infrastructure in §2B1.1 (Theft, Property Destruction, and Fraud). In this new context, is the scope of this language overly broad? Are there types of cases that should not be covered by Option 3? If so, what types of cases?

Option 4 of the proposed amendment would reference offenses under section 2320 that involve counterfeit military goods or services (e.g., offenses described in section 2320(a)(3)) to [§2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) and] §2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities). If the Commission were to adopt Option 4, what changes, if any, should the Commission make to those guidelines to better account for such offenses?

2. Offenses Under 18 U.S.C. § 2320 Involving Counterfeit Drugs (and Response to Directive)

Option 1 of the proposed amendment would provide a new specific offense characteristic in §2B5.3 for offenses involving counterfeit drugs. If the Commission were to adopt Option 1, how should this new specific offense characteristic interact with other specific offense characteristics in §2B5.3? In particular, how should it interact with the specific offense characteristic currently at §2B5.3(b)(5), which provides a 2-level enhancement and a minimum offense level 14 if the offense involved a risk of death or serious bodily injury or possession of a dangerous weapon? Should the new specific offense characteristic be fully cumulative with the current one, or should they be less than fully cumulative in cases where both apply?

Option 3 of the proposed amendment would reference offenses under section 2320 that

involve counterfeit drugs (e.g., offenses described in section 2320(a)(4)) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Serious Bodily Injury). If the Commission were to adopt Option 3, what changes, if any, should the Commission make to that guideline to better account for such offenses?

In addition, to assist the Commission in determining how best to respond to the directive, the Commission seeks comment on offenses under section 2320 involving counterfeit drugs. What actual and potential harms to the public do such offenses pose? What aggravating and mitigating circumstances may be involved in such offenses that are not already adequately addressed in the guidelines? For example, if death or serious bodily injury resulted from the offense, should that circumstance be addressed by a departure provision, by a specific offense characteristic, by a cross-reference to another guideline (e.g., a homicide guideline), or in some other manner?

Does the new specific offense characteristic in Option 1, or the revised specific offense characteristic in Option 2, adequately respond to the directive? If not, what changes, if any, should the Commission make to §2B5.3 to better account for offenses under section 2320(a)(4) and the factors identified in the directive?

In the alternative, does Option 3 of the proposed amendment — referencing offenses involving counterfeit drugs to §2N1.1 — adequately respond to the directive? If not, what changes, if any, should the Commission make to §2N1.1 to better account for offenses

under section 2320(a)(4) and the factors identified in the directive?

3. Offenses Under 21 U.S.C. § 333(b)(7) Involving Intentionally Adulterated Drugs

Option 2 of the proposed amendment amends Appendix A (Statutory Index) to reference offenses under section 333(b)(7) to §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury). Section 2N1.1 provides a base offense level of 25 and an enhancement of 2 to 4 levels if the victim sustained serious bodily injury, depending on whether the injury was permanent or life-threatening. Section 2N1.1 also contains cross-references to other guidelines and a special instruction for certain cases involving more than one victim.

If the Commission were to reference offenses under section 333(b)(7) to §2N1.1, as the proposed amendment provides, what changes, if any, should the Commission make to §2N1.1 to better account for offenses under section 333(b)(7)?

Option 1 of the proposed amendment contemplates that offenses under section 333(b)(7) would be referenced to §2N2.1. Section 2N2.1 provides a base offense level 6 and an enhancement for repeat offenders under 21 U.S.C. § 331. It also provides a cross reference to §2B1.1 (Theft, Property Destruction, and Fraud) if the offense involved fraud and a cross reference to any other offense guideline if the offense was committed in furtherance of, or to conceal, an offense covered by that other offense guideline. If

offenses under section 333(b)(7) are to be sentenced under §2N2.1, what changes, if any, should the Commission make to §2N2.1? For example, should the Commission adopt Option 1, which would provide an alternative base offense level of 14 if the defendant was convicted under section 333(b)(7)? Should the Commission provide a different alternative base offense level instead? Or should the Commission provide additional specific offense characteristics, additional cross references, or a combination of such provisions to better account for offenses under section 333(b)(7)? If so, what provisions should the Commission provide?

