TABLE OF CONTENTS

21.00 AIDING AND ABETTING

21.01 STATUTORY LANGUAGE: 18 U.S.C. § 2

§ 2. ***Principals***

(a)Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b)Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21.02 GENERALLY

A person may be convicted of a crime even if he or she personally did not perform every act constituting the crime. The basis for this liability is Section 2 of Title 18, the accomplice statute. Under this statute, an individual may be indicted as a principal for the commission of a substantive offense and may be convicted by proof showing the individual to be an aider and abettor. *See* ***Nye & Nissen v. United States***, 336 U.S. 613, 618-20 (1949); ***United States v. Griffin***, 324 F.3d 330, 357 (5th Cir. 2003); ***United States v. Clifford***, 979 F.2d 896, 899 (1st Cir. 1992); ***United States v. Horton***, 847 F.2d 313, 321-22 (6th Cir. 1988); ***United States v. Martin***, 747 F.2d 1404, 1407 (11th Cir. 1984); ***United States v. Sannicandro***, 434 F.2d 321, 323-24 (9th Cir. 1970).

Aiding and abetting is not an independent crime. ***United States v. Roan Eagle***, 867 F.2d 436, 445 (8th Cir. 1989); ***United States v. Causey***, 835 F.2d 1289, 1291 (9th Cir. 1987); ***United States v. Cook***, 745 F.2d 1311, 1315 (10th Cir. 1984); ***Martin***, 747 F.2d at 1407. One cannot aid or abet oneself. Some underlying criminal offense must be pled and proved in order for liability to attach under Section 2. ***Roan Eagle***, 867 F.2d at 445; ***Martin***, 747 F.2d at 1407.

Section 2 covers two types of aiding and abetting. ***Causey***, 835 F.2d at 1291-92. Subsection 2(a) of the statute is aimed at traditional aiding and abetting, which requires

proof of an underlying substantive offense. ***Id***. at 1291; ***United States v. Motley***, 940 F.2d 1079, 1082 (7th Cir. 1991). Under subsection 2(a), the government must prove that someone committed a crime and that another person aided and abetted in the commission of that crime. ***Causey***, 835 F.2d at 1291-92. In effect, the second person is made "a coprincipal with the person who takes the final step and violates a criminal statute." ***Id***. at 1292; ***United States v. Smith***, 891 F.2d 703, 711 (9th Cir. 1989).

Under subsection 2(b), frequently referred to as "causing," the government is not required to prove that someone other than the defendant was guilty of a substantive offense. ***Causey***, 835 F.2d at 1292. This subsection is aimed at the person "who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent and . . . is innocent of the substantive crime charged." ***United States v. Tobon-Builes***, 706 F.2d 1092, 1099 (11th Cir. 1983).

Under subsection 2(b), it is irrelevant whether the agent who committed the criminal act is innocent or acquitted, ***Motley***, 940 F.2d at 1081; ***United States v. Ruffin***, 613 F.2d 408, 412 (2d Cir. 1979); whether the agent lacked a criminal intent to commit the offense, ***Causey***, 835 F.2d at 1292; or whether the accused lacked the capacity to commit the criminal offense without the agent's involvement, ***Causey***, 835 F.2d at 1292***;*** ***Smith***, 891 F.2d at 711.

21.03 ELEMENTS

To establish a violation of 18 U.S.C. § 2, the government must establish the following elements beyond a reasonable doubt:

1.The defendant associated with the criminal venture;

2.The defendant knowingly participated in the venture; and

3.The defendant sought by his or her actions to make the venture succeed.

Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); ***United v. McDowell***, 498 F.3d 308, 313 (5th Cir. 2007); ***United States v. Sobrilski***, 127 F.3d 669, 677 (8th Cir. 1997); ***United States v. Yost***, 24 F.3d 99, 104 (10th Cir. 1994); ***United States v. Clifford***, 979 F.2d 896, 899 (1st Cir. 1992); ***United States v. Singh***, 922 F.2d 1169, 1173 (5th Cir.

1991); ***United States v. Perez***, 922 F.2d 782, 785 (11th Cir. 1991); ***United States v. Labat***, 905 F.2d 18, 23 (2d Cir. 1990); ***United States v. Lanier***, 838 F.2d 281, 284 (8th Cir. 1988); ***United States v. Torres***, 809 F.2d 429, 433 (7th Cir. 1987); ***United States v. Weaver***, 594 F.2d 1272, 1275 (9th Cir. 1979).

