

## APPENDIX C:

### AMENDMENTS TO THE SENTENCING GUIDELINES MANUAL OF OCTOBER 1987

Pursuant to the Emergency Guidelines Promulgation Authority provided in section 21 of the Sentencing Act of 1987 (Pub. L. 100-182, Dec. 7, 1987), the Sentencing Commission has:

- 1) re-promulgated, effective January 15, 1988, the revisions in official commentary, policy statement revision, and correction of typographical errors in certain guidelines which were previously adopted by the Commission and issued in the Guidelines Manual (October 1987);
- 2) promulgated, effective January 15, 1988, additional temporary amendments to previously issued sentencing guidelines and official commentary; and
- 3) promulgated, effective June 15, 1988, additional temporary amendments to previously issued sentencing guidelines, policy statements, and official commentary.

The format under which the temporary amendments are presented in this Appendix is designed to facilitate a comparison between previously existing and amended provisions, in the event it becomes necessary to reference the former guideline, policy statement, or commentary language.

#### **§1B1.1. Application Instructions**

1. Section 1B1.1(b) is amended by inserting "in the order listed" immediately following "Chapter Two".

Section 1B1.1(d) is amended by deleting "one" and "three" and inserting in lieu thereof "(a)" and "(c)" respectively.

The Commentary to §1B1.1 captioned "Application Notes" is amended by inserting, as an additional note, the following:

- "4. The offense level adjustments from more than one specific offense characteristic within an offense guideline are cumulative (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. E.g., in §2A2.2(b)(3), pertaining to degree of bodily injury, the subsection that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subsections (A), (B), and (C)) are not added together."

The purposes of this amendment are to correct a clerical error and to clarify the operation of the guidelines by consolidating the former §1B1.4 (Determining the Offense Level) with this section. The effective date of this amendment is January 15, 1988.

**§1B1.2. Applicable Guidelines**

2. Section 1B1.2(a) is amended by deleting "guideline" the first time it appears and inserting in lieu thereof "offense guideline section".

Section 1B1.2(a) is amended by inserting, as an additional sentence at the end of the subsection, the following:

"Similarly, stipulations to additional offenses are treated as if the defendant had been convicted of separate counts charging those offenses."

Section 1B1.2(b) is amended by deleting:

"The court shall determine any applicable specific offense characteristic, victim-related adjustment, or departure from the guidelines attributable to offense conduct, according to the principles in §1B1.3 (Relevant Conduct).",

and inserting in lieu thereof:

"After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct)."

The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 2 by deleting:

"any applicable victim-related adjustment from Chapter Three, Part A, and any guideline departures attributable to the offense conduct from Chapter Five, Part K, using a 'relevant conduct' standard, as that standard is defined in §1B1.3.",

and inserting in lieu thereof:

"and any other applicable sentencing factors pursuant to the relevant conduct definition in §1B1.3."

The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 3 by deleting:

"In such instances, the court should consider all conduct, circumstances, and injury relevant to the offense (as well as all relevant offender characteristics). See §1B1.3 (Relevant Conduct).",

and inserting in lieu thereof:

"See §§1B1.3 (Relevant Conduct) and 1B1.4 (Information to be Used in Imposing Sentence)."

The purposes of this amendment are to correct a clerical error and to clarify the operation of the guidelines. The effective date of this amendment is January 15, 1988.

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

3. Section 1B1.3 and the Commentary thereto is amended by deleting the entire text thereof, including the title, as follows:

**"Relevant Conduct**

To determine the seriousness of the offense conduct, all conduct, circumstances, and injuries relevant to the offense of conviction shall be taken into account.

- (a) Unless otherwise specified under the guidelines, conduct and circumstances relevant to the offense of conviction means:

acts or omissions committed or aided and abetted by the defendant, or by a person for whose conduct the defendant is legally accountable, that (1) are part of the same course of conduct, or a common scheme or plan, as the offense of conviction, or (2) are relevant to the defendant's state of mind or motive in committing the offense of conviction, or (3) indicate the defendant's degree of dependence upon criminal activity for a livelihood.

- (b) Injury relevant to the offense of conviction means harm which is caused intentionally, recklessly or by criminal negligence in the course of conduct relevant to the offense of conviction.

Commentary

Application Note:

1. In sentencing, the court should consider all relevant offense and offender characteristics. For purposes of assessing offense conduct, the relevant conduct and circumstances of the offense of conviction are as follows:
- a. conduct directed toward preparation for or commission of the offense of conviction, and efforts to avoid detection and responsibility for the offense of conviction;
  - b. conduct indicating that the offense of conviction was to some degree part of a broader purpose, scheme, or plan;
  - c. conduct that is relevant to the state of mind or motive of the defendant in committing the crime;
  - d. conduct that is relevant to the defendant's involvement in crime as a livelihood.

The first three criteria are derived from two sources, Rule 8(a) of the Federal Rules of Criminal Procedure, governing joinder of similar or related offenses, and Rule 404(b) of the Federal Rules of Evidence, permitting admission of evidence of other crimes to establish motive, intent, plan, and common scheme. These rules provide standards that govern consideration at trial of crimes "of the same or similar character," and utilize concepts and terminology familiar to judges, prosecutors, and defenders. The governing standard should be liberally

construed in favor of considering information generally appropriate to sentencing. When other crimes are inadmissible under the Rule 404(b) standard, such crimes may not be "relevant to the offense of conviction" under the criteria that determine this question for purposes of Chapter Two; such crimes would, however, be considered in determining the relevant offender characteristics to the extent authorized by Chapter Three (Adjustments), and Chapter Four (Criminal History and Criminal Livelihood) and Chapter Five, Part H (Specific Offender Characteristics). This construction is consistent with the existing rule that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense . . . for the purpose of imposing an appropriate sentence," 18 U.S.C. § 3577, so long as the information "has sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F. Supp. 751 (D. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983).

The last of these criteria is intended to ensure that a judge may consider at sentencing, information that, although not specifically within other criteria of relevance, indicates that the defendant engages in crime for a living. Inclusion of this information in sentencing considerations is consistent with 28 U.S.C. § 994(d)(11).",

and inserting in lieu thereof the following:

**"Relevant Conduct (Factors that Determine the Guideline Range)"**

The conduct that is relevant to determining the applicable guideline range includes that set forth below.

- (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
- (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
  - (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
  - (3) all harm or risk of harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk that was the object of such acts or omissions;

- (4) the defendant's state of mind, intent, motive and purpose in committing the offense; and
  - (5) any other information specified in the applicable guideline.
- (b) Chapter Four (Criminal History and Criminal Livelihood). To determine the criminal history category and the applicability of the career offender and criminal livelihood guidelines, the court shall consider all conduct relevant to a determination of the factors enumerated in the respective guidelines in Chapter Four.

