

APPENDIX C - AMENDMENTS TO THE SENTENCING GUIDELINES MANUAL OF OCTOBER 1987

This Appendix presents the amendments to the guidelines, policy statements, and official commentary promulgated since issuance of the Guidelines Manual of October 1987.*

The format under which the 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.

AMENDMENTS

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 the following additional note:

- "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.**

*In addition to the numbered amendments set forth in this Appendix, the following minor editorial revisions have been made to update the Manual to reflect that the guidelines system now constitutes current practice: the terms "current practice," "existing practice," and "present practice," where used to denote sentencing practice prior to guidelines, have been replaced by the term "pre-guidelines practice" and conforming tense changes have been made in §2B3.1, comment. (backg'd); Chapter Two, Part C, intro. comment., §2F1.1, comment. (backg'd); §2J1.3, comment. (backg'd); §2K2.1, comment. (backg'd); §2R1.1, comment. (backg'd); §2T1.1, comment. (backg'd); §2T1.2, comment. (backg'd); §2T1.8, comment. (backg'd); §6A1.3, comment.; and Chapter Six, Part B, intro. comment. Also, an additional sentence ("For additional statutory provision(s), *see* Appendix A (Statutory Index).") has been inserted for clarity in the Commentary captioned "Statutory Provision[s]" of each Chapter Two offense guideline that has additional statutory provision(s) listed in Appendix A (Statutory Index). **The effective date of this amendment is November 1, 1990.**

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 the following additional sentence at the end of the subsection: "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.**

3. Section 1B1.3 is amended by deleting the entire guideline and accompanying commentary 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:

"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 (Mis-handling 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.**

4. Section 1B1.4 is amended by deleting the entire guideline and accompanying commentary 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:

"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.**

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.**

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.**

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.**

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.**

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.**

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.**

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.**

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.**

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.

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.**

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.**

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 the following additional note:

"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.**

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.**

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.**

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.**

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.**

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.

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.

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.

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.

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

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,**

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.**

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.**

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.

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 the following additional note:

"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.**

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 the following additional note:

"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.**

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

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

"(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.**

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.**

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.**

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.**

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.**

43. Section 2X5.1 is amended by deleting the entire guideline and accompanying commentary 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.**

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.**

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.

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.

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 last paragraph as follows:

"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.**

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.**

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)" immediately following "course of conduct", "(e.g., a number of burglaries or robberies, or both)" immediately following "independent offenses", and "or petty" immediately following "to minor".

The Commentary to §4B1.3 captioned "Background" is amended by deleting "that offense" and inserting in lieu thereof "an offense", and by deleting the last sentence as follows: "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.**

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.**

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.**

53. Section 5E4.1(a) is amended by inserting immediately before 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.

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.**

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

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.**

56. Section 5J1.1 is amended by deleting the entire policy statement 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:

"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.**

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.**

58. Section 6A1.1 is amended by deleting "(a)" immediately before "A probation officer", and by 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.

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:

"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.**

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.**

61. Appendix A is amended by deleting:

"16 U.S.C. § 703	2Q2.1",
"16 U.S.C. § 707	2Q2.1",

and inserting in lieu thereof:

"16 U.S.C. § 707(b)	2Q2.1";
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by deleting:

"18 U.S.C. § 112(a)	2A2.1, 2A2.2, 2A2.3",
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and inserting in lieu thereof:

"18 U.S.C. § 112(a)	2A2.2, 2A2.3";
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by deleting:

"18 U.S.C. § 510(a)	2B5.1",
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and inserting in lieu thereof:

"18 U.S.C. § 510 2B5.2";

by deleting:

"18 U.S.C. § 1005 2F1.1, 2S1.3",

and inserting in lieu thereof:

"18 U.S.C. § 1005 2F1.1";

by deleting:

"18 U.S.C. § 1701 2B1.1, 2H3.3",

and inserting in lieu thereof:

"18 U.S.C. § 1700 2H3.3";

by deleting:

"18 U.S.C. § 2113(a) 2B1.1, 2B3.1",

and inserting in lieu thereof:

"18 U.S.C. § 2113(a) 2B1.1, 2B2.2, 2B3.1, 2B3.2";

by deleting "2B5.1," from the line beginning with "18 U.S.C. § 2314"; and

by deleting "2B5.1," from the line beginning with "18 U.S.C. § 2315".

The purpose of this amendment is to correct clerical errors. 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**.