To establish a violation of 18 U.S.C. § 2, Third Circuit precedent requires that the government establish two elements beyond a reasonable doubt: "(1) that the substantive crime has been committed; and (2) that the defendant charged with aiding and abetting knew of the commission of the substantive offense and acted with intent to facilitate it." ***United States v. Huet***, 665 F.3d 588, 596 (3d Cir. 2012); ***United States v. Petersen***, 622 F.3d 196, 208 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 2443 (2011). Similarly, the Sixth Circuit determined that in order to establish a violation of § 2 "the essential elements of aiding and abetting are (1) an act by the defendant that contributes to the commission of the crime, and (2) an intention to aid in the commission of the crime." ***United States v. Graham***, 622 F.3d 445, 450 (6th Cir. 2010) According to the Graham court "to prove that [the defendant] participated in the venture as something [] he wished to bring about and sought to make succeed." ***Id.*** (citations and punctuation omitted).

Criminal intent may be inferred from surrounding facts and circumstances. ***United States v. Campa***, 679 F.2d 1006, 1010-11 (1st Cir. 1982). The aiding and abetting statute is broader than a conspiracy charge because “it states a rule of criminal responsibility for acts which one *assists* another in performing.” ***Nye & Nissen***, 336 U.S. at 620 (emphasis added). A crime is aided and abetted at the moment one “consciously shares in any criminal act” with a principal regardless of whether there is a conspiracy. ***Id***.

21.03[1] Need for Underlying Offense

In order to sustain a conviction under subsection 2(a), the government must present evidence showing that a principal committed an underlying offense and that the principal was aided and abetted by the accused. ***United States v. Elusma***, 849 F.2d 76, 78 (2d Cir. 1988); ***United States v. Martin***, 747 F.2d 1404, 1407-08 (11th Cir. 1984). The government is not required, however, to show that the principal was indicted, convicted or even identified. ***United States v. Powell***, 806 F.2d 1421, 1424 (9th Cir. 1986); ***Ray v. United States***, 588 F.2d 601, 603-04 (8th Cir. 1978). Moreover, the fact that the principal may have been acquitted of the underlying offense does not bar prosecution of the aider

and abettor for the same offense. ***Standefer v. United States***, 447 U.S. 10, 14 (1980); ***Ray***, 588 F.2d at 603-04.

Under subsection 2(b), the government does not have to establish the guilt of the actor, but only that of the accused who caused the actor to commit the offense. ***United States v. Motley***, 940 F.2d 1079, 1082 (7th Cir. 1991). The government need only show that the aider and abettor caused the act to be performed. ***Id.***; ***United States v. Smith***, 891 F.2d 703, 711 (9th Cir. 1989).

21.03[2] Association Defined

Association with the criminal venture has been interpreted to mean that the defendant shared the criminal intent of the principal. *See* ***United States v. Spinney***, 65 F.3d 231, 233-36 (1st Cir. 1995) (circumstantial evidence, including evidence of 73 phone calls between defendant and principal in 19-day period preceding bank robbery, evidence that principal picked defendant up on day of robbery and then proceeded to "criss-cross the streets around" bank principal robbed, evidence of coordinated traffic maneuvers between defendant and principal later that same day, and evidence that defendant and principal abandoned their vehicles near each other, was sufficient to support jury finding that defendant possessed criminal intent); ***United States v. Moore***, 936 F.2d 1508, 1527 (7th Cir. 1991); ***United States v. Roan Eagle***, 867 F.2d 436, 445 n.15 (8th Cir. 1989); ***United States v. Winstead***, 708 F.2d 925, 927 (4th Cir. 1983).

In prosecutions under subsection 2(a), this means that the government must show that (1) the perpetrator had the requisite criminal intent to commit the underlying offense and (2) the aider and abettor had the same requisite intent. ***Perez***, 922 F.2d at 785; ***Labat***, 905 F.2d at 23; ***United States v. Lindell***, 881 F.2d 1313, 1323 (5th Cir. 1989); ***United States v. Gaskins***, 849 F.2d 454, 459 (9th Cir. 1988); ***United States v. Lard***, 734 F.2d 1290, 1298 (8th Cir. 1984); ***United States v. Sanborn***, 563 F.2d 488, 491 (1st Cir. 1977); *see also* ***United States v. Bancalari***, 110 F.3d 1425, 1430 (9th Cir. 1997) (jury must find that defendant knowingly and intentionally aided and abetted the principals in each essential element of the crime).

