

REVISED PROPOSED AMENDMENT: TECHNICAL AMENDMENT

Synopsis of Proposed Amendment: *This two-part revised proposed amendment makes various technical and conforming changes to the guidelines.*

Part A of the proposed amendment makes changes to the Guidelines Manual to promote accuracy and completeness. For example, it corrects typographical errors, and it addresses cases in which the Guidelines Manual provides information (such as a reference to a guideline, statute, or regulation) that has become incorrect or obsolete. Specifically, it amends:

- (1) *§1B1.3 (Relevant Conduct), Application Note 6, to ensure that two quotations contained in that note are accurate;*
- (2) *§1B1.8 (Use of Certain Information), Application Note 2, to revise a reference to the "Probation Service";*
- (3) *§1B1.9 (Class B or C Misdemeanors and Infractions), Application Note 1, to reflect that some infractions do not have any authorized term of imprisonment;*
- (4) *§1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), Application Note 2, to correct a typographical error;*
- (5) *§2A1.1 (First Degree Murder), Application Note 1, to provide specific citations for the examples given;*
- (6) *§2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), Application Note 5, to correct typographical errors;*
- (7) *§2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), Application Note 1, to correct a typographical error;*
- (8) *§2A3.5 (Failure to Register as a Sex Offender), Application Note 1, to ensure that the statutory definitions referred to in that note are accurately cited;*
- (9) *§2B1.4 (Insider Trading), Application Note 1, to correct a typographical error;*
- (10) *§2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), Application Note 1, to provide updated citations to statutes and regulations;*
- (11) *§2B3.1 (Robbery), Application Note 2, to correct a typographical error;*
- (12) *§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), Background, to provide an updated description and reference to the statute criminalizing bribery in connection with Medicare and Medicaid referrals;*
- (13) *§2B6.1 (Altering or Removing Motor Vehicle Identification Numbers), Background, to update the statutory maximum term of imprisonment for violations of 18 U.S.C. § 553(a)(2);*

- (14) §2C1.1 (*Offering, Giving, Soliciting, or Receiving a Bribe*), Application Note 3, to ensure that the subsection relating to "loss" is accurately cited;
- (15) §2C1.2 (*Offering, Giving, Soliciting, or Receiving a Gratuity*), Application Note 4, to correct a typographical error;
- (16) §2D1.1 (*Unlawful Manufacturing, Importing, Exporting, or Trafficking*), in the Notes to the Drug Quantity Table, to provide updated citations to regulations;
- (17) both §2D1.11 (*Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical*), Application Note 6, and §2D1.12 (*Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material*) to provide a more accurate statutory citation and description;
- (18) §2D1.14 (*Narco-Terrorism*), subsection (a)(1), to provide an updated guideline reference;
- (19) §2D2.1 (*Unlawful Possession*), Commentary, to provide updated statutory references;
- (20) §2G3.1 (*Importing, Mailing, or Transporting Obscene Matter*), Application Note 1, to make the definition of "distribution" in that guideline more consistent with the definition of "distribution" in the child pornography guidelines;
- (21) §2K2.1 (*Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition*), Application Notes 2 and 10, to ensure that a quotation contained in Note 2 is accurate and that a citation in Note 10 is accurate;
- (22) §2K2.5 (*Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone*), Application Notes 2 and 3, to provide updated statutory references;
- (23) both §2L2.2 (*Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport*), Statutory Provisions, and §2L2.2 (*Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use*), Statutory Provisions, to provide updated statutory references;
- (24) §2M3.1 (*Gathering or Transmitting National Defense Information to Aid a Foreign Government*), Application Note 1, to provide an updated reference to an executive order;
- (25) §2M3.3 (*Transmitting National Defense Information*), to provide an updated statutory reference;
- (26) §2M3.9 (*Disclosure of Information Identifying a Covert Agent*), Application Note 3, to provide an updated statutory reference;
- (27) §2M6.1 (*Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxiins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass*

- Destruction*), Application Note 1, to provide updated statutory references;
- (28) §2Q1.2 (*Mishandling of Hazardous or Toxic Substances or Pesticides*), Background, to provide updated guideline references;
 - (29) §2Q1.6 (*Hazardous or Injurious Devices on Federal Lands*), subsection (a)(1), to correct a typographical error;
 - (30) §2Q2.1 (*Offenses Involving Fish, Wildlife, and Plants*), Application Note 3, to provide a more complete reference to regulations;
 - (31) Chapter Two, Part T, Subpart 2 (*Alcohol and Tobacco Taxes*), Introductory Commentary, to provide a more complete statutory reference;
 - (32) §2X5.2 (*Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)*), to strike an erroneous statutory reference;
 - (33) Appendix A (*Statutory Index*), to provide updated statutory references and strike an erroneous statutory reference.