#### Commentary

#### Application Notes:

1. Conduct "for which the defendant is otherwise accountable," as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. 18 U.S.C. § 2.) If the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant. If the conviction is for solicitation, misprision or accessory after the fact, it includes all conduct relevant to determining the offense level for the underlying offense that was known to or reasonably should have been known by the defendant. See generally §§2X1.1-2X4.1.
2. "Such acts and omissions," as used in subsection (a)(2), refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable. This subsection applies to offenses of types for which convictions on multiple counts would be grouped together pursuant to §3D1.2(d); multiple convictions are not required.
3. "Harm:" includes bodily injury, monetary loss, property damage and any resulting harm.
4. If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. See, e.g., §2K1.4 (Arson); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (e.g., §2A2.2 (Assault); §2B3.1 (Robbery)) or to actual, attempted or intended harm (e.g., §2F1.1 (Fraud); §2X1.1 (Attempt, Solicitation or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range. See generally §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with §2X1.1 (Attempt, Solicitation or Conspiracy) and the applicable offense guideline.

5. 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. E.g., in §2K2.3, a base offense level of 12 is used "if convicted under 26 U.S.C. § 5861." 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. Examples of this usage are found in §2K1.3(b)(4) ("if the defendant was a person prohibited from receiving explosives under 18 U.S.C. § 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under 18 U.S.C. § 842(i), increase by 10 levels"); and §2A3.4(b)(2) ("if the abusive contact was accomplished as defined in 18 U.S.C. § 2242, increase by 4 levels").

Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by §1B1.2(a)). No such rule of construction is necessary with respect to Chapter Four because the guidelines in that Chapter are explicit as to the specific factors to be considered.

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of §3D1.2(d), which provides for grouping together (i.e., treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they are part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would not be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (i.e., to which §3D1.2(d) applies) often

involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when §3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent "double counting" of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to §3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.

Subsection (a)(4) requires consideration of the defendant's "state of mind, intent, motive or purpose in committing the offense." The defendant's state of mind is an element of the offense that may constitute a specific offense characteristic. See, e.g., §2A1.4 (Involuntary Manslaughter) (distinction made between recklessness and criminal negligence). The guidelines also incorporate broader notions of intent or purpose that are not elements of the offense, e.g., whether the offense was committed for profit, or for the purpose of facilitating a more serious offense. Accordingly, such factors must be considered in determining the applicable guideline range."

The purpose of this amendment is to clarify the guideline. The amended language restates the intent of §1B1.3 as originally promulgated. The effective date of this amendment is January 15, 1988.

**§1B1.4. Determining the Offense Level (Retitled Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines))**

4. Section 1B1.4 and the Commentary thereto is amended by deleting the entire text thereof, including the title, as follows:

**"Determining the Offense Level**

In determining the offense level:

- (a) determine the base offense level from Chapter Two;
- (b) make any applicable adjustments for specific offense characteristics from Chapter Two in the order listed;

- (c) make any applicable adjustments from Chapter Three;
- (d) make any applicable adjustments from Chapter Four, Part B (Career Offenders and Criminal Livelihood).

Commentary

Application Notes:

1. 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. E.g., in §2K2.3, a base offense level of 12 is used "if convicted under 26 U.S.C. § 5861." 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. Examples of this usage are found in §2K1.3(b)(4) ("if the defendant was a person prohibited from receiving explosives under 18 U.S.C. § 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under 18 U.S.C. § 842(i), increase by 10 levels"); and §2A3.4(b)(2) ("if the abusive contact was accomplished as defined in 18 U.S.C. § 2242, increase by 4 levels"). In such cases, the particular circumstances described are to be evaluated under the "relevant conduct" standard of §1B1.3.
2. Once the appropriate base offense level is determined, all specific offense characteristics are to be applied in the order listed.
3. The offense level adjustments from more than one specific offense characteristic within an offense guideline are cumulative (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. E.g., in §2A2.2(b)(3), pertaining to degree of bodily injury, the subsection that best describes the level of bodily injury is used; the adjustments from different degrees of bodily injury (subsections (A), (B) and (C)) are not added together).
4. The adjustments in Chapter Three that may apply include Part A (Victim-Related Adjustments), Part B (Role in the Offense), Part C (Obstruction), Part D (Multiple Counts), and Part E (Acceptance of Responsibility).",

and inserting in lieu thereof the following:

**"Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)**

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.



## Commentary

**Background:** This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3557. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range. In addition, information that does not enter into the determination of the applicable guideline sentencing range may be considered in determining whether and to what extent to depart from the guidelines. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. See, e.g., Chapter Five, Part H (Specific Offender Characteristics)."

The purposes of this amendment are to remove material made redundant by the reorganization of this Part and to replace it with material that clarifies the operation of the guidelines. The material formerly in this section is now covered by §1B1.1. **The effective date of this amendment is January 15, 1988.**

### **§1B1.8. Use of Certain Information**

5. Chapter One, Part B, is amended by inserting the following additional guideline and accompanying commentary:

#### **"§1B1.8. Use of Certain Information**

- (a) Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and the government agrees that self-incriminating information so provided will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.
- (b) The provisions of subsection (a) shall not be applied to restrict the use of information:
  - (1) known to the government prior to entering into the cooperation agreement;
  - (2) in a prosecution for perjury or giving a false statement; or
  - (3) in the event there is a breach of the cooperation agreement.

## Commentary

### Application Notes:

1. This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guideline range. Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement. Although this guideline, consistent with the general structure of these guidelines, affects only the determination of the guideline range, the policy of the Commission is that where a defendant as a result of a cooperation agreement with the government to assist in the investigation or prosecution of other offenders reveals information that implicates him in unlawful conduct not already known to the government, such defendant should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose.
2. The Commission does not intend this guideline to interfere with determining adjustments under Chapter Four, Part A (Criminal History) or §4B1.1 (Career Offender) (e.g., information concerning the defendant's prior convictions). The Probation Service generally will secure information relevant to the defendant's criminal history independent of information the defendant provides as part of his cooperation agreement.
3. On occasion the defendant will provide incriminating information to the government during plea negotiation sessions before a cooperation agreement has been reached. In the event no agreement is reached, use of such information is governed by the provisions of Rule 11 of the Federal Rules of Criminal Procedure and Rule 408 of the Rules of Evidence.
4. As with the statutory provisions governing use immunity, 18 U.S.C. § 6002, this guideline does not apply to information used against the defendant in a prosecution for perjury, giving a false statement, or in the event the defendant otherwise fails to comply with the cooperation agreement."

The purpose of this amendment is to facilitate cooperation agreements by ensuring that certain information revealed by a defendant, as part of an agreement to cooperate with the government by providing information concerning unlawful activities of others, will not be used to increase the guideline sentence. The effective date of this amendment is **June 15, 1988.**

**§1B1.9. Petty Offenses**

6. Chapter One, Part B, is amended by inserting the following additional guideline and accompanying commentary:

**"§1B1.9. Petty Offenses**

The sentencing guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction (petty offense).

Commentary

Application Notes:

1. Notwithstanding any other provision of the guidelines, the court may impose any sentence authorized by statute for each count that is a petty offense. A petty offense is any offense for which the maximum sentence that may be imposed does not exceed six months' imprisonment.
2. The guidelines for sentencing on multiple counts do not apply to counts that are petty offenses. Sentences for petty offenses may be consecutive to or concurrent with sentences imposed on other counts. In imposing sentence, the court should, however, consider the relationship between the petty offense and any other offenses of which the defendant is convicted.
3. All other provisions of the guidelines should be disregarded to the extent that they purport to cover petty offenses.