Under subsection 2(b), the government need only show that the one causing the commission of the prohibited act had the requisite criminal intent to commit the underlying offense. The intent of the actor who committed the criminal act is irrelevant.

United States v. Johnson, 132 F.3d 1279, 1285 (9th Cir. 1997); ***United States v. Rucker***, 586 F.2d 899, 905 (2d Cir. 1978).

The government may use circumstantial evidence to establish the aider and abettor's intent. ***Spinney***, 65 F.3d at 235-36; ***United States v. Castro***, 887 F.2d 988, 995-96 (9th Cir. 1989). Further, the government is not required to show that the aider and abettor knew every detail of the underlying crime. ***Perez***, 922 F.2d at 785; ***Campbell v. Fair***, 838 F.2d 1, 4 (1st Cir. 1988); ***United States v. Smith***, 832 F.2d 1167, 1170 (9th Cir. 1987); ***Torres***, 809 F.2d at 433; ***Lard***, 734 F.2d at 1298; ***United States v. Sampol***, 636 F.2d 621, 676 (D.C. Cir. 1980).

21.03[3] Participation and Success of Venture

In order to aid and abet, one must do more than merely be present at the scene of a crime and have knowledge of its commission. ***United States v. Ortiz***, 447 F.3d 28, 32-33 (1st Cir. 2006); ***United States v. Morrow***, 977 F.2d 222, 231 (6th Cir. 1992) (*en banc*); ***United States v. Esparsen***, 930 F.2d 1461, 1470 (10th Cir. 1991); ***Lindell***, 881 F.2d at 1323; ***Lard***, 734 F.2d at 1298; ***United States v. Burrell***, 496 F.2d 609, 610 (3d Cir. 1974). The element of participation requires the government to show some active participation or encouragement, or some affirmative act designed to further the crime. ***Morrow***, 977 F.2d at 231; ***Perez***, 922 F.2d at 785. Prosecutors should be aware that in a number of cases, courts of appeals have reversed aiding and abetting convictions after determining that the facts adduced at trial did not support a finding that the defendant was a participant in the offense. For example, in ***Burrell***, a transportation of stolen goods case, the Third Circuit reversed one defendant's aiding and abetting conviction after concluding that, viewed in the light most favorable to the verdict, the evidence established only that the defendant had traveled with others engaged in the transport of stolen goods, that the defendant and the stolen goods had arrived at a certain foreign location on the same date, and that, on the date of arrival, further transport arrangements were made for the stolen goods. ***Id.*** at 614-15. The court noted that although there was evidence that the defendant had been present during discussions relating to the sale of the goods, there was no evidence to suggest whether the defendant knew that the goods were stolen or from whom they were stolen. ***Id.*** at 615; *cf.* ***Spinney***, 65 F.3d at 233-36 (affirming conviction as aider and abettor on circumstantial evidence of defendant's involvement in bank robbery).

The "participation" and "seeking success of the venture" elements may be established by circumstantial evidence. *See* ***United States v. Leos-Quijada***, 107 F.3d 786, 794 (10th Cir. 1997); ***Smith***, 832 F.2d at 1170. Further, the evidence may be of "relatively slight moment." ***United States v. Issac-Sigala***, 448 F.3d 1206, 1210 (10th Cir. 2006) (internal quotation omitted); ***United States v. Folks***, 236 F.3d 384, 389 (7th Cir. 2001); ***Burrell***, 496 F.2d at 610; ***United States v. King***, 373 F.2d 813, 815 (2d Cir. 1967). While mere presence and association alone are insufficient to sustain a conviction under Section 2, they are factors that may be considered along with other circumstantial evidence establishing participation. ***United States v. Ivey***, 915 F.2d 380, 384 (8th Cir. 1990); ***Lindell***, 881 F.2d at 1323.