64. Chapter Two, Part A is amended by inserting the following additional guideline and accompanying commentary:

"§2A2.4. Obstructing or Impeding Officers

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
 - (1) If the conduct involved striking, beating, or wounding, increase by 3 levels.
- (c) Cross Reference
 - (1) If the defendant is convicted under 18 U.S.C. § 111 and the conduct constituted aggravated assault, apply §2A2.2

(Aggravated Assault).

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 1501, 1502, 3056(d).

Application Notes:

1. Do not apply §3A1.2 (Official Victim). The base offense level reflects the fact that the victim was a governmental officer performing official duties.
2. "Striking, beating, or wounding" is discussed in the Commentary to §2A2.3 (Minor Assault).
3. The base offense level does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. See §5K2.7 (Disruption of Governmental Function).

Background: Violations of 18 U.S.C. §§ 1501, 1502, and 3056(d) are misdemeanors; violation of 18 U.S.C. § 111 is a felony. The guideline has been drafted to provide offense levels that are identical to those otherwise provided for assaults involving an official victim; when no assault is involved, the offense level is 6."

The Commentary to §2A2.3 captioned "Statutory Provisions" is amended by deleting "111".

Appendix A is amended by deleting "2A2.3," from the line beginning with "18 U.S.C. § 111", and inserting in lieu thereof "2A2.4";

by deleting "2A2.3," from the line beginning with "18 U.S.C. § 1501", and inserting in lieu thereof "2A2.4";

by inserting the following statutes in the appropriate place according to statutory title and section number:

"18 U.S.C. § 1502	2A2.4",
"18 U.S.C. § 3056(d)	2A2.4".

The purpose of this amendment is to make the guidelines more comprehensive. The effective date of this amendment is October 15, 1988.

65. Chapter Two, Part A is amended by inserting the following additional guideline and accompanying commentary:

"§2A5.3. Committing Certain Crimes Aboard Aircraft

- (a) Base Offense Level: The offense level applicable to the underlying offense.

Commentary

Statutory Provision: 49 U.S.C. § 1472(k)(1).

Application Notes:

1. "Underlying offense" refers to the offense listed in 49 U.S.C. § 1472(k)(1) that the defendant is convicted of violating.

2. If the conduct intentionally or recklessly endangered the safety of the aircraft or passengers, an upward departure may be warranted."

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

"49 U.S.C. § 1472(k)(1) 2A5.3".

The purpose of this amendment is to make the guidelines more comprehensive. The effective date of this amendment is October 15, 1988.

66. Section 2D1.5 is amended by deleting the entire text of the guideline and accompanying commentary as follows:

"(a) Base Offense Level:

- (1) 32, for the first conviction of engaging in a continuing criminal enterprise; or
- (2) 38, for the second or any subsequent conviction of engaging in a continuing criminal enterprise; or
- (3) 43, for engaging in a continuing criminal enterprise as the principal administrator, leader, or organizer, if either the amount of drugs involved was 30 times the minimum in the first paragraph (i.e., the text corresponding to Level 36) of the Drug Quantity Table or 300 times the minimum in the third paragraph (i.e., the text corresponding to Level 32), or the principal received \$10 million in gross receipts for any twelve-month period.

Commentary

Statutory Provision: 21 U.S.C. § 848.

Application Note:

1. Do not apply any adjustment from Chapter Three, Part B (Role in the Offense).

Background: The base offense levels for continuing criminal enterprises are mandatory minimum sentences provided by the statute that mandate imprisonment for leaders of large scale drug enterprises. A conviction establishes that the defendant controlled and exercised decision-making authority over one of the most serious forms of ongoing criminal activity. Therefore, an adjustment for role in the offense in Chapter Three, Part B, is not applicable."

and inserting in lieu thereof:

"(a) Base Offense Level: 36

Commentary

Statutory Provision: 21 U.S.C. § 848.

Application Notes:

1. Do not apply any adjustment from Chapter Three, Part B (Role in the

Offense).

2. If as part of the enterprise the defendant sanctioned the use of violence, if the quantity of drugs substantially exceeds that required for level 36 in the drug quantity table, or if the number of persons managed by the defendant is extremely large, an upward departure may be warranted.
3. Under 21 U.S.C. § 848, certain conduct for which the defendant has previously been sentenced may be charged as part of the instant offense to establish a "continuing series of violations." A sentence resulting from a conviction sustained prior to the last overt act of the instant offense is to be considered a prior sentence under §4A1.2(a)(1) and not part of the instant offense.
4. Violations of 21 U.S.C. § 848 will be grouped with other drug offenses for the purpose of applying Chapter Three, Part D (Multiple Counts).