Finally, the Commission seeks comment comparing and contrasting offenses involving intentionally adulterated drugs under section 333(b)(7) and offenses involving counterfeit drugs under section 2320(a)(4). How do these offenses compare to each other in terms of the conduct involved in the offense, the culpability of the offenders, the actual and potential harms posed by the offense, and other factors relevant to sentencing? Which offenses should be treated more seriously by the guidelines and which should be treated less seriously?

4. Tax Deductions

Synopsis of Proposed Amendment: This proposed amendment addresses a circuit conflict over whether a sentencing court, in calculating the tax loss in a tax case, may subtract the unclaimed deductions that the defendant legitimately could have claimed if he or she had filed an accurate

tax return.

Circuits have disagreed over whether the tax loss in such a case may be reduced by the defendant's legitimate but unclaimed deductions. Specifically, the issue is whether a defendant is allowed to present evidence of unclaimed deductions that would have the effect of reducing the tax loss for purposes of the guidelines and thereby reducing the ultimate sentence, or whether the defendant is categorically barred from offering such evidence.

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

unclaimed deductions in analyzing a defendant's estimate of the tax loss suffered by the government. See Hoskins, 654 F.3d at 1094-95.

Six other circuits — the Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh — have reached the opposite conclusion, finding that a defendant may not present evidence of unclaimed deductions to reduce the tax loss. See United States v. Delfino, 510 F.3d 468, 473 (4th Cir. 2007) ("The law simply does not require the district court to engage in [speculation as to what deductions would have been allowed], nor does it entitle the Delfinos to the benefit of deductions they might have claimed now that they stand convicted of tax evasion."); United States v. Phelps, 478 F.3d 680, 682 (5th Cir. 2007) (holding that the defendant could not reduce tax loss by taking a social security tax deduction that he did not claim on the false return); United States v. Chavin, 316 F.3d 666, 679 (7th Cir. 2002) (holding that the definition of tax loss "excludes consideration of unclaimed deductions"); United States v. Psihos, 683 F.3d 777, 781-82 (7th Cir. 2012) (following Chavin in disallowing consideration of unclaimed deductions); United States v. Sherman, 372 F.App'x 668, 676-77 (8th Cir. 2010); United States v. Blevins, 542 F.3d 1200, 1203 (8th Cir. 2008) (declining to decide "whether an unclaimed tax benefit may ever offset tax loss," but finding the district court properly declined to reduce tax loss based on taxpayers' unclaimed deductions); United States v. Yip, 592 F.3d 1035, 1041 (9th Cir. 2010) ("We hold that § 2T1.1 does not entitle a defendant to reduce the tax loss charged to him by the amount of potentially legitimate, but unclaimed, deductions even if those deductions are related to the offense."); United States v. Clarke, 562 F.3d 1158, 1164 (11th Cir. 2009) (holding that the defendant was not entitled to a tax loss calculation based on a filing status other than the one he

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

The proposed amendment presents three options for resolving the conflict. They would amend the Commentary to §2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents), as follows:

> Option 1 provides that the determination of the tax loss shall account for any credit, deduction, or exemption to which the defendant was entitled, whether or not the defendant claimed the deduction at the time the tax offense was committed.
>
> Option 2 provides that the determination of the tax loss shall not account for any credit, deduction, or exemption, unless the defendant was entitled to the credit, deduction, or exemption and claimed the credit, deduction, or exemption at the time the tax offense was committed.
>
> Option 3 provides that the determination of the tax loss shall not account for any unclaimed credit, deduction, or exemption, unless the defendant demonstrates by contemporaneous documentation that the defendant was entitled to the credit, deduction, or exemption.

Issues for comment are also included.

Proposed Amendment:

The Commentary to §2T1.1 captioned "Application Notes" is amended by redesignating Notes 3 through 7 as 4 through 8, respectively, and by inserting after Note 2 the following:

Option 1:

"3. Credits, Deductions, and Exemptions.—The determination of the tax loss shall account for any credit, deduction, or exemption to which the defendant was entitled, whether or not the defendant claimed the deduction at the time the tax offense was committed.".