For example, in ***King***, the Second Circuit explained that, while merely providing company to a person engaged in criminal conduct is not sufficient to support an aiding and abetting charge, "'evidence of an act of relatively slight moment may warrant a jury's finding participation in a crime.'" 373 F.2d at 815 (quoting ***United States v. Garguilo***, 310 F.2d 249, 253 (2d Cir. 1962)). The court in ***King*** affirmed the defendant's aiding and abetting conviction for his participation in carrying on the business of a non-bonded distillery based on evidence that the defendant had acted as lookout, assisted in handling the distilling equipment, and fled from the scene when arresting officers arrived. ***Id***. In a drug distribution case, the First Circuit affirmed the aiding and abetting conviction of a defendant who had gathered with others at a warehouse, traveled to another town in a refrigeration truck together with the others who had gathered, was present on the truck when there was talk of unloading marijuana, and spent the night waiting to unload a vessel that never arrived. ***United States v. Clifford***, 979 F.2d 896, 898-99 (1st Cir. 1992). The court characterized those acts as "secretive and suspicious" and determined that, from those acts alone, the jury could reasonably infer that the defendant had knowingly participated in the criminal venture to distribute drugs. ***Id***. at 899. Finally, "[w]hile innocent association with those involved in illegal activities can never form the sole basis for a conviction . . ., the existence of a close relationship between a defendant and others involved in criminal activity can, as a part of a larger package of proof, assist in supporting an inference of involvement in illicit activity." ***United States v. Ortiz***, 966 F.2d 707, 713 (1st Cir. 1992) (citations omitted) (describing brother-in-law relationship between principal and defendant convicted of aiding and abetting drug trafficking).

21.04 PLEADING REQUIREMENTS

Because Section 2 does not define a separate offense, the defendant must be charged with a substantive offense as to which the he or she was an aider and abettor. ***Londono-Gomez v. INS***, 699 F.2d 475, 477 (9th Cir. 1983); ***United States v. Cowart***, 595 F.2d 1023, 1031 n.10 (11th Cir. 1979); ***United States v. Campbell***, 426 F.2d 547, 553 (2d Cir. 1970). It is well settled that Section 2 applies to all federal criminal offenses except those as to which Congress clearly provides to the contrary. *See* ***United States v. Hill***, 55 F.3d 1197, 1200 (6th Cir.1995); ***United States v. Frorup***, 963 F.2d 41, 42 n.1 (3d Cir. 1992); ***United States v. Pino-Perez***, 870 F.2d 1230, 1233 (7th Cir. 1989); ***United States v. Sopczak***, 742 F.2d 1119, 1121 (8th Cir. 1984); ***United States v. Jones***, 678 F.2d 102, 105 (9th Cir. 1982); ***Breeze v. United States***, 398 F.2d 178, 192 (10th Cir. 1968); *see also* ***United States v. Southard***, 700 F.2d 1, 19-20 (1st Cir. 1983) (listing exceptions -- *e.g.*, a victim whose conduct significantly assisted in the commission of the crime, such as a person who pays extortion).

While it is preferable that an indictment charge a violation of Section 2 if the government intends to proceed on a theory of aiding and abetting, Section 2 need not be specifically alleged. ***Frorup***, 963 F.2d at 42 n.1; ***United States v. Vaughn***, 797 F.2d 1485, 1491 n.1 (9th Cir. 1986); ***United States v. Cook***, 745 F.2d 1311, 1315 (10th Cir. 1984); ***United States v. Tobon-Builes***, 706 F.2d 1092, 1099 n.3 (11th Cir. 1983); ***United States v. Beardslee***, 609 F.2d 914, 919 (8th Cir. 1979); ***United States v. Tucker***, 552 F.2d 202, 204 (7th Cir. 1977); ***United States v. McCambridge***, 551 F.2d 865, 871 (1st Cir. 1977) (collecting cases). All indictments for substantive offenses must be read as if the alternative provided by Section 2 were embodied in the indictment. ***United States v. Sabatino***, 943 F.2d 94, 99-100 (1st Cir. 1991); ***United States v. Gaskins***, 849 F.2d 454, 459 (9th Cir. 1988); ***United States v. Catena***, 500 F.2d 1319, 1323 (3d Cir. 1974); ***United States v. Bullock***, 451 F.2d 884, 888 (11th Cir. 1971).

One may be convicted of aiding and abetting even though it is not alleged in the indictment, provided that (1) the jury is properly instructed on the aiding and abetting charge and (2) the defendant had sufficient notice of the aiding and abetting charge and was not unfairly surprised. ***United States v. Martin***, 747 F.2d 1404, 1407 (11th Cir. 1984); ***Tucker***, 552 F.2d at 204; *see also* ***United States v. Gordon***, 641 F.2d 1281, 1284 (9th Cir. 1981) (omission of statutory citation from indictment not fatal to indictment if defendant is not misled); Fed. R. Crim. P. 7(c)(3) ("Unless the defendant was misled and

thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction").