Background: Because a conviction under 21 U.S.C. § 848 establishes that a defendant controlled and exercised authority over one of the most serious types of ongoing criminal activity, this guideline provides a base offense level of 36. An adjustment from Chapter Three, Part B is not authorized because the offense level of this guideline already reflects an adjustment for role in the offense.

Title 21 U.S.C. § 848 provides a 20-year minimum mandatory penalty for second convictions and a mandatory life sentence for principal administrators of extremely large enterprises. If the application of the guidelines results in a sentence below the minimum sentence required by statute, the statutory minimum shall be the guideline sentence. See §5G1.1(b)."

The purpose of this amendment is to ensure that the guideline adequately reflects the seriousness of the criminal conduct. The previous guideline specified sentences that were lower than sentences typically imposed on defendants convicted of engaging in a continuing criminal enterprise, a result that the Commission did not intend. The guideline is also amended to delete, as unnecessary, provisions that referred to statutory minimum sentences. **The effective date of this amendment is October 15, 1988.**

67. Chapter One, Part A (4)(b) is amended in the first sentence by deleting "... that was" and inserting in lieu thereof "of a kind, or to a degree,".

Chapter One, Part A, section 4(b) is amended in the second sentence of the last paragraph by deleting "Part H" and inserting in lieu thereof "Part K (Departures)", and in the third sentence of the last paragraph by deleting "Part H" and inserting in lieu thereof "Part K".

The purposes of this amendment are to conform the quotation to the statute, as amended by Section 3 of the Sentencing Act of 1987, and to correct a clerical error. **The effective date of this amendment is November 1, 1989.**

68. Chapter One, Part A, section 4(b) is amended in the first sentence of the fourth paragraph by deleting "three" and inserting in lieu thereof "two"; in the fourth paragraph by deleting the second through eighth sentences as follows:

"The first kind, which will most frequently be used, is in effect an interpolation between two adjacent, numerically oriented guideline rules. A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than requiring a court to force middle instances into either the 'serious' or the 'simple' category, the guideline commentary suggests that the court may interpolate and select a midpoint increase of three levels. The Commission has decided to call such an interpolation a 'departure' in light of the

legal views that a guideline providing for a range of increases in offense levels may violate the statute's 25 percent rule (though other have presented contrary legal arguments). Since interpolations are technically departures, the courts will have to provide reasons for their selection, and it will be subject to review for 'reasonableness' on appeal. The Commission believes, however, that a simple reference by the court to the 'mid-category' nature of the facts will typically provide sufficient reason. It does not foresee serious practical problems arising out of the application of the appeal provisions to this form of departure.";

in the first sentence of the fifth paragraph by deleting "second" and inserting in lieu thereof "first"; and, in the first sentence of the sixth paragraph by deleting "third" and inserting in lieu thereof "second".

The purpose of this amendment is to eliminate references to interpolation as a special type of departure. The Commission has reviewed the discussion of interpolation in Chapter One, which has been read as describing "interpolation" as a departure from an offense level rather than from the guideline range established after the determination of an offense level. The Commission concluded that it is simpler to add intermediate offense level adjustments to the guidelines in the cases where interpolation is most likely to be considered (*i.e.*, degree of bodily injury). This amendment is not intended to preclude interpolation in other cases; where appropriate, the court will be able to achieve the same result by use of the regular departure provisions. **The effective date of this amendment is November 1, 1989.**

69. Section 1B1.1(a) is amended by deleting "guideline section in Chapter Two most applicable to the statute of conviction" and inserting in lieu thereof "applicable offense guideline section from Chapter Two", and by deleting the last sentence as follows: "If more than one guideline is referenced for the particular statute, select the guideline most appropriate for the conduct of which the defendant was convicted."

The purposes of this amendment are to clarify the guideline and conform the language to §1B1.2. **The effective date of this amendment is November 1, 1989.**

70. Section 1B1.1(e) is amended by deleting the last sentence as follows: "The resulting offense level is the total offense level."

Section 1B1.1(g) is amended by deleting "total", and by inserting "determined above" immediately following "category".

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

71. The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(c) by deleting "firearm or other dangerous weapon" and inserting in lieu thereof "dangerous weapon (including a firearm)".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(d) by inserting the following additional sentence at the end: "Where an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon."