Part B of the proposed amendment makes a series of changes to the Guidelines Manual to promote stylistic consistency in how subdivisions are designated. Specifically, when dividing guideline sections into subdivisions, the guidelines generally follow the structure used by Congress to divide statutory sections into subdivisions. Thus, a section is broken into subsections (starting with "(a)"), which are broken into paragraphs (starting with "(1)"), which are broken into subparagraphs (starting with "(A)"), which are broken into clauses (starting with "(i)"), which are broken into subclauses (starting with "(I)"). See Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004). For a generic term, "subdivision" is also used. When dividing application notes into subdivisions, the guidelines generally follow the same structure, except that subsections and paragraphs are not used; the first subdivisions used are subparagraphs (starting with "(A)"). Part B of the proposed amendment identifies places in the Guidelines Manual where these principles are not followed and brings them into conformity.

Proposed Amendment:

(A) Changes to Promote Accuracy and Completeness

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

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Commentary

Application Notes:

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- 6. A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in §2S1.1 (*Laundering of Monetary Instruments; Engaging in Monetary Transactions*)

in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant "is was convicted under 18 U.S.C. § 1956". Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense was committed by the means set forth in involved conduct described in 18 U.S.C. § 2242").

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§1B1.8. Use of Certain Information

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Commentary

Application Notes:

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2. Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender). The Probation Serviceprobation office generally will secure information relevant to the defendant's criminal history independent of information the defendant provides as part of his cooperation agreement.

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§1B1.9. Class B or C Misdemeanors and Infractions

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Commentary

Application Notes:

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1. Notwithstanding any other provision of the guidelines, the court may impose any sentence authorized by statute for each count that is a Class B or C misdemeanor or an infraction. A Class B misdemeanor is any offense for which the maximum authorized term of imprisonment is more than thirty days but not more than six months; a Class C misdemeanor is any offense for which the maximum authorized term of imprisonment is more than five days but not more than thirty days; an infraction is any offense for which the maximum authorized term of imprisonment is not more than five days or for which no imprisonment is authorized. See 18 U.S.C. § 3559.

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

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Commentary

Application Notes:

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2. *Under subsection (b)(1), the last date of the offense of conviction is the controlling date for ex post facto purposes. For example, if the offense of conviction (i.e., the conduct charged in the count of the indictment or information of which the defendant was convicted) was determined by the court to have been committed between October 15, 1991 and October 28, 1991, the date of October 28, 1991 is the controlling date for ex post facto purposes. This is true even if the defendant's conduct relevant to the determination of the guideline range under §1B1.3 (Relevant Conduct) included an act that occurred on November 2, 1991 (after a revised Guidelines Manual took effect).*

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§2A1.1. First Degree Murder

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Commentary

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Application Notes:

1. *Applicability of Guideline.—This guideline applies in cases of premeditated killing. This guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference (e.g., a kidnapping in which death occurs, see §2A4.1(c)(1)), or in cases in which the offense level of a guideline is calculated using the underlying crime (e.g., murder in aid of racketeering, see §2E1.3(a)(2)).*

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§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

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Commentary

Application Notes:

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5. *Cross Reference.—Subsection (c)(1) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if (A) the victim had not attained the age of 12 years (see 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnapping (see 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnapping (see 18 U.S.C. § 2242(1)).*

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§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

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Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline:

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"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

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§2A3.5. Failure to Register as a Sex Offender

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Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline:

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"Sex offense" has the meaning given that term in 42 U.S.C. § 16911(5).