If an indictment charges Section 2, it is not necessary for the indictment to state particulars such as who, when, how, or in what manner the defendant aided and abetted another in the commission of a substantive offense. *See* ***United States v. Garrison***, 527 F.2d 998, 999 (8th Cir. 1975).

21.05 APPLICATION IN TAX CASES

21.05[1] Aiding in Preparation/Filing of False Return: 26 U.S.C. § 7206(2)

Section 7206(2) of Title 26 makes it a felony to

> [w]illfully aid[] or assist[] in . . . the preparation or presentation under . . . the internal revenue laws . . . of a return, . . . which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return . . . .

This statute is known as the Internal Revenue Code's aiding and abetting provision, and applies not only to tax return preparers but to anyone who causes or aids in the filing of a false return. ***United States v. Sassak***, 881 F.2d 276, 277-78 (6th Cir. 1989); ***United States v. Hooks***, 848 F.2d 785, 789 (7th Cir. 1988); ***United States v. Williams***, 644 F.2d 696, 701 (8th Cir. 1981), *superseded on other grounds by statute*, Pub. L. 98-369, § 159(a)(1), 98 Stat. 696, *as recognized in* ***United States v. Brooks***, 174 F.3d 950 (8th Cir. 1999). Reference should be made to the discussion of this statute in the section of this Manual dealing with section 7206(2). *See* Section 13, *supra*.

In prosecutions under 18 U.S.C. 2(a), the government must prove that a criminally responsible person committed an underlying offense. Internal Revenue Code Section 7206(2), however, does not require proof that the assisted taxpayer was criminally responsible. *See* ***United States v. Griffin***, 814 F.2d 806, 811 (1st Cir. 1987); ***United States v. Motley***, 940 F.2d 1079, 1082-83 (7th Cir. 1991) (language of Section 7206(2) makes it clear that government does not have to show that the taxpayers had guilty knowledge). Consequently, in false return cases in which the taxpayer does not appear to be criminally culpable, 26 U.S.C. § 7206(2), rather than another offense and 18 U.S.C. § 2(a), should be charged.

21.05[2] Filing False Claim for Refund: 18 U.S.C. § 287

Section 287 of Title 18 makes it a felony to "make[] or present[] . . . any claim upon or against the United States, . . . knowing such claim to be false, fictitious or fraudulent." 18 U.S.C. § 287. Sections 287 and 2(b) are commonly used in false claim for refund schemes.

For example, in ***United States v. Causey***, 835 F.2d 1289, 1290 (9th Cir. 1987), the Ninth Circuit upheld a defendant's convictions under 18 U.S.C. §§ 287 and 2 for causing 18 individuals to file false tax returns claiming refunds. The defendant argued on appeal that the evidence was insufficient to support the convictions because the government had failed to establish that the persons actually submitting the false claims knew them to be false. ***Id***. at 1291. Distinguishing between 18 U.S.C. § 2(a) and 18 U.S.C. § 2(b), the Ninth Circuit concluded that under subsection 2(b), a person may be guilty of causing a false claim to be presented to the United States even though he or she uses an innocent intermediary to actually pass on the claim to the United States. ***Id***. at 1292.

Consequently, in prosecutions for false refund claims, it is recommended that prosecutors charge Sections 287 and 2(b).

21.06 VENUE

Venue in an aiding and abetting charge is proper both in the district in which the underlying offense took place and in the district where the accessorial acts took place. ***United States v. Delia***, 944 F.2d 1010, 1013-14 (2d Cir. 1991); ***United States v. Griffin***, 814 F.2d 806, 810 (1st Cir. 1987); ***United States v. Winship***, 724 F.2d 1116, 1125 (5th Cir. 1984); ***United States v. Buttorff***, 572 F.2d 619, 627 (8th Cir. 1978); ***United States v. Kilpatrick***, 458 F.2d 864, 868 (7th Cir. 1972).

For a general discussion of venue in criminal tax cases, *see* Section 6.00, *supra*.

21.07 STATUTE OF LIMITATIONS

The statute of limitations for the offense of aiding and abetting is the statute of limitations applicable to the substantive offense. ***United States v. Musacchia***, 900 F.2d 493, 499 (2d Cir. 1990), *vacated in part on other grounds*, 955 F.2d 3, 4 (2d Cir. 1991).

For a general discussion of statute of limitations in criminal tax cases, *see* Section 7.00, *supra*.