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(g) by deleting "firearm or other dangerous weapon" the first time it appears and inserting in lieu thereof "dangerous weapon (including a firearm)".

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

- "5. Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level. E.g., in §2A2.2(b)(2), if a firearm is both discharged and brandished, the provision applicable to the discharge of the firearm would be used."

The purposes of this amendment are to clarify the definition of a dangerous weapon; and to clarify that when two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, the provision that results in the greater offense level is to be used. **The effective date of this amendment is November 1, 1989.**

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

- "6. In the case of a defendant subject to a sentence enhancement under 18 U.S.C. § 3147 (Penalty for an Offense Committed While on Release), see §2J1.7 (Commission of Offense While on Release)."

The purpose of this amendment is to clarify the treatment of a specific enhancement provision. **The effective date of this amendment is November 1, 1989.**

73. Section 1B1.2(a) is amended in the first sentence by deleting "The court shall apply" and inserting in lieu thereof "Determine"; and in the second sentence by deleting "the court shall apply" and inserting in lieu thereof "determine", and by deleting "guideline in such chapter" and inserting in lieu thereof "offense guideline section in Chapter Two".

The purposes of this amendment are to clarify the guideline and to make the phraseology of this subsection more consistent with that of §§1B1.1 and 1B1.2(b). **The effective date of this amendment is November 1, 1989.**

74. Section 1B1.2(a) is amended in the first sentence by inserting immediately before the period: "(i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)".

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

"As a general rule, the court is to apply the guideline covering the offense conduct most applicable to the offense of conviction. Where a particular statute proscribes a variety of conduct which might constitute the subject of different guidelines, the court will decide which guideline applies based upon the nature of the offense conduct charged.",

and inserting in lieu thereof:

"As a general rule, the court is to use the guideline section from Chapter Two most applicable to the offense of conviction. The Statutory Index (Appendix A) provides a listing to assist in this determination. When a particular statute proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and there will be only one offense guideline referenced. When a particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines, the court will determine which guideline section applies based upon the nature of the offense conduct charged in the count of which the defendant was convicted."

The purpose of this amendment is to clarify the guideline and commentary. The effective date of this amendment is November 1, 1989.

75. Section 1B1.2(a) is amended by deleting the last sentence as follows:

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

and by inserting the following additional subsections:

- "(c) A conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).
- (d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit."

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

"Similarly, if the defendant pleads guilty to one robbery but admits the elements of two additional robberies as part of a plea agreement, the guideline applicable to three robberies is to be applied.",

and by inserting the following additional notes:

- "4. Subsections (c) and (d) address circumstances in which the provisions of Chapter Three, Part D (Multiple Counts) are to be applied although there may be only one count of conviction. Subsection (c) provides that in the case of a stipulation to the commission of additional offense(s), the guidelines are to be applied as if the defendant had been convicted of an additional count for each of the offenses stipulated. For example, if the defendant is convicted of one count of robbery but, as part of a plea agreement, admits to having committed two additional robberies, the guidelines are to be applied as if the defendant had been convicted of three counts of robbery. Subsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.
- 5. Particular care must be taken in applying subsection (d) because there are cases in which the jury's verdict does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be grouped together under §3D1.2(d) (e.g., a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because §1B1.3(a)(2) governs consideration of the defendant's conduct."

The purpose of this amendment is to add a guideline subsection (subsection (d)) expressly providing that a conviction of conspiracy to commit more than one offense is treated for guideline purposes as if the defendant had been convicted of a separate conspiracy count for each offense that the defendant conspired to commit. The current instruction in Application Note 9 of §3D1.2 is inadequate. For consistency, material now contained at §1B1.2(a) concerning stipulations to having committed additional offenses is moved to a new subsection (subsection (c)).