"Tier I offender", "Tier II offender", and "Tier III offender" have the meaning given those terms in 42 U.S.C. § 16911(2), (3) and (4), respectively the terms "tier I sex offender", "tier II sex offender", and "tier III sex offender", respectively, in 42 U.S.C. § 16911.

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§2B1.4. Insider Trading

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Commentary

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Application Note:

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

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

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Commentary

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Application Notes:

1. "Cultural Heritage Resource" Defined.—For purposes of this guideline, "cultural heritage resource" means any of the following:

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- (C) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. pt. 7; 36 C.F.R. pt. 296; 32 C.F.R. pt. 299229; 18 C.F.R. pt. 1312).

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- (E) A commemorative work. "Commemorative work" (A) has the meaning given that term in section 2(c) of Public Law 99-652 (40 U.S.C. § 1002(c)) 40 U.S.C. § 8902(a)(1); and (B) includes any national monument or national memorial.

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§2B3.1. Robbery

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Commentary

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Application Notes:

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2. Consistent with Application Note 1 (d)(ii) of §1B1.1 (Application Instructions), an object shall be considered to be a dangerous weapon for purposes of subsection (b)(2)(E) if (A) the object closely

resembles an instrument capable of inflicting death or serious bodily injury; or (B) the defendant used the object in a manner that created the impression that the object was an instrument capable of inflicting death or serious bodily injury (e.g., a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

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

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Commentary

Background:

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This guideline also applies to making prohibited payments to induce the award of subcontracts on federal projects for which the maximum term of imprisonment authorized was recently increased from two to ten years. 41 U.S.C. §§ 51, 53-54. Violations of 42 U.S.C. §§ 1395nn(b)(1) and (b)(2), involve the offer or acceptance of a payment to refer an individual for services or items paid for under the Medicare program. Similar provisions in 42 U.S.C. §§ 1396h(b)(1) and (b)(2) cover the offer or acceptance of a payment for referral to the Medicaid program. Violations of 42 U.S.C. § 1320a-7b involve the offer or acceptance of a payment to refer an individual for services or items paid for under a federal health care program (e.g., the Medicare and Medicaid programs).

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

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Background: *The statutes covered in this guideline prohibit altering or removing motor vehicle identification numbers, importing or exporting, or trafficking in motor vehicles or parts knowing that the identification numbers have been removed, altered, tampered with, or obliterated. Violations of 18 U.S.C. §§ 511 and 553(a)(2) carry a maximum of five years imprisonment. Violations of 18 U.S.C. §§ 553(a)(2) and 2321 carry a maximum of ten years imprisonment.*

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

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Commentary

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Application Notes:

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- 3. *Application of Subsection (b)(2).—“Loss”, for purposes of subsection (b)(2)(A), shall be determined in accordance with Application Note 3 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud). The value of “the benefit received or to be received” means the net value of such benefit. Examples: (A) A government employee, in return for a \$500 bribe, reduces the price of a piece of surplus property offered for sale by the government from \$10,000 to \$2,000; the value of the benefit received is \$8,000. (B) A \$150,000 contract on which \$20,000 profit was made was awarded in return for a bribe; the value of the benefit received is \$20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the preceding examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.*

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

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Commentary

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Application Notes:

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- 4. *Inapplicability of §3B1.3.—Do not apply the adjustment in §3B1.3 (Abuse of Position or Trust or Use of Special Skill).*

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

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(c) DRUG QUANTITY TABLE

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*Notes to Drug Quantity Table:

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- (H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(2530)), (ii) at least

two of the following: cannabiniol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

- (I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(2530)), (ii) at least two of the following: cannabiniol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

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

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Commentary

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Application Notes:

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- 6. *Subsection (b)(3) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 5124, 9603(b), and 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).*

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§2D1.12. Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy

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Commentary

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Application Notes:

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3. *Subsection (b)(2) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), or the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ ~~5124~~, 9603(b), and 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(2) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, any costs of environmental cleanup and harm to persons or property should be considered by the court in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release).*

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§2D1.14. Narco-Terrorism

(a) Base Offense Level:

- (1) The offense level from §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) applicable to the underlying offense, except that §2D1.1(a)(35)(A), (a)(35)(B), and (b)(11) shall not apply.