Option 2:

"3. Credits, Deductions, and Exemptions.—The determination of the tax loss shall not account for any credit, deduction, or exemption, unless the defendant was entitled to the credit, deduction, or exemption and claimed the credit, deduction, or exemption at the time the tax offense was committed.".

Option 3:

"3. Credits, Deductions, and Exemptions.—The determination of the tax loss shall not

account for any unclaimed credit, deduction, or exemption, unless the defendant demonstrates by contemporaneous documentation that the defendant was entitled to the credit, deduction, or exemption.".

Issues For Comment:

1. If the Commission were to adopt Option 1 or 3, what requirements, if any, should be met before an unclaimed deduction is counted, other than the requirement that the unclaimed deduction be legitimate? In particular:

   (A) Should a legitimate but unclaimed deduction be counted only if the defendant establishes that the deduction would have been claimed if an accurate return had been filed? If so, should this determination be a subjective one (e.g., this particular defendant would have claimed the deduction) or an objective one (e.g., a reasonable taxpayer in the defendant's position would have claimed the deduction)?

   (B) Should a legitimate but unclaimed deduction be counted only if it is related to the offense? See United States v. Hoskins, 654 F.3d 1086, 1095 n.9 (10th Cir. 2011) ("We must emphasize, however, that § 2T1.1 does not permit a defendant to benefit from deductions unrelated to the offense at issue."); see also United States v. Yip, 592 F.3d 1035, 1040 (9th Cir. 2010) ("[D]eductions are not permissible if

they are unintentionally created or are unrelated to the tax violation, because such deductions are not part of the 'object of the offense' or intended loss.").

(C) Are there differences among the various types of tax offenses that would make it appropriate to have different rules on the use of unclaimed deductions? If so, what types of tax offenses warrant different rules, and what should those different rules be? Additionally, are there certain cases in which the legitimacy of the deductions, credits, or exemptions and the likelihood that the defendant would have claimed them had an accurate return been filed is evident by the nature of the crime? For example, if a restaurant owner failed to report some gross receipts and made some payments to employees or vendors in cash, but actually keeps two sets of books (one accurate and one fraudulent), should the unclaimed deductions reflected in the accurate set of books be counted?

2. The proposed amendment presents options for resolving the circuit conflict, each of which is based on whether a defendant's tax loss may be reduced by unclaimed "credits, deductions, or exemptions." The Commission seeks comment regarding whether this list of potential offsets provides sufficient clarity as to what the court may or may not consider depending on which option is chosen. In particular, should the Commission expand the language to clarify that the list includes any type of deduction? See, e.g., United States v. Psihos, 683 F.3d 777, 781-82 (7th Cir. 2012) (noting a dispute between the parties regarding whether the unclaimed cash payments at issue were to be used in

computing adjusted gross income (an "above-the-line" deduction) or to be used in computing taxable income (a "below-the-line" deduction)).

5. Acceptance of Responsibility

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

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

This is the language of the guideline after it was directly amended by Congress in section 401(g) of the PROTECT Act, Public Law 108–21, effective April 30, 2003. The PROTECT Act also directly amended Application Note 6 (including adding the last paragraph of that application note), and the Background Commentary. Section 401(j)(4) of the PROTECT Act states, "At no time may the Commission promulgate any amendment that would alter or repeal the amendments made by subsection (g) of this section."

Whether the Court Has Discretion to Deny the Third Level of Reduction

Circuits have disagreed over whether the court has discretion to deny the third level of reduction for acceptance of responsibility when the government has filed a motion under subsection (b) and the defendant is otherwise eligible.

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

The Fifth Circuit has held to the contrary, that the decision whether to grant the third level of reduction "is the district court's — not the government's — even though the court may only do so on the government's motion." See United States v. Williamson, 598 F.3d 227, 230 (5th Cir.

2010).