Additional commentary (Application Note 5) is provided to address cases in which the jury's verdict does not specify how many or which offenses were the object of the conspiracy of which the defendant was convicted. Compare U.S. v. Johnson, 713 F.2d 633, 645-46 (11th Cir. 1983) (conviction stands if there is sufficient proof with respect to any one of the objectives), with U.S. v. Tarnopol, 561 F.2d 466 (3d Cir. 1977) (failure of proof with respect to any one of the objectives renders the conspiracy conviction invalid). In order to maintain consistency with other §1B1.2(a) determinations, this decision should be governed by a reasonable doubt standard. A higher standard of proof should govern the creation of what is, in effect, a new count of conviction for the purposes of Chapter Three, Part D (Multiple Counts). Because the guidelines do not explicitly establish standards of proof, the proposed new application note calls upon the court to determine which offense(s) was the object of the conspiracy as if it were "sitting as a trier of fact." The foregoing determination is not required, however, in the case of offenses that are grouped together under §3D1.2(d) (e.g., fraud and theft) because §1B1.3(a)(2) governs consideration of the defendant's conduct. **The effective date of this amendment is November 1, 1989.**

76. Section 1B1.3 is amended in subsection (a)(3) by deleting "or risk of harm" immediately following "all harm", and by deleting "if the harm or risk was caused intentionally, recklessly or by criminal negligence, and all harm or risk" and inserting in lieu thereof "and all harm".

Section 1B1.3(a) is amended by deleting:

"(4) the defendant's state of mind, intent, motive and purpose in committing the offense; and",

by renumbering subsection (a)(5) as (a)(4), and by inserting "and" at the end of subsection (a)(3) immediately following the semicolon.

The Commentary to §1B1.3 captioned "Background" is amended by deleting:

" 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.",

and inserting in lieu thereof:

" Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created."

The purpose of this amendment is to delete language pertaining to "risk of harm" and "state of mind" as unnecessary. Cases in which the guidelines specifically address risk of harm or state of mind are covered in the amended guideline under subsection (a)(4) [formerly subsection (a)(5)]. In addition, the amendment deletes reference to harm committed

"intentionally, recklessly, or by criminal negligence" as unnecessary and potentially confusing. **The effective date of this amendment is November 1, 1989.**

77. Section 1B1.3 is amended by deleting the introductory sentence as follows: "The conduct that is relevant to determining the applicable guideline range includes that set forth below."

Section 1B1.3(b) is amended by deleting:

- "(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."

and inserting in lieu thereof:

- "(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines."

The Commentary to §1B1.3 captioned "Background" is amended in the second paragraph by deleting "Chapter Four" and inserting in lieu thereof "Chapters Four and Five", and by deleting "that Chapter" and inserting in lieu thereof "those Chapters".

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

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

"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."

and inserting in lieu thereof:

"In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant 'would be otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.

In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant 'would be otherwise accountable' includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Illustrations of Conduct for Which the Defendant is Accountable

a. Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a boat containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actually unloaded, and notwithstanding any claim on his part that he was neither aware of, nor could reasonably foresee, that the boat contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the boat because he aided and abetted the unloading, and hence the importation, of the entire shipment.

b. Defendant C, the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is injured, is convicted of the substantive count of bank robbery. Defendant C is accountable for the money taken because he aided and abetted the taking of the money. He is accountable for the injury inflicted because he participated in concerted criminal conduct that he could reasonably foresee might result in the infliction of injury.

c. Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check. Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he jointly undertook with Defendant D.

d. Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Each defendant is accountable for the entire amount (\$55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire \$55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable.

e. Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. For the purposes of determining the offense level under this guideline, Defendant J is accountable for the entire single shipment of marihuana he conspired to help import and any acts or omissions in furtherance of the importation that were reasonably foreseeable. He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I if those acts were beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he agreed to jointly undertake with Defendants H and I (i.e., the importation of the single shipment of marihuana).".

The purpose of this amendment is to clarify the definition of conduct for which the defendant is "otherwise accountable." The effective date of this amendment is November 1, 1989.

79. Section 1B1.5 is amended by deleting "adjustments for" immediately following "all applicable", and by inserting "and cross references" immediately before the period at the end of the sentence.

The Commentary to §1B1.5 captioned "Application Note" is amended in Note 1 by inserting "and cross references" immediately before "as well as the base offense level".

The purpose of this amendment is to clarify the guideline and commentary. The effective

date of this amendment is November 1, 1989.

80. The Commentary to §1B1.5 captioned "Application Note" is amended in Note 1 by deleting the last sentence as follows: "If the victim was vulnerable, the adjustment from §3A1.1 (Vulnerable Victim) also would apply."

The purpose of this amendment is to delete an unnecessary sentence. No substantive change is made. **The effective date of this amendment is November 1, 1989.**

81. Section 1B1.9 is amended in the title by deleting "Petty Offenses" and inserting in lieu thereof "Class B or C Misdemeanors and Infractions".

Section 1B1.9 is amended by deleting "(petty offense)" immediately following "infraction".