Background: For the sake of judicial economy, the Commission has voted to adopt a temporary amendment to exempt all petty offenses from the coverage of the guidelines. Consequently, to the extent that some published guidelines may appear to cover petty offenses, they should be disregarded even if they appear in the Statutory Index."

The purpose of this guideline is to delete coverage of petty offenses. **The effective date of this amendment is June 15, 1988.**

**§2B1.1. Larceny, Embezzlement, and Other Forms of Theft**

7. Section 2B1.1(b)(1) is amended by deleting "value of the property taken" and inserting in lieu thereof "loss".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2 by deleting:

"Loss is to be based upon replacement cost to the victim or market value of the property, whichever is greater.",

and inserting in lieu thereof:

"Loss' means the value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. When property is damaged the loss is the cost of repairs, not to exceed the loss had the property been destroyed. In cases of partially completed conduct, the loss is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy Not Covered by a Specific Guideline). E.g., in the case of the theft of a government check or money order, loss refers to the loss that would have occurred if the check or money order had been cashed. Similarly, if a defendant is apprehended in the process of taking a vehicle, the loss refers to the value of the vehicle even if the vehicle is recovered immediately."

The purpose of this amendment is to clarify the guideline in respect to the determination of loss. **The effective date of this amendment is June 15, 1988.**

**§2B1.2. Receiving Stolen Property**

8. Section 2B1.2 is amended by transposing the texts of subsections (b)(2) and (3).

The Commentary to §2B1.2 captioned "Application Notes" is amended by deleting:

"3. For consistency with §2B1.1, it is the Commission's intent that specific offense characteristic (b)(3) be applied before (b)(2).",

and by renumbering Note 4 as Note 3.

The purpose of this amendment is to correct a clerical error in the guideline. Correction of the error makes the deleted Commentary unnecessary. **The effective date of this amendment is January 15, 1988.**

9. Section 2B1.2(b)(1) is amended by deleting "taken", and inserting "stolen" immediately before "property".

The purpose of this amendment is to correct a clerical error. **The effective date of this amendment is June 15, 1988.**

**§2B1.3. Property Damage or Destruction (Other than by Arson or Explosives)**

10. Section 2B1.3(b)(1) is amended by deleting "amount of the property damage or destruction, or the cost of restoration," and inserting in lieu thereof "loss".

The Commentary to §2B1.3 captioned "Application Notes" is amended in Note 2 by deleting "property" and inserting in lieu thereof "loss".

The purpose of this amendment is to clarify the guideline in respect to the determination of loss. **The effective date of this amendment is June 15, 1988.**

**§2B2.1. Burglary of a Residence**

11. The Commentary to §2B2.1 captioned "Application Notes" is amended in Note 4 by inserting "or other dangerous weapon" immediately following "firearm".

The purpose of the amendment is to correct a clerical error. The effective date of this amendment is January 15, 1988.

12. Section 2B2.1(b)(2) is amended by deleting "value of the property taken or destroyed" and inserting in lieu thereof "loss".

The Commentary to §2B2.1 captioned "Application Notes" is amended in Note 3 by deleting "property" and inserting in lieu thereof "loss".

The purpose of this amendment is to clarify the guideline in respect to the determination of loss. The effective date of this amendment is June 15, 1988.

**§2B2.2. Burglary of Other Structures**

13. Section 2B2.2(b)(2) is amended by deleting "value of the property taken or destroyed" and inserting in lieu thereof "loss".

The Commentary to §2B2.2 captioned "Application Notes" is amended in Note 3 by deleting "property" and inserting in lieu thereof "loss".

The purpose of this amendment is to clarify the guideline in respect to the determination of loss. The effective date of this amendment is June 15, 1988.

**§2B3.1. Robbery**

14. Section 2B3.1(b)(1) is amended by deleting "value of the property taken or destroyed" and inserting in lieu thereof "loss".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 3 by deleting "property" and inserting in lieu thereof "loss".

The purpose of this amendment is to clarify the guideline in respect to the determination of loss. The effective date of this amendment is June 15, 1988.

15. The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 2 by inserting "or attempted robbery" immediately following "robbery".

The purpose of this amendment is to clarify the guideline. The effective date of this amendment is June 15, 1988.

**§2B5.1. Offenses Involving Counterfeit Obligations of the United States**

16. The Commentary to §2B5.1 captioned "Statutory Provisions" is amended by deleting "473" and inserting in lieu thereof "474", and by deleting "510," and ", 2314, 2315".

The purpose of this amendment is to correct a clerical error. The effective date of this amendment is January 15, 1988.

**§2B5.2. Forgery; Offenses Involving Counterfeit Instruments Other than Obligations of the United States**

17. The Commentary to §2B5.2 is amended by deleting "Statutory Provision: 18 U.S.C. § 510" and inserting in lieu thereof "Statutory Provisions: 18 U.S.C. §§ 471-473, 500, 510, 1003, 2314, 2315".

The purpose of this amendment is to correct a clerical error. The effective date of this amendment is January 15, 1988.

**§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right**

18. The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 3 by deleting "§3C1.1(c)(1)" and inserting in lieu thereof "§2C1.1(c)(1)".

The purpose of this amendment is to correct a typographical error. The effective date of this amendment is January 15, 1988.

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

19. The Commentary to §2D1.1 captioned "Application Notes" is amended in the Measurement Conversion Table in Note 10 by deleting "1 lb = .45 kg" and inserting in lieu thereof "1 lb = .4536 kg", by deleting "1 kg = 2.2 lbs", by deleting "1 gal = 3.8 liters" and inserting in lieu thereof "1 gal = 3.785 liters", and by deleting "1 qt = .95 liters" and inserting in lieu thereof "1 qt = .946 liters".

The purpose of this amendment is to correct a clerical error. The effective date of this amendment is January 15, 1988.

20. The Commentary to §2D1.1 captioned "Application Notes" is amended by deleting:

"11. If it is uncertain whether the quantity of drugs involved falls into one category in the table or an adjacent category, the court may use the intermediate level for sentencing purposes. For example, sale of 700-999 grams of heroin is at level 30, while sale of 400-699 grams is at level 28. If the exact quantity is uncertain, but near 700 grams, use of level 29 would be permissible."

The purpose of this amendment is to delete an erroneous reference to interpolation, which cannot apply as the guideline is written. The effective date of this amendment is January 15, 1988.

21. The Commentary to §2D1.1 captioned "Application Notes" is amended by inserting, as a new note, the following:

"11. Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct). If the amount seized does not reflect the scale of the offense, see Application Note 2 of the Commentary to §2D1.4. If the offense involved negotiation to traffic in a controlled substance, see Application Note 1 of the Commentary to §2D1.4."

The purpose of this amendment is to clarify the Commentary. The effective date of this amendment is January 15, 1988.

#### **§2D1.2. Involving Juveniles in the Trafficking of Controlled Substances**

22. Section 2D1.2(a)(1) is amended by deleting "less than fourteen years of age" and inserting in lieu thereof "fourteen years of age or less".

Section 2D1.2(a)(2) is amended by deleting "fourteen" and inserting in lieu thereof "fifteen".

The Commentary to §2D1.2 captioned "Statutory Provision" is amended by deleting "21 U.S.C. § 845(b)" and inserting in lieu thereof "21 U.S.C. § 845b".