The proposed amendment adopts the approach of the Fifth Circuit by recognizing that the court has discretion to deny the third level of reduction. Specifically, it amends Application Note 6 to §3E1.1 by adding a statement that "The court may grant the motion if the court determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. In such a case, the 1-level decrease under subsection (b) applies."

An issue for comment is also provided on whether the Commission should instead resolve this issue in a different manner.

Whether the Government Has Discretion to Withhold Making a Motion

Circuits have also disagreed over whether the government has discretion to withhold making a motion under subsection (b) when there is no evidence that the government was required to prepare for trial. An issue for comment is also provided on whether the Commission should resolve this circuit conflict and, if so, how it should do so.

Proposed Amendment:

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 6, in the paragraph beginning "Because the Government", by adding at the end the following: "The court may grant the motion if the court determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. In such a case, the 1-level decrease under subsection (b) applies.".

The Commentary to §3E1.1 captioned "Background" is amended in the paragraph beginning "Section 401(g)" by inserting "first sentence of the" before "last paragraph".

Issues for Comment:

1. Whether the Court Has Discretion to Deny the Third Level of Reduction

The Commission seeks comment on whether it should resolve this circuit conflict in a manner other than that provided in the proposed amendment. If so, how should the conflict be resolved and how should the Commission amend the guidelines to do so?

2. Whether the Government Has Discretion to Withhold Making a Motion

Circuits have also disagreed over whether the government has discretion to withhold making a motion under subsection (b) when there is no evidence that the government was required to prepare for trial.

The Second and Fourth Circuits have held that the government may withhold the motion only if it determines that it has been required to prepare for trial. See United States v. Lee, 653 F.3d 170, 173-174 (2d Cir. 2011) (government withheld the motion because it was required to prepare for a Fatico hearing; court held this was "an unlawful reason"); United States v. Divens, 650 F.3d 343, 346 (4th Cir. 2011) (government withheld the motion because the defendant failed to sign an appellate waiver; court held the defendant was "entitled" to the motion and the reduction).

The majority of circuits, in contrast, have held that §3E1.1 recognizes that the government has an interest both in being permitted to avoid preparing for trial and in being permitted to allocate its resources efficiently, see §3E1.1(b), and that both are legitimate government interests that justify the withholding of the motion. See, e.g., United States v. Collins, 683 F.3d 697, 704-708 (6th Cir. 2012) (government withheld the motion because it was required to litigate pretrial motion to suppress evidence; court held the government did not abuse its discretion); United States v. Newson, 515 F.3d 374 (5th Cir. 2008) (government withheld the motion because the defendant refused to waive right to appeal; court held the government did not abuse its discretion); United States v. Johnson, 581 F.3d 994 (9th Cir. 2009) (same).

The Commission seeks comment on whether it should resolve this circuit conflict and, if so, how

it should do so.

8. Setser

Synopsis of Proposed Amendment: A federal court imposing a sentence on a defendant generally has discretion to order that the sentence run consecutive to (or, in the alternative, concurrently with) a term of imprisonment previously imposed but not yet discharged. See 18 U.S.C. § 3584(a); USSG §5G1.3, comment. (backg'd.). Recently, the Supreme Court held that a federal court also generally has discretion to order that the sentence run consecutive to (or concurrently with) an anticipated, but not yet imposed, term of imprisonment. See Setser v. United States, __ U.S. __ (March 28, 2012).

For cases in which there is a term of imprisonment previously imposed but not yet discharged, §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) provides guidance to the court in determining whether the sentence for the instant offense should run consecutive to (or, in the alternative, concurrently with) the undischarged term of imprisonment. This proposed amendment responds to Setser by ensuring that §5G1.3 also applies to cases covered by Setser, i.e., cases in which there is an anticipated, but not yet imposed, term of imprisonment. The proposed amendment revises §5G1.3 in two ways.