The Commentary to §1B1.9 captioned "Application Notes" is amended in the first sentence of Note 1 by deleting "petty offense" and inserting in lieu thereof "Class B or C misdemeanor or an infraction", in the second sentence of Note 1 by deleting "A petty offense is any offense for which the maximum sentence that may be imposed does not exceed six months' imprisonment." and inserting in lieu thereof "A Class B misdemeanor is any offense for which the maximum authorized term of imprisonment is more than thirty days but not more than six months; a Class C misdemeanor is any offense for which the maximum authorized term of imprisonment is more than five days but not more than thirty days; an infraction is any offense for which the maximum authorized term of imprisonment is not more than five days.", in the first sentence of Note 2 by deleting "petty offenses" and inserting in lieu thereof "Class B or C misdemeanors or infractions", in the second sentence of Note 2 by deleting "petty" and inserting in lieu thereof "such", in the third sentence of Note 2 by deleting "petty offense" and inserting in lieu thereof "Class B or C misdemeanor or infraction" and, in Note 3 by deleting:

"3. All other provisions of the guidelines should be disregarded to the extent that they purport to cover petty offenses."

The Commentary to §1B1.9 captioned "Background" is amended by deleting:

"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",

and inserting in lieu thereof:

"exempted all Class B and C misdemeanors and infractions from the coverage of the guidelines".

The purposes of this amendment are to conform the guideline to a revision in the statutory definition of a petty offense, and to convert the wording of the Commission's emergency amendment at §1B1.9 (effective June 15, 1988) to that appropriate for a permanent amendment. Section 7089 of the Anti-Drug Abuse Act of 1988 revises the definition of a petty offense so that it no longer exactly corresponds with a Class B or C misdemeanor or infraction. Under the revised definition, a Class B or C misdemeanor or infraction that has an authorized fine of more than \$5,000 for an individual (or more than \$10,000 for an organization) will not be a petty offense. This legislative revision does not affect the maximum terms of imprisonment authorized. The maximum authorized term of imprisonment remains controlled by the grade of the offense (*i.e.*, the maximum term of imprisonment remains five days for an infraction, thirty days for a Class C misdemeanor, and six months for a Class B misdemeanor). Because the statutory grade of the offense (*i.e.*, a Class B or C misdemeanor or an infraction) is the more relevant definition for guideline

purposes, this amendment deletes the references in §1B1.9 to "petty offenses" and in lieu thereof inserts references to "Class B and C misdemeanors and infractions." **The effective date of this amendment is November 1, 1989.**

82. The Commentary to §2A1.1 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions", and by inserting "; 21 U.S.C. § 848(e)" at the end immediately before the period.

The Commentary to §2A1.1 captioned "Application Note" is amended in the caption by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional note:

- "2. If the defendant is convicted under 21 U.S.C. § 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed."

The Commentary to §2A1.1 captioned "Background" is amended by deleting "statute" and inserting in lieu thereof "18 U.S.C. § 1111", and by inserting immediately after the first sentence:

"Prior to the applicability of the Sentencing Reform Act of 1984, a defendant convicted under this statute and sentenced to life imprisonment could be paroled (see 18 U.S.C. § 4205(a)). Because of the abolition of parole by that Act, the language of 18 U.S.C. § 1111(b) (which was not amended by the Act) appears on its face to provide a mandatory minimum sentence of life imprisonment for this offense. Other provisions of the Act, however, classify this offense as a Class A felony (see 18 U.S.C. § 3559(a)(1)), for which a term of imprisonment of any period of time is authorized as an alternative to imprisonment for the duration of the defendant's life (see 18 U.S.C. §§ 3559(b), 3581(b)(1), as amended); hence, the relevance of the discussion in Application Note 1, supra, regarding circumstances in which a sentence less than life may be appropriate for a conviction under this statute."

The Commentary to §2A1.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

" The maximum penalty authorized under 21 U.S.C. § 848(e) is death or life imprisonment. If a term of imprisonment is imposed, the statutorily required minimum term is twenty years."

The purpose of this amendment is to incorporate new first-degree murder offenses created by Section 7001 of the Anti-Drug Abuse Act of 1988 where the death penalty is not imposed. This amendment also clarifies the existing commentary to this guideline. **The effective date of this amendment is November 1, 1989.**

83. Section 2A2.1 is amended in subsection (b)(2)(B) by deleting "a firearm or a dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)", and in subsection (b)(2)(C) by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in the language between specific offense characteristic subdivisions (b)(2)(B) and (b)(2)(C). **The effective date of this amendment is November 1, 1989.**

84. Section 2A2.1(b)(3) is amended by inserting the following additional subdivisions:

- "(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or
- (E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The Commentary to §2A2.1 captioned "Application Notes" is amended in the caption by deleting "Notes" and inserting in lieu thereof "Note", and by deleting:

- "2. If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate."