The Commentary to §2D1.2 captioned "Background" is amended by deleting:

"(provided for by the minimum base offense level of 13) in addition to the punishment imposed for the applicable crime in which the defendant involved a juvenile. An increased penalty for the employment or use of persons under age fourteen is statutorily directed by 21 U.S.C. § 845b(d).",

and inserting in lieu thereof:

". An increased penalty for the employment or use of persons fourteen years of age or younger reflects the enhanced sentence authorized by 21 U.S.C. § 845b(d)."

The purpose of this amendment is to correct clerical errors in the guideline and Commentary. The effective date of this amendment is January 15, 1988.

**§2D1.3. Distributing Controlled Substances to Individuals Younger than Twenty-One Years, To Pregnant Women, or Within 1000 Feet of a School or College**

23. The Commentary to §2D1.3 captioned "Application Notes" is amended in Note 1 by deleting:

"If more than one enhancement provision is applicable in a particular case, the punishment imposed under the separate enhancement provisions should be added together in calculating the appropriate guideline sentence.",

and inserting in lieu thereof:

"If both subsections (a)(1) and (a)(2) apply to a single distribution (e.g., the distribution of 10 grams of a controlled substance to a pregnant woman under twenty-one years of age), the enhancements are applied cumulatively, i.e., by using four times rather than two times the amount distributed."

The purpose of this amendment is to clarify the Commentary. The effective date of this amendment is January 15, 1988.

**§2D2.1. Unlawful Possession**

24. Section 2D2.1(a)(1) is amended by deleting "or LSD," immediately following "opiate".

Section 2D2.1(a)(2) is amended by inserting ", LSD," immediately following "cocaine".

The purpose of this amendment is to correct a clerical error. The effective date of this amendment is January 15, 1988.

**§2D2.3. Operating or Directing the Operation of a Common Carrier Under the Influence of Alcohol or Drugs**

25. The Commentary to §2D2.3 captioned "Statutory Provision" is amended by deleting "21 U.S.C. § 342" and inserting in lieu thereof "18 U.S.C. § 342".

The purpose of this amendment is to correct a typographical error. The effective date of this amendment is January 15, 1988.

**§2E1.1. Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations**

26. The Commentary to §2E1.1 captioned "Application Notes" is amended in Note 1 by deleting:

"For purposes of subsection (a)(2), determine the offense level for each underlying offense. Use the provisions of Chapter Three, Part D (Multiple Counts), to determine the offense level, treating each underlying offense as if contained in a separate count of conviction.",



and inserting in lieu thereof:

"Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level."

The purpose of this amendment is to clarify the guideline. The effective date of this amendment is June 15, 1988.

**§2E1.2. Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise**

27. The Commentary to §2E1.2 captioned "Application Notes" is amended in Note 1 by deleting:

"For purposes of subsection (a)(2), determine the offense level for each underlying offense. Use the provisions of Chapter Three, Part D (Multiple Counts), to determine the offense level, treating each underlying offense as if contained in a separate count of conviction."

and inserting in lieu thereof:

"Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level."

The purpose of this amendment is to clarify the guideline. The effective date of this amendment is June 15, 1988.

**§2E5.2. Theft or Embezzlement from Employee Pension and Welfare Benefit Plans**

28. Section 2E5.2(b)(3) is amended by deleting "value of the property stolen" and inserting in lieu thereof "loss".

The Commentary to §2E5.2 captioned "Application Notes" is amended in Note 1 by inserting immediately following the first sentence:

"Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)."

The purpose of this amendment is to clarify the guideline in respect to the determination of loss. The effective date of this amendment is June 15, 1988.

**§2E5.4. Embezzlement or Theft from Labor Unions in the Private Sector**

29. Section 2E5.4(b)(3) is amended by deleting "value of the property stolen" and inserting in lieu thereof "loss".

The Commentary to §2E5.4 captioned "Application Notes" is amended in Note 1 by inserting immediately following the first sentence:

"Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).".

The purpose of this amendment is to clarify the guideline in respect to the determination of loss. **The effective date of this amendment is June 15, 1988.**

**§2F1.1 Fraud and Deceit**

30. Section 2F1.1(b)(1) is amended by deleting "estimated, probable, or intended".

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by deleting "291" and inserting in lieu thereof "290".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 7 by inserting as the first sentence: "Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).".

The purposes of this amendment are to clarify the guideline in respect to the determination of loss and to delete an inadvertently included infraction. **The effective date of this amendment is June 15, 1988,**

**§2G2.2. Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor**

31. Section 2G2.2(b)(1) is amended by inserting "a prepubescent minor or" immediately following "involved".

The purpose of this amendment is to provide an alternative measure to be used in determining whether the material involved an extremely young minor for cases in which the actual age of the minor is unknown. **The effective date of this amendment is June 15, 1988.**

**§2J1.7. Commission of Offense While on Release**

32. The Commentary to §2J1.7 captioned "Application Notes" is amended by deleting:

1. By statute, a term of imprisonment imposed for this offense runs consecutively to any other term of imprisonment. 18 U.S.C. § 3147.
2. This guideline assumes that the sentence imposed for the offense committed while on release, which may have been imposed by a state court, is reasonably

consistent with that which the guidelines would provide for a similar federal offense. If this is not the case, a departure may be warranted. See Chapter Five, Part K (Departures).

3. If the defendant was convicted in state court for the offense committed while on release, the term of imprisonment referred to in subdivision (b) is the maximum term of imprisonment authorized under state law.",

and inserting in lieu thereof:

- "1. This guideline applies whenever a sentence pursuant to 18 U.S.C. § 3147 is imposed.
2. By statute, a term of imprisonment imposed for a violation of 18 U.S.C. § 3147 runs consecutively to any other term of imprisonment. Consequently, a sentence for such a violation is exempt from grouping under the multiple count rules. See §3D1.2."

The Commentary to §2J1.7 captioned "Background" is amended by deleting "necessarily" and inserting in lieu thereof "generally".

The purposes of this amendment are to clarify the Commentary and to delete erroneous references. **The effective date of this amendment is January 15, 1988.**

**§2J1.8. Bribery of Witness**

33. Section 2J1.8(c) is amended by deleting "perjury" and inserting in lieu thereof "bribery of a witness".

The Commentary to §2J1.8 captioned "Application Notes" is amended by deleting:

- "4. Subsection (c) refers to bribing a witness regarding his testimony in respect to a criminal offense."

The purpose of this amendment is to correct a clerical error. Correction of this error makes the deleted Commentary unnecessary. **The effective date of this amendment is January 15, 1988.**

**§2K2.2. Receipt, Possession, or Transportation of Firearms and Other Weapons in Violation of National Firearms Act**

34. The Commentary to §2K2.2 captioned "Application Note" is amended by deleting "Application Note" and inserting in lieu thereof "Application Notes", and by inserting, as an additional Application Note, the following:

- "2. Subsection (c)(1) refers to any situation in which the defendant possessed a firearm to facilitate another offense that he committed or attempted."

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is January 15, 1988.**

**§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien**

35. Section 2L1.1(a) is amended by deleting "6" and inserting in lieu thereof "9".

Section 2L1.1(b)(1) is amended by deleting "for profit or with knowledge" and inserting in lieu thereof "other than for profit, and without knowledge", and by deleting "increase by 3 levels" and inserting in lieu thereof "decrease by 3 levels".