First, when the offense with the undischarged term of imprisonment is relevant conduct to the instant offense and resulted in an increase in the Chapter Two or Three offense level for the

instant offense, the instant offense already includes an incremental punishment to account for the prior offense. Accordingly, subsection (b) of §5G1.3 provides that the court generally should order the sentence for the instant offense to run concurrently with the undischarged term of imprisonment. The proposed amendment ensures that subsection (b) also applies to a case in which there is an anticipated, but not yet imposed, term of imprisonment for an offense that is relevant conduct to the instant offense and resulted in an increase in the Chapter Two or Three offense level for the instant offense.

Second, when the offense with the undischarged term of imprisonment is not covered by subsection (b), the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense. See §5G1.3(c) (Policy Statement). The proposed amendment ensures that subsection (c) also applies to any other case in which there is an anticipated, but not yet imposed, term of imprisonment.

Conforming changes to the relevant application notes, to the background commentary, and to the heading of the guideline are also made.

Proposed Amendment:

Section 5G1.3 is amended in the heading by inserting after "Undischarged" the following: "or Anticipated"; in subsection (b) by inserting after "resulted" the following: "or is anticipated to

result"; in subsection (b)(2) by inserting after "to the remainder of the undischarged term of imprisonment" the following: "or to the anticipated term of imprisonment, as applicable"; and in subsection (c) by inserting after "an undischarged term of imprisonment" the following: "or an anticipated term of imprisonment"; and by striking "prior undischarged term of imprisonment" and inserting "undischarged term of imprisonment or to the anticipated term of imprisonment, as applicable,".

The Commentary to section 5G1.3 captioned "Application Notes" is amended in Note 3(A) by inserting after "undischarged term of imprisonment" the following: "or to the anticipated but not yet imposed term of imprisonment, as applicable"; in Note 3(A)(ii) by striking "prior undischarged" and inserting "undischarged or anticipated"; in Note 3(A)(iv) by striking "prior" and by inserting after "imposed" the following: ", or the fact that the anticipated sentence may be imposed,"; in Note 3(B) by striking "prior" and in the last sentence by inserting after "undischarged" both places it appears the following: "or anticipated"; in Note 3(C) by inserting after "Undischarged" the following: "or Anticipated"; by striking "has had"; by inserting "has been or is anticipated to be" before "revoked"; and by inserting "that has been, or that is anticipated to be," before "imposed for the revocation"; and in Note 3(D) by inserting after "undischarged" the following: "or anticipated".

The Commentary to section 5G1.3 captioned "Background" is amended by striking "In a case in which" and all that follows through "Exercise of that authority," and inserting the following: "Federal courts generally 'have discretion to select whether the sentences they impose will run

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

7. Miscellaneous and Technical

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation and miscellaneous and technical guideline issues.

A. Recently Enacted Legislation

Part A amends Appendix A (Statutory Index) to provide guideline references for four offenses not currently referenced in Appendix A that were established or revised by recently enacted legislation. They are as follows:

1. 18 U.S.C. § 39A. Section 311 of the Federal Aviation Administration Modernization and Reform Act of 2012, Pub. L. 112–95 (February 14, 2012), established a new criminal offense at 18 U.S.C. § 39A (Aiming a laser pointer at an aircraft). The offense applies to whoever knowingly aims the beam of a laser pointer at an aircraft in the special aircraft

jurisdiction of the United States or at the flight path of such an aircraft. The statutory maximum term of imprisonment is five years.

The proposed amendment amends Appendix A (Statutory Index) to reference section 39A offenses to §2A5.2 (Interference with Flight Crew or Flight Attendant).

2. 18 U.S.C. § 1514(c). Section 3(a) of the Child Protection Act of 2012, Pub. L. 112–206 (December 7, 2012), established a new offense at 18 U.S.C. § 1514(c) that makes it a criminal offense to knowingly and intentionally violate or attempt to violate an order issued under section 1514 (Civil action to restrain harassment of a victim or witness). The new offense has a statutory maximum term of imprisonment of five years.

The proposed amendment amends Appendix A (Statutory Index) to reference the new offense at section 1514(c) to §2J1.2 (Obstruction of Justice).