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§2D2.1. Unlawful Possession; Attempt or Conspiracy

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Commentary

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Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under ~~Section 6371 of the Anti-Drug Abuse Act of 1988~~ 21 U.S.C. § 844(a). Other cases for which enhanced penalties are

provided under Section 6371 of the Anti-Drug Abuse Act of 1988 21 U.S.C. § 844(a) (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b).

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§2G3.1. Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names

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Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline:

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"Distribution" means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of obscene matter. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

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§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

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Commentary

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Application Notes:

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2. Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.—For purposes of subsections (a)(1), (a)(3), and (a)(4), a "semiautomatic firearm that is capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device

capable of operating only with .22 caliber rim fire ammunition.

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- 10. Prior Felony Convictions.—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2), §4A1.2, comment. (n.3).

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§2K2.5. Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone

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Commentary

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Application Notes:

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- 2. "Federal court facility" includes the courtroom; judges' chambers; witness rooms; jury deliberation rooms; attorney conference rooms; prisoner holding cells; offices and parking facilities of the court clerks, the United States attorney, and the United States marshal; probation and parole offices; and adjoining corridors and parking facilities of any court of the United States. See 18 U.S.C. § 930(f)(g)(3).
- 3. "School zone" is defined at 18 U.S.C. § 922(q). A sentence of imprisonment under 18 U.S.C. § 922(q) must run consecutively to any sentence of imprisonment imposed for any other offense. See 18 U.S.C. § 924(a)(4). In order to comply with the statute, when the guideline range is based on the underlying offense, and the defendant is convicted both of the underlying offense and 18 U.S.C. § 922(q), the court should apportion the sentence between the count for the underlying offense and the count under 18 U.S.C. § 922(q). For example, if the guideline range is 30-37 months and the court determines "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense, plus 6 months under 18 U.S.C. § 922(q) would satisfy this requirement.

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§2L2.1. Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

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Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), 1325(b), (c), (d); 18 U.S.C. §§ 1015, 1028, 1425-1427, 1542, 1544, 1546. For additional statutory provision(s), see Appendix A (Statutory Index).

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§2L2.2. **Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport**

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Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (5), 1325(b), (c), (d); 18 U.S.C. §§ 911, 1015, 1028, 1423-1426, 1542-1544, 1546.

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§2M3.1. **Gathering or Transmitting National Defense Information to Aid a Foreign Government**

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Commentary

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Application Notes:

1. "Top secret information" is information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security." Executive Order 12356/12958 (50 U.S.C. § 435 note).

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§2M3.3. **Transmitting National Defense Information; Disclosure of Classified Cryptographic Information; Unauthorized Disclosure to a Foreign Government or a Communist Organization of Classified Information by Government Employee; Unauthorized Receipt of Classified Information**

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Commentary

Statutory Provisions: 18 U.S.C. §§ 793(d), (e), (g), 798; 50 U.S.C. § 783(b), (c).

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

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Commentary

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Application Notes:

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3. *A term of imprisonment imposed for a conviction under 50 U.S.C. § 421 shall be imposed consecutively to any other term of imprisonment. See 50 U.S.C. § 421(d).*

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§2M6.1. Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

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Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline:

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"Foreign terrorist organization" (A) means an organization that engages in terrorist activity that threatens the security of a national of the United States or the national security of the United States; and (B) includes an organization designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. § 1219). "National of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(22)).

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"Restricted person" has the meaning given that term in 18 U.S.C. § 175b(b)(2).

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§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

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Commentary

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Background: This section applies both to substantive violations of the statute governing the handling of pesticides and toxic and hazardous substances and to recordkeeping offenses. The first four specific offense characteristics provide enhancements when the offense involved a substantive violation. The last two fifth and sixth specific offense characteristics apply to recordkeeping offenses. Although other sections of the guidelines generally prescribe a base offense level of 6 for regulatory violations, §2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous and toxic substances and pesticides. A decrease of 2 levels is provided, however, for "simple recordkeeping or reporting violations" under §2Q1.2(b)(6).