The Commentary to §2L1.1 captioned "Background" is amended by deleting:

"A specific offense characteristic provides an enhancement if the defendant committed the offense for profit or with knowledge that the alien was excludable as a subversive.",

and inserting in lieu thereof:

"A specific offense characteristic provides a reduction if the defendant did not commit the offense for profit and did not know that the alien was excludable as a subversive."

The purpose of this amendment is to make the guideline conform to the typical case. **The effective date of this amendment is January 15, 1988.**

36. Section 2L1.1(b)(2) is amended by deleting "bringing illegal aliens into the United States" and inserting in lieu thereof "smuggling, transporting, or harboring an unlawful alien, or a related offense".

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 2 by deleting "bringing illegal aliens into the United States" and inserting in lieu thereof "smuggling, transporting, or harboring an unlawful alien, or a related offense".

The purpose of this amendment is to correct a clerical error in the guideline and conform the Commentary to the corrected guideline. **The effective date of this amendment is January 15, 1988.**

37. The Commentary to §2L1.1 captioned "Application Notes" is amended by inserting, as an additional note, the following:

"8. The Commission has not considered offenses involving large numbers of aliens or dangerous or inhumane treatment. An upward departure should be considered in those circumstances."

The purpose of this amendment is to clarify the factors considered by the Commission in promulgating the guideline. **The effective date of this amendment is January 15, 1988.**

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

38. Section 2L1.2(a) is amended by deleting "6" and inserting in lieu thereof "8".

Section 2L1.2(b) is amended by deleting the following:

"(b) Specific Offense Characteristic

- (1) If the defendant previously has unlawfully entered or remained in the United States, increase by 2 levels."

The Commentary to §2L1.2 captioned "Statutory Provisions" is amended by deleting "§§ 1325, 1326" and inserting in lieu thereof "§ 1325 (second or subsequent offense only), 8 U.S.C. § 1326".

The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 1 by deleting:

"The adjustment at §2L1.2(b)(1) is to be applied where the previous entry resulted in deportation (voluntary or involuntary), with or without a criminal conviction. If the previous entry resulted in a conviction, this adjustment is to be applied in addition to any points added to the criminal history score for such conviction in Chapter Four, Part A (Criminal History).",

and inserting in lieu thereof:

"This guideline applies only to felonies. First offenses under 8 U.S.C. § 1325 are petty offenses for which no guideline has been promulgated."

The purpose of this amendment is to delete coverage of a petty offense. The effective date of this amendment is January 15, 1988.

**§2L2.2. Fraudulently Acquiring Evidence of Citizenship or Documents Authorizing Entry for Own Use**

39. The Commentary to §2L2.2 captioned "Application Notes" is amended in Note 1 by deleting "an enhancement equivalent to that at §2L1.2(b)(1)," and inserting in lieu thereof "a result equivalent to §2L1.2."

The purpose of this amendment is to make the Commentary consistent with §2L1.2, as amended. The effective date of this amendment is January 15, 1988.

**§2L2.4. Fraudulently Acquiring or Improperly Using a United States Passport**

40. The Commentary to §2L2.4 captioned "Application Notes" is amended in Note 1 by deleting "an enhancement equivalent to that at §2L1.2(b)(1)," and inserting in lieu thereof "a result equivalent to §2L1.2."

The purpose of this amendment is to make the Commentary consistent with §2L1.2, as amended. The effective date of this amendment is January 15, 1988.

**§2Q2.1. Specially Protected Fish, Wildlife, and Plants**

41. The Commentary to §2Q2.1 captioned "Statutory Provisions" is amended by deleting "707" and inserting in lieu thereof "707(b)".

The purpose of this amendment is to correct a clerical error. The effective date of this amendment is January 15, 1988.

**§2X1.1. Attempt, Solicitation, or Conspiracy Not Covered by a Specific Guideline**

42. The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 by deleting "§2A4.1" and inserting in lieu thereof "§2D1.4".

The purpose of this amendment is to correct a typographical error. The effective date of this amendment is January 15, 1988.

**§2X5.1. Other Offenses**

43. Section 2X5.1 and the Commentary thereto is amended by deleting the entire text, including the title, as follows:

**"Other Offenses (Policy Statement)**

For offenses for which no specific guideline has been promulgated:

- (a) If the offense is a felony or class A misdemeanor, the most analogous guideline should be applied. If no sufficiently analogous guideline exists, any sentence that is reasonable and consistent with the purposes of sentencing should be imposed. See 18 U.S.C. § 3553(b).
- (b) If the offense is a Class B or C misdemeanor or an infraction, any sentence that is reasonable and consistent with the purpose of sentencing should be imposed. See 18 U.S.C. § 3553(b).

**Commentary**

**Background:** This policy statement addresses cases in which a defendant has been convicted of an offense for which no specific guideline has been written. For a felony or a class A misdemeanor (see 18 U.S.C. §§ 3559(a) and 3581(b)), the court is directed to apply the most analogous guideline. If no sufficiently analogous guideline exists, the court is directed to sentence without reference to a specific guideline or guideline range, as provided in 18 U.S.C. § 3553(b).

For a class B or C misdemeanor or an infraction (see 18 U.S.C. §§ 3559(a) and 3581(b)) that is not covered by a specific guideline, the court is directed to sentence without reference to a specific guideline or guideline range, as provided in 18 U.S.C. § 3553(b). An inquiry as to whether there is a sufficiently analogous guideline that might be applied is not required. The Commission makes this distinction in treatment because for many lesser offenses (e.g., traffic infractions), generally handled under assimilative offense

provisions by magistrates, there will be no sufficiently analogous guideline, and a case-by-case determination in respect to this issue for the high volume of cases processed each year would be unduly burdensome and would not significantly reduce disparity.",

and inserting in lieu thereof:

**"Other Offenses**

If the offense is a felony or Class A misdemeanor for which no guideline expressly has been promulgated, apply the most analogous offense guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) shall control.

**Commentary**

**Background:** Many offenses, especially assimilative crimes, are not listed in the Statutory Index or in any of the lists of Statutory Provisions that follow each offense guideline. Nonetheless, the specific guidelines that have been promulgated cover the type of criminal behavior that most such offenses proscribe. The court is required to determine if there is a sufficiently analogous offense guideline, and, if so, to apply the guideline that is most analogous. Where there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) control. That statute provides in relevant part as follows: 'In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in [18 U.S.C. § 3553] subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.'

The purposes of this amendment are to make the section a binding guideline (as the Commission originally intended with respect to felonies and Class A misdemeanors) rather than a policy statement, to delete language relating to petty offenses, and to conform and clarify the Commentary. The effective date of this amendment is June 15, 1988.

**§3A1.2. Official Victim**

44. The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 1 by deleting:

" 'Victim' refers to an individual directly victimized by the offense. This term does not include an organization, agency, or the government itself.",

and inserting in lieu thereof:

"This guideline applies when specified individuals are victims of the offense. This guideline does not apply when the only victim is an organization, agency, or the government."

The purpose of this amendment is to clarify the Commentary. The effective date of this amendment is January 15, 1988.