3. 18 U.S.C. § 1752. The Federal Restricted Buildings and Grounds Improvement Act of 2011, Pub. L. 112–98 (March 8, 2012), amended the criminal offense at 18 U.S.C. § 1752 (Restricted building or grounds). As so amended, the statute defines "restricted buildings or grounds" to mean any restricted area (A) of the White House or its grounds, or the Vice President's residence or its grounds; (B) of a building or grounds where the President or other person protected by the United States Secret Service is or will be temporarily visiting; or (C) of a building or grounds restricted in conjunction with an event designated

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

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

4. 19 U.S.C. § 1590. The Ultralight Aircraft Smuggling Prevention Act of 2012, Pub. L. 112–93 (February 10, 2012), amended the criminal offense at 19 U.S.C. § 1590 (Aviation smuggling) to provide a more specific definition of the term "aircraft" (i.e., to include ultralight aircraft) and to cover attempts and conspiracies. Section 1590 makes it unlawful for the pilot of an aircraft to transport, or for any individual on board any aircraft to possess, merchandise knowing that the merchandise will be introduced into the United States contrary to law. It is also unlawful for a person to transfer merchandise between an aircraft and a vessel on the high seas or in the customs waters of the United States unlawfully. The Act did not change the statutory maximum terms of imprisonment, which are 20 years if any of the merchandise involved was a controlled substance, see § 1590(c)(2), and five years otherwise, see § 1590(c)(1).

The proposed amendment amends Appendix A (Statutory Index) to reference section 1590 offenses to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property).

The proposed amendment also includes an issue for comment on the offenses described above.

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

Part B responds to an application issue that arises in cases in which the defendant is sentenced under an offense guideline in Chapter Two, Part J (Offenses Involving the Administration of Justice) and the defendant may also be subject to an adjustment under Chapter Three, Part C (Obstruction and Related Adjustments).

In the Commentary to four of the Chapter Two, Part J offense guidelines, there is an application note stating that Chapter Three, Part C, does not apply, unless the defendant obstructed the investigation or trial of the instant offense. See §§2J1.2, comment. (n.2(A)); 2J1.3, comment. (n.2); §2J1.6, comment. (n.2); 2J1.9, comment. (n.1). These application notes in Chapter Two, Part J, originated when Chapter Three, Part C, contained only one guideline ─ §3C1.1

(Obstructing or Impeding the Administration of Justice).

Chapter Three, Part C, now contains three additional guidelines, and these application notes in Chapter Two, Part J, appear to encompass these three additional guidelines as well and generally prohibit the court from applying them. See, e.g., United States v. Duong, 665 F.3d 364 (1st Cir. January 6, 2012) ("Thus, according to the literal terms of Application Note 2, 'Chapter 3, Part C' ― presumably including section 3C1.3 ― 'does not apply.'"). The First Circuit in Duong, however, determined that the application note in §2J1.6 was in conflict with §3C1.3 (Commission of Offense While on Release) and its underlying statute, 18 U.S.C. § 3147, and indicated that the Commission's stated purpose in establishing §3C1.3 "was not to bring that guideline within the purview of Application Note 2 of section 2J1.6". Id. at 368. Accordingly, the First Circuit held that the application note must be disregarded. Id.

Consistent with Duong, the proposed amendment clarifies the scope of Application Note 2 by striking the general reference to Chapter Three, Part C, and replacing it with a specific reference to §3C1.1. It makes the same change to the corresponding application notes in §§2J1.2, 2J1.3, and 2J1.9, and conforming changes to other parts of the Commentary in those guidelines.

C. Appendix A (Statutory Index) References for Offenses Under 18 U.S.C. § 554

Section 554 of title 18, United States Code (Smuggling goods from the United States), makes it unlawful to export or send from the United States (or attempt to do so) any merchandise, article,

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

The Department of Justice in its annual letter to the Commission has proposed that section 554 offenses should also be referenced to a fourth guideline, §2M5.1. The Department indicates that section 554 is used to prosecute a range of export offenses related to national security and that some cases would more appropriately be sentenced under §2M5.1 than §2M5.2. For example, when the section 554 offense involves a violation of export controls on arms, munitions, or military equipment (e.g., export controls under the Arms Export Control Act, 22 U.S.C. § 2778), the section 554 offense may appropriately be sentenced under §2M5.2, because other offenses involving a violation of export controls on arms, munitions, or military equipment (such as offenses under 22 U.S.C. § 2778) are referenced to §2M5.2.