The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury. The effective date of this amendment is November 1, 1989.

85. Section 2A2.2 is amended in subsection (b)(2)(B) by deleting "a firearm or a dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)", and in subsection (b)(2)(C) by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in language between specific offense characteristic subdivisions (b)(2)(B) and (b)(2)(C). The effective date of this amendment is November 1, 1989.

86. Section 2A2.2(b)(3) is amended by inserting the following additional subdivisions:

- "(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or
- (E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The Commentary to §2A2.2 captioned "Application Notes" is amended by deleting:

- "3. If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate."

and by renumbering Note 4 as Note 3.

The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury. The effective date of this amendment is November 1, 1989.

87. Section 2A2.3(a)(1) is amended by deleting "striking, beating, or wounding" and inserting in lieu thereof "physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened".

The Commentary to §2A2.3 captioned "Application Notes" is amended by deleting:

- "2. 'Striking, beating, or wounding' means conduct sufficient to violate 18 U.S.C. § 113(d)."

and inserting in lieu thereof:

- "2. Definitions of 'firearm' and 'dangerous weapon' are found in the Commentary to §1B1.1 (Application Instructions)."

The Commentary to §2A2.3 captioned "Background" is amended by deleting the last sentence as follows: "The distinction for striking, beating, or wounding reflects the statutory distinction found in 18 U.S.C. § 113(d) and (e).".

The purpose of this amendment is to provide a clearer standard by replacing the phrase "striking, wounding, or beating" (a statutory phrase dealing with a petty offense) with "physical contact." The amendment also provides an enhanced offense level for the case in which a weapon is possessed and its use is threatened. **The effective date of this amendment is November 1, 1989.**

88. The Commentary to §2A2.3 captioned "Statutory Provisions" is amended by deleting "113(d), 113(e).".

The purpose of this amendment is to delete references to petty offenses. **The effective date of this amendment is November 1, 1989.**

89. The Commentary to §2A2.4 captioned "Application Notes" is amended in Note 1 by deleting the first sentence as follows:

"Do not apply §3A1.2 (Official Victim).",

and by inserting the following additional sentence at the end:

"Therefore, do not apply §3A1.2 (Official Victim) unless subsection (c) requires the offense level to be determined under §2A2.2 (Aggravated Assault).".

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

90. Section 2A2.4(b)(1) is amended by deleting "striking, beating, or wounding", and inserting in lieu thereof "physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened".

The Commentary to §2A2.4 captioned "Application Notes" is amended by deleting:

"2. 'Striking, beating, or wounding' is discussed in the Commentary to §2A2.3 (Minor Assault).",

and inserting in lieu thereof:

"2. Definitions of 'firearm' and 'dangerous weapon' are found in the Commentary to §1B1.1 (Application Instructions).".

The purpose of this amendment is to provide a clearer standard by replacing the phrase "striking, wounding, or beating" (a statutory phrase dealing with a petty offense) with "physical contact." The amendment also provides an enhanced offense level for the case in which a weapon is possessed and its use is threatened. **The effective date of this amendment is November 1, 1989.**

91. Section 2A3.1(b)(1) is amended by deleting:

"criminal sexual abuse was accomplished as defined in 18 U.S.C. § 2241",

and inserting in lieu thereof:

"offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b)".

The Commentary to §2A3.1 captioned "Application Notes" is amended in Note 2 by deleting:

"'Accomplished as defined in 18 U.S.C. § 2241' means accomplished by force, threat, or other means as defined in 18 U.S.C. § 2241(a) or (b) (i.e., by using force against that person; by threatening or placing that other person",

and inserting in lieu thereof:

"The means set forth in 18 U.S.C. § 2241(a) or (b)' are: by using force against the victim; by threatening or placing the victim",

by deleting the parenthesis immediately before the period at the end of the Note, and by inserting the following additional sentence at the end of the Note:

"This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim."