**§3D1.2. Groups of Closely-Related Counts**

45. Section 3D1.2(d) is amended by deleting:

"(d) When counts involve the same general type of offense and the guidelines for that type of offense determine the offense level primarily on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm. Offenses of this kind are found in Chapter Two, Part B (except §§2B2.1-2B3.3), Part D (except §§2D1.6-2D3.4), Part E (except §§2E1.1-2E2.1), Part F, Part G (§§2G2.2-2G3.1), Part K (§2K2.3), Part N (§§2N2.1, 2N3.1), Part Q (§§2Q2.1, 2Q2.2), Part R, Part S, and Part T. This rule also applies where the guidelines deal with offenses that are continuing, e.g., §§2L1.3 and 2Q1.3(b)(1)(A)."

and inserting in lieu thereof:

"(d) Counts are grouped together if the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are specifically included under this subsection:

§§2B1.1, 2B1.2, 2B1.3, 2B4.1, 2B5.1, 2B5.2, 2B5.3, 2B5.4, 2B6.1;  
§§2D1.1, 2D1.2, 2D1.3, 2D1.5;  
§§2E4.1, 2E5.1, 2E5.2, 2E5.4, 2E5.6;  
§§2F1.1, 2F1.2;  
§2N3.1;  
§2R1.1;  
§§2S1.1, 2S1.2, 2S1.3;  
§§2T1.1, 2T1.2, 2T1.3, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1, 2T3.2.

Specifically excluded from the operation of this subsection are:

all offenses in Part A;  
§§2B2.1, 2B2.2, 2B2.3, 2B3.1, 2B3.2, 2B3.3;  
§§2C1.1, 2C1.5;  
§§2D2.1, 2D2.2, 2D2.3;  
§§2E1.3, 2E1.4, 2E1.5, 2E2.1;  
§§2G1.1, 2G1.2, 2G2.1, 2G3.2;  
§§2H1.1, 2H1.2, 2H1.3, 2H1.4, 2H2.1, 2H4.1;  
§§2L1.1, 2L2.1, 2L2.2, 2L2.3, 2L2.4, 2L2.5;  
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.6, 2M3.7, 2M3.8, 2M3.9;  
§§2P1.1, 2P1.2, 2P1.3, 2P1.4.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.



Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection."

The purpose of this amendment is to clarify the guideline. The effective date of this amendment is June 15, 1988.

**§3E1.1. Acceptance of Responsibility**

46. Section 3E1.1(a) is amended by deleting "the offense of conviction" and inserting in lieu thereof "his criminal conduct".

The purpose of this amendment is to clarify the guideline. The effective date of this amendment is January 15, 1988.

**§4B1.1. Career Offender**

47. Section 4B1.1 is amended by deleting "(2) the instant offense is a crime of violence or trafficking in a controlled substance" and inserting in lieu thereof "(2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense".

The purposes of this amendment are to correct a clerical error and to clarify the guideline. The effective date of this amendment is January 15, 1988.

48. Section 4B1.1 is amended by deleting:

<u>"Offense Statutory Maximum</u>	<u>Offense Level</u>
(A) Life	37
(B) 20 years or more	34
(C) 10 years or more, but less than 20 years	26
(D) 5 years or more, but less than 10 years	19
(E) More than 1 year, but less than 5 years	12
(F) 1 year or less	4",

and inserting in lieu thereof:

<u>"Offense Statutory Maximum</u>	<u>Offense Level</u>
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12".

The Commentary to §4B1.1 captioned "Background" is amended by deleting:

"The guideline levels for career offenders were established by using the statutory maximum for the offense of conviction to determine the class of felony provided in 18 U.S.C. § 3559. Then the maximum authorized sentence of imprisonment for each class of felony was determined as provided by 18 U.S.C. § 3581. A guideline range for each class of felony was then chosen so that the maximum of the guideline range was at or near the maximum provided in 18 U.S.C. § 3581."

The purpose of this amendment is to correct the guideline so that the table relating offense statutory maxima to offense levels is consistent with the current authorized statutory maximum terms. The effective date of this amendment is January 15, 1988.

**§4B1.2. Definitions**

49. Section 4B1.2(2) is amended by inserting "845b, 856," immediately following "841," and by deleting "§§ 405B and 416 of the Controlled Substance Act as amended in 1986," immediately following "959;"

Section 4B1.2(3) is amended by deleting:

"(1) the defendant committed the instant offense subsequent to sustaining at least two felony convictions for either a crime of violence or a controlled substance offense (i.e., two crimes of violence, two controlled substance offenses, or one crime of violence and one controlled substance offense), and (2)",

and inserting in lieu thereof:

"(A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (B)".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 2 by deleting "means any of the federal offenses identified in the statutes referenced in §4B1.2, or substantially equivalent state offenses" and inserting in lieu thereof "includes any federal or state offense that is substantially similar to any of those listed in subsection (2) of the guideline", by inserting "importing," immediately following "manufacturing," and by inserting "import," immediately following "manufacture,".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 3 by deleting "Felony" and inserting in lieu thereof "Prior felony".

The purposes of this amendment are to correct a clerical error and to clarify the guideline. The effective date of this amendment is January 15, 1988.

#### **§4B1.3. Criminal Livelihood**

50. Section 4B1.3 is amended by deleting:

". In no such case will the defendant be eligible for a sentence of probation."

and inserting in lieu thereof:

", unless §3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than 11."

The Commentary to §4B1.3 captioned "Application Note" is amended by deleting "(e.g., an ongoing fraudulent scheme)", "(e.g., a number of burglaries or robberies, or both)", and "or petty".

The Commentary to §4B1.3 captioned "Background" is amended by deleting "that offense" and inserting in lieu thereof "an offense", and by deleting "Under this provision, the offense level is raised to 13, if it is not already 13 or greater".

The purpose of this amendment is to provide that the adjustment from §3E1.1 (Acceptance of Responsibility) applies to cases under §4B1.3 (Criminal Livelihood). The effective date of this amendment is June 15, 1988.

**§5C2.1. Imposition of a Term of Imprisonment**

51. The Commentary to §5C2.1 captioned "Application Notes" is amended in Note 4 by deleting "at least six" and inserting in lieu thereof "more than six", by deleting "6-12" whenever it appears and inserting in lieu thereof in each instance "8-14", and by deleting "three" whenever it appears and inserting in lieu thereof in each instance "four".

The purpose of this amendment is to correct a clerical error. The effective date of this amendment is January 15, 1988.

**§5D3.2. Term of Supervised Release**

52. Section 5D3.2(b) is amended by deleting:

- "(1) three years for a defendant convicted of a Class A or B felony;
- (2) two years for a defendant convicted of a Class C or D felony;
- (3) one year for a defendant convicted of a Class E felony or a misdemeanor.",

and inserting in lieu thereof:

- "(1) at least three years but not more than five years for a defendant convicted of a Class A or B felony;
- (2) at least two years but not more than three years for a defendant convicted of a Class C or D felony;
- (3) one year for a defendant convicted of a Class E felony or a Class A misdemeanor.",

The purpose of this amendment is to permit implementation of the longer terms of supervised release authorized by the Sentencing Act of 1987. The effective date of this amendment is January 15, 1988.