In contrast, when the section 554 offense involves a violation of export controls not involving

munitions (e.g., violations of economic sanctions or other export controls under the International Emergency Economic Powers Act, 50 U.S.C. § 1705), the Department proposes that the section 554 offense be sentenced under §2M5.1 rather than under §2M5.2, because other offenses involving evasion of export controls (such as offenses under 50 U.S.C. § 1705) are referenced to §2M5.1 (among other guidelines).

Part C of the proposed amendment amends Appendix A (Statutory Index) to broaden the range of guidelines to which offenses under 18 U.S.C. § 554 are referenced. Specifically, it adds a reference to §2M5.1. The proposed amendment also brackets the possibility of adding a reference to §2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose).

D. Technical and Stylistic Changes

Part D makes certain technical and stylistic changes to the Guidelines Manual.

First, it amends the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud) to provide updated references to the definitions contained in 7 U.S.C. §1a, which were renumbered by Public Law 111–203 (July 21, 2010).

Second, it amends the Notes to the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These

Offenses); Attempt or Conspiracy) to provide updated references to the definition of tetrahydrocannabinols contained in 21 C.F.R. § 1308.11(d), which were renumbered by 75 FR 79296 (December 20, 2010).

Third, it makes several stylistic revisions in the Guidelines Manual to change "court martial" to "court-martial".

Proposed Amendment:

(A) Recently Enacted Legislation

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

"18 U.S.C. § 39A 2A5.2";

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

"18 U.S.C. § 1514(c) 2J1.2";

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

"18 U.S.C. § 1752 2A2.4, 2B2.3"; and

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

"19 U.S.C. § 1590 2D1.1, 2T3.1".

(B) Interaction Between 2J and 3C

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

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

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

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

(C) 18 U.S.C. § 554

Appendix A (Statutory Index) is amended by striking the line referenced to 18 U.S.C. § 554 and inserting the following:

"18 U.S.C. § 554 2B1.5, 2M5.1, 2M5.2, [2M5.3,] 2Q2.1".

(D) Technical and Stylistic Changes

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 14(A) by striking "1a(5)" both places it appears and inserting "1a(11)"; by striking "1a(6)" both places it appears and inserting "1a(12)"; by striking "1a(26)" both places it appears and inserting "1a(28)"; by striking "1a(23)" both places it appears and inserting "1a(31)".

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

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

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

Issue for Comment:

1. Part A of the proposed amendment would reference offenses under 18 U.S.C. § 39A, 18 U.S.C. § 1514(c), 18 U.S.C. § 1752, and 19 U.S.C. § 1590 to various guidelines. The Commission invites comment on offenses under these statutes, including in particular the conduct involved in such offenses and the nature and seriousness of the harms posed by such offenses. Do the guidelines covered by the proposed amendment adequately account for these offenses? If not, what revisions to the guidelines would be appropriate to account for these offenses? In particular, should the Commission provide one or more new alternative base offense levels, specific offense characteristics, or departure provisions in one or more of these guidelines to better account for these offenses? If so, what should the Commission provide?

Similarly, are there any guideline application issues that the Commission should address for cases involving these statutes? For example, the proposed amendment would reference offenses under 19 U.S.C. § 1590 to §2D1.1 and §2T3.1. In a section 1590 case sentenced under §2T3.1, should the use of an aircraft be considered a form of "sophisticated means," such that the defendant should receive the specific offense characteristic at §2T3.1(b)(1), which provides an

increase of 2 levels and a minimum offense level of 12 if the offense involved sophisticated means? If not, then under what circumstances (if any) should the defendant in a section 1590 case receive that specific offense characteristic?