The Commentary to §2A3.1 captioned "Background" is amended in the fifth sentence of the first paragraph by deleting the comma immediately following "force" and inserting in lieu thereof a semicolon, and by deleting "kidnapping," and inserting in lieu thereof "or kidnapping;"; and in the last sentence of the last paragraph by deleting "serious physical" and inserting in lieu thereof "permanent, life-threatening, or serious bodily".

The purpose of this amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

92. Section 2A3.1(b)(4) is amended by inserting immediately before the period at the end of the sentence: "; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels".

The purpose of this amendment is to provide an intermediate adjustment level for degree of bodily injury. **The effective date of this amendment is November 1, 1989.**

93. The Commentary to §2A3.2 captioned "Statutory Provision" and "Background" is amended by deleting "2243" wherever it appears and inserting in lieu thereof "2243(a)".

The Commentary to §2A3.2 captioned "Background" is amended by deleting "statutory rape, i.e.," immediately following "applies to", and by deleting "victim's incapacity to give lawful consent" and inserting in lieu thereof "age of the victim".

The purposes of this amendment are to clarify that the relevant factor is the age of the victim, and to provide a more specific reference to the underlying statute. **The effective date of this amendment is November 1, 1989.**

94. Section 2A3.3 is amended in the title by deleting "(Statutory Rape)" immediately following "a Ward".

The Commentary to §2A3.3 captioned "Statutory Provision" is amended by deleting "§2243" and inserting in lieu thereof "§2243(b)".

The purposes of this amendment are to delete inapt language from the title and to provide a more specific reference to the underlying statute. **The effective date of this amendment is November 1, 1989.**

95. Section 2A3.4 is amended by deleting the entire guideline and accompanying commentary as follows:

"§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristics
 - (1) If the abusive sexual contact was accomplished as defined in 18 U.S.C. § 2241 (including, but not limited to, the use or display of any dangerous weapon), increase by 9 levels.
 - (2) If the abusive sexual contact was accomplished as defined in 18 U.S.C. § 2242, increase by 4 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2244, 2245.

Application Notes:

1. 'Accomplished as defined in 18 U.S.C. § 2241' means accomplished by force, threat, or other means as defined in 18 U.S.C. § 2241(a) or (b) (*i.e.*, by using force against that person; by threatening or placing that other person in fear that any person will be subject to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct).
2. 'Accomplished as defined in 18 U.S.C. § 2242' means accomplished by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or when the victim is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §2A3.1-3.3). Enhancements are provided for the use of force or threats. The maximum term of imprisonment authorized by statute for offenses covered in this section is five years (if accomplished as defined in 18 U.S.C. § 2241), three years (if accomplished as defined in 18 U.S.C. § 2242), and six months otherwise. The base offense level applies to conduct that is consensual."

and inserting in lieu thereof:

"§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

- (a) Base Offense Level:
 - (1) 16, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);
 - (2) 12, if the offense was committed by the means set forth in 18 U.S.C. § 2242;

(3) 10, otherwise.

(b) Specific Offense Characteristics

(1) If the victim had not attained the age of twelve years, increase by 4 levels; but if the resulting offense level is less than 16, increase to level 16.

(2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. § 2244(a)(1),(2),(3).

Application Notes:

1. 'The means set forth in 18 U.S.C. § 2241(a) or (b)' are by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.
2. 'The means set forth in 18 U.S.C. § 2242' are by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of 6."

The purposes of the amendment are to make the offense levels under this guideline consistent with the structure of related guidelines (§§2A3.1, 2A3.2, 2G1.2, 2G2.1, and 2G2.2) and to reflect the increased maximum sentences for certain conduct covered by this guideline. The amendment increases all offense levels, but in particular provides enhanced punishment for victimization of minors and children. **The effective date of this amendment is November 1, 1989.**

96. Section 2A4.1(b)(2) is amended by inserting immediately before the period at the end of the sentence: "; or (C) if the degree of injury is between that specified in subdivisions (A) and

(B), increase by 3 levels".

The purpose of this amendment is to provide an intermediate adjustment level for the degree of bodily injury. The effective date of this amendment is November 1, 1989.

97. The Commentary to §2A5.2 captioned "Application Note" is amended by deleting:

"Application Note:

1. If an assault occurred, apply the most analogous guideline from Part A, Subpart 2 (Assault) if the offense level under that guideline is greater."

The purpose of this amendment is to simplify the guideline by deleting redundant material. The effective date of this amendment is November 1, 1989.

98. The Commentary to §2A5.3 captioned "Application Notes" is amended in Note 1 by deleting "that the