**§5E4.1. Restitution**

53. Section 5E4.1(a) is amended by inserting immediately preceding the period at the end of the subsection:

", and may be ordered as a condition of probation or supervised release in any other case".

The purpose of this amendment is to clarify the guideline. The effective date of this amendment is January 15, 1988.

**§5E4.2. Fines for Individual Defendants**

54. Section 5E4.2 is amended by deleting:

"(b) The generally applicable minimum and maximum fine for each offense level is shown in the Fine Table in subsection (c) below. Unless a statute expressly authorizes a greater amount, no fine may exceed \$250,000 for a felony or a misdemeanor resulting in the loss of human life; \$25,000 for any other misdemeanor; or \$1,000 for an infraction. 18 U.S.C. § 3571(b)(1).

- (c) (1) The minimum fine range is the greater of:
- (A) the amount shown in column A of the table below; or
  - (B) any monetary gain to the defendant, less any restitution made or ordered.
- (2) Except as specified in (4) below, the maximum fine is the greater of:
- (A) the amount shown in column B of the table below;
  - (B) twice the estimated loss caused by the offense; or
  - (C) three times the estimated gain to the defendant."

and inserting in lieu thereof:

"(b) Except as provided in subsections (f) and (i) below, or otherwise required by statute, the fine imposed shall be within the range specified in subsection (c) below.

- (c) (1) The minimum of the fine range is the greater of:
- (A) the amount shown in column A of the table below; or
  - (B) the pecuniary gain to the defendant, less restitution made or ordered.
- (2) Except as specified in (4) below, the maximum of the fine range is the greater of:
- (A) the amount shown in column B of the table below;
  - (B) twice the gross pecuniary loss caused by the offense; or
  - (C) three times the gross pecuniary gain to all participants in the offense."

The Commentary to §5E4.2 captioned "Application Notes" is amended by deleting:

- "2. The maximum fines generally authorized by statute are restated in subsection (b). These apply to each count of conviction. Ordinarily, the maximum fines on each count are independent and cumulative. However, if the offenses 'arise from a common scheme or plan' and 'do not cause separable or distinguishable kinds of harm or damage,' the aggregate fine may not exceed 'twice the amount imposable for the most serious offense.' 18 U.S.C. § 3572(b) (former 18 U.S.C. § 3623(c)(2)).
3. Alternative fine limits are provided in subsection (c)(2). The term 'estimated gain' is used to emphasize that the Commission does not intend precise or detailed calculation of the monetary gain (nor of the loss) in using the alternative fine limits. In many cases, circumstances will make it unnecessary to consider these standards other than in the most general terms.",

and inserting in lieu thereof:

- "2. In general, the maximum fine permitted by law as to each count of conviction is \$250,000 for a felony or for any misdemeanor resulting in death; \$100,000 for a Class A misdemeanor; and \$5,000 for any other offense. 18 U.S.C. § 3571(b)(3)-(7). However, higher or lower limits may apply when specified by statute. 18 U.S.C. § 3571(b)(1), (e). As an alternative maximum, the court may fine the defendant up to the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(b)(2), (d).
3. Alternative fine limits are provided in subsection (c). The terms 'pecuniary gain' and 'pecuniary loss' are taken from 18 U.S.C. § 3571(d). The Commission does not intend precise or detailed calculation of the gain or loss in using the alternative fine limits. In many cases, circumstances will make it unnecessary to consider these standards other than in the most general terms.",

The Commentary to §5E4.2 captioned "Application Notes" is amended in Note 4 by deleting "Any restitution" and inserting in lieu thereof "Restitution".

The Commentary to §5E4.2 captioned "Background" is amended by deleting:

"defendant. In addition, the Commission concluded that greater latitude with a gain-based fine was justified; when the court finds it necessary to rely on the gain, rather than the loss, to set the fine, ordering restitution usually will not be feasible because of the difficulty in computing the amount.",

and inserting in lieu thereof:

"participants. In addition, in many such cases restitution will not be feasible.",

The purposes of this amendment are to make the guideline consistent with 18 U.S.C. § 3571, as amended, to clarify the Commentary, and to correct clerical errors in the guideline and Commentary. The effective date of this amendment is January 15, 1988.

**CHAPTER FIVE, PART J - RELIEF FROM DISABILITY PERTAINING TO CERTAIN EMPLOYMENT (retitled RELIEF FROM DISABILITY)**

55. Chapter 5, Part J is amended in the title of the Part by deleting "PERTAINING TO CERTAIN EMPLOYMENT".

The purpose of this amendment is to eliminate the possible inference that this part covers only employment for compensation. The effective date of this amendment is June 15, 1988.

**§5J1.1. Relief From Disability Pertaining to Certain Employment (Policy Statement) (retitled Relief From Disability Pertaining to Convicted Persons Prohibited From Holding Certain Positions (Policy Statement)**

56. Section 5J1.1 is amended by deleting the entire text, including the title, as follows:

**"Relief From Disability Pertaining to Certain Employment (Policy Statement)**

With regard to labor racketeering offenses, a part of the punishment imposed by 29 U.S.C. §§ 504 and 511 is the prohibition of convicted persons from service in labor unions, employer associations, employee benefit plans, and as labor relations consultants. Violations of these provisions are felony offenses. Persons convicted after October 12, 1984, may petition the sentencing court to reduce the statutory disability (thirteen years after sentence or imprisonment, whichever is later) to a lesser period (not less than three years after entry of judgment in the trial court). After November 1, 1987, petitions for exemption from the disability that were formerly administered by the United States Parole Commission will be transferred to the courts. Relief shall not be given in such cases to aid rehabilitation, but may be granted only following a clear demonstration by the convicted person that he has been rehabilitated since commission of the crime.",

and inserting in lieu thereof the following:

**"Relief from Disability Pertaining to Convicted Persons Prohibited from Holding Certain Positions (Policy Statement)**

A collateral consequence of conviction of certain crimes described in 29 U.S.C. §§ 504 and 1111 is the prohibition of convicted persons from service and employment with labor unions, employer associations, employee pension and welfare benefit plans, and as labor relations consultants in the private sector. A convicted person's prohibited service or employment in such capacities without having been granted one of the following three statutory procedures of administrative or judicial relief is subject to criminal prosecution. First, a disqualified person whose citizenship rights have been fully restored to him or her in the jurisdiction of conviction, following the revocation of such rights as a result of the disqualifying conviction, is relieved of the disability. Second, a disqualified person convicted after October 12, 1984, may petition the sentencing court to reduce the statutory length of disability (thirteen years after date of sentencing or release from imprisonment, whichever is later) to a lesser period (not less than three years after date of conviction or release

from imprisonment, whichever is later). Third, a disqualified person may petition either the United States Parole Commission or a United States District Court judge to exempt his or her service or employment in a particular prohibited capacity pursuant to the procedures set forth in 29 U.S.C. §§ 504(a)(B) and 1111(a)(B). In the case of a person convicted of a disqualifying crime committed before November 1, 1987, the United States Parole Commission will continue to process such exemption applications.