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§2Q1.6. Hazardous or Injurious Devices on Federal Lands

(a) Base Offense Level (Apply the greatest):

- (1) If the intent was to violate the Controlled Substances Act, apply §2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy);

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

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Commentary

Application Notes:

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3. For purposes of subsection (b)(2), the quarantine requirements include those set forth in 9 C.F.R. Part 92, and 7 C.F.R., Subtitle B, Chapter III. State quarantine laws are included as well.

* * *

PART T - OFFENSES INVOLVING TAXATION

* * *

2. ALCOHOL AND TOBACCO TAXES

Introductory Commentary

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

* * *

§2X5.2. Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)

(a) Base Offense Level: 6

Commentary

Statutory Provisions: 18 U.S.C. §§ 1365(f), 1801; 42 U.S.C. §§ ~~1129(a)~~, 14133; 49 U.S.C. § 31310.

* * *

APPENDIX A - STATUTORY INDEX

		* * *
7 U.S.C. § 13(fe)	2B1.4	* * *
8 U.S.C. § 1325(bc)	2L2.1, 2L2.2	* * *
8 U.S.C. § 1325(cd)	2L2.1, 2L2.2	* * *
18 U.S.C. § 247	2H1.1	
18 U.S.C. § 248	2H1.1	* * *
18 U.S.C. § 1129(a)	2X5.2	* * *
42 U.S.C. § 1320a-7b	2B1.1, 2B4.1	
42 U.S.C. § 1320a-8b	2X5.1, 2X5.2	

50 U.S.C. § 783(b) 2M3.3 * * *

50 U.S.C. § 783(c) ————— 2M3.3 * * *

(B) Changes to Promote Stylistic Consistency

§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

* * *

Commentary

Application Notes:

* * *

2. *A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.*

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

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

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

* * *

§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement)

* * *

Commentary

Application Notes:

1. Application of Subsection Subdivision (1)(A).—

* * *

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

* * *

(b) Specific Offense Characteristics

- (1) If the offense involved (iA) serious bodily injury, increase by 4 levels; or (iiB) bodily injury, increase by 2 levels.

* * *

§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials

* * *

Commentary

Application Notes:

* * *

10. *An upward departure may be warranted in any of the following circumstances: (FA) the quantity of explosive materials significantly exceeded 1000 pounds; (ZB) the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives (e.g., plastic explosives); (3C) the defendant knowingly distributed explosive materials to a person under twenty-one years of age; or (4D) the offense posed a substantial risk of death or bodily injury to multiple individuals.*

* * *

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

* * *

Commentary

Application Notes:

* * *

11. *Upward Departure Provisions.—An upward departure may be warranted in any of the following circumstances: (FA) the number of firearms substantially exceeded 200; (ZB) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (4D) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).*

* * *

§3C1.1. Obstructing or Impeding the Administration of Justice

* * *

Commentary

Application Notes:

* * *

4. Examples of Covered Conduct.—*The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:*
- (aA) *threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;*
 - (bB) *committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;*
 - (cC) *producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;*
 - (dD) *destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;*
 - (eE) *escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;*
 - (fF) *providing materially false information to a judge or magistrate;*
 - (gG) *providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;*
 - (hH) *providing materially false information to a probation officer in respect to a presentence or other investigation for the court;*
 - (iI) *other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511);*
 - (jJ) *failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p);*

~~(K)~~ *threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.*

* * *

5.

* * *

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

~~(a)~~ *providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;*

~~(b)~~ *making false statements, not under oath, to law enforcement officers, unless Application Note 4(g) above applies;*

~~(c)~~ *providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;*

~~(d)~~ *avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight));*

~~(e)~~ *lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility).*

* * *

§3E1.1. Acceptance of Responsibility

* * *

Commentary

Application Notes:

1. *In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:*

~~(a)~~ *truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously*

contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;

- (bB) voluntary termination or withdrawal from criminal conduct or associations;*
- (cC) voluntary payment of restitution prior to adjudication of guilt;*
- (dD) voluntary surrender to authorities promptly after commission of the offense;*
- (eE) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;*
- (fF) voluntary resignation from the office or position held during the commission of the offense;*
- (gG) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and*
- (hH) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.*

* * *

§5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)

* * *

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A "semiautomatic firearm capable of accepting a large capacity magazine" means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A1) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B2) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

* * *

Unanimous