In the case of a person convicted of a disqualifying crime committed on or after November 1, 1987, however, a petition for exemption from disability must be directed to a United States District Court. If the petitioner was convicted of a disqualifying federal offense, the petition is directed to the sentencing judge. If the petitioner was convicted of a disqualifying state or local offense, the petition is directed to the United States District Court for the district in which the offense was committed. In such cases, relief shall not be given to aid rehabilitation, but may be granted only following a clear demonstration by the convicted person that he or she has been rehabilitated since commission of the disqualifying crime and can therefore be trusted not to endanger the organization in the position for which he or she seeks relief from disability."

The purpose of this amendment is to clarify the policy statement and conform it to the pertinent provisions of the Sentencing Act of 1987. The effective date of this amendment is June 15, 1988.

**§5K2.0**      **Grounds for Departure (Policy Statement)**

57. Section 5K2.0 is amended by deleting "an aggravating or mitigating circumstance exists that was" and inserting in lieu thereof "there exists an aggravating or mitigating circumstance of a kind, or to a degree".

The purpose of this amendment is to conform the quotation in this section to the wording in the Sentencing Act of 1987. The effective date of this amendment is June 15, 1988.

**§6A1.1.**      **Presentence Report**

58. Section 6A1.1 is amended by deleting "(a)" and deleting:

"(b) The presentence report shall be disclosed to the defendant, counsel for the defendant and the attorney for the government, to the maximum extent permitted by Rule 32(c), Fed. R. Crim. P. Disclosure shall be made at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant. 18 U.S.C. § 3552(d)."

The purpose of this amendment is to delete material more properly covered elsewhere. See §6A1.2 (Disclosure of Presentence Report; Issues in Dispute (Policy Statement)). The effective date of this amendment is June 15, 1988.



**§6A1.2. Position of Parties with Respect to Sentencing Factors (Retitled Disclosure of Presentence Report; Issues in Dispute (Policy Statement))**

59. Section 6A1.2 is amended by deleting:

**"Position of Parties with Respect to Sentencing Factors**

- (a) After receipt of the presentence report and within a reasonable time before sentencing, the attorney for the government and the attorney for the defendant, or the pro se defendant, shall each file with the court a written statement of the sentencing factors to be relied upon at sentencing. The parties are not precluded from asserting additional sentencing factors if notice of the intention to rely upon another factor is filed with the court within a reasonable time before sentencing.
- (b) Copies of all sentencing statements filed with the court shall be contemporaneously served upon all other parties and submitted to the probation officer assigned to the case.
- (c) In lieu of the written statement required by §6A1.2(a), any party may file:
  - (1) a written statement adopting the findings of the presentence report;
  - (2) a written statement adopting such findings subject to certain exceptions or additions; or
  - (3) a written stipulation in which the parties agree to adopt the findings of the presentence report or to adopt such findings subject to certain exceptions or additions.
- (d) A district court may, by local rule, identify categories of cases for which the parties are authorized to make oral statements at or before sentencing, in lieu of the written statement required by this section.
- (e) Except to the extent that a party may be privileged not to disclose certain information, all statements filed with the court or made orally to the court pursuant to this section shall:
  - (1) set forth, directly or by reference to the presentence report, the relevant facts and circumstances of the actual offense conduct and offender characteristics; and
  - (2) not contain misleading facts."

and inserting in lieu thereof the following:

**"Disclosure of Presentence Report; Issues in Dispute (Policy Statement)**

Courts should adopt procedures to provide for the timely disclosure of the presentence report; the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute. See Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference (August 1987)."

This amendment deletes this guideline and inserts in lieu thereof a general policy statement. The Commission has determined that this subject is more appropriately covered by the Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference. The effective date of this amendment is June 15, 1988.

**Appendix A Statutory Index**

60. Appendix A is amended by inserting the following statutes in the appropriate place according to statutory title and section number:

"7 U.S.C. § 2024(b)	2F1.1",
"7 U.S.C. § 2024(c)	2F1.1",
"18 U.S.C. § 874	2B3.2, 2B3.3",
"18 U.S.C. § 914	2F1.1",
"18 U.S.C. § 923	2K2.3",
"18 U.S.C. § 1030(a)(1)	2M3.2",
"18 U.S.C. § 1030(a)(2)	2F1.1",
"18 U.S.C. § 1030(a)(3)	2F1.1",
"18 U.S.C. § 1030(a)(4)	2F1.1",
"18 U.S.C. § 1030(a)(5)	2F1.1",
"18 U.S.C. § 1030(a)(6)	2F1.1",
"18 U.S.C. § 1030(b)	2X1.1",
"18 U.S.C. § 1501	2A2.2, 2A2.3",
"18 U.S.C. § 1720	2F1.1",
"18 U.S.C. § 4082(d)	2P1.1",
"19 U.S.C. § 1304	2T3.1",
"20 U.S.C. § 1097(c)	2B4.1",
"20 U.S.C. § 1097(d)	2F1.1",
"38 U.S.C. § 3502	2F1.1",
"42 U.S.C. § 1307(a)	2F1.1",
"42 U.S.C. § 1395nn(c)	2F1.1",
"45 U.S.C. § 359(a)	2F1.1".

The purpose of this amendment is to make the statutory index more comprehensive. The effective date of this amendment is January 15, 1988.



62. Appendix A is amended by inserting the following statutes in the appropriate place according to statutory title and section number:

"18 U.S.C. § 911	2F1.1, 2L2.2",
"18 U.S.C. § 922(n)	2K2.1",
"18 U.S.C. § 2071	2B1.1, 2B1.3",
"26 U.S.C. § 7212(a)	2A2.2, 2A2.3",
"42 U.S.C. § 2278(a)(c)	2B2.3",
"46 U.S.C. § 3718(b)	2K3.1",
"47 U.S.C. § 553(b)(2)	2B5.3",
"49 U.S.C. § 1472(h)(2)	2K3.1".

The purpose of this amendment is to make the statutory index more comprehensive. The effective date of this amendment is June 15, 1988.

63. Appendix A is amended by deleting:

"7 U.S.C. § 166	2N2.1",
"7 U.S.C. § 213	2F1.1",
"7 U.S.C. § 473	2N2.1";

by deleting:

"7 U.S.C. § 511e	2N2.1",
"7 U.S.C. § 511k	2N2.1",

and inserting in lieu thereof:

"7 U.S.C. § 511d	2N2.1",
"7 U.S.C. § 511i	2N2.1";

by deleting:

"7 U.S.C. § 586	2N2.1",
"7 U.S.C. § 596	2N2.1",
"7 U.S.C. § 608e-1	2N2.1";

by deleting:

"16 U.S.C. § 117(c)	2B1.1, 2B1.3",
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and inserting in lieu thereof:

"16 U.S.C. § 117c	2B1.1, 2B1.3";
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**by deleting:**

"16 U.S.C. § 414	2B2.3",
"16 U.S.C. § 426i	2B1.1, 2B1.3",
"16 U.S.C. § 428i	2B1.1, 2B1.3",
"18 U.S.C. § 291	2C1.3, 2F1.1",
"26 U.S.C. § 7269	2T1.2",
"41 U.S.C. § 51	2B4.1",
"42 U.S.C. § 4012	2Q1.3",
"50 U.S.C. § 2410	2M5.1";

**and by deleting the first time it appears:**

"50 U.S.C. App. § 462	2M4.1".
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**The purposes of this amendment are to correct clerical errors and delete inadvertently included statutes. The effective date of this amendment is June 15, 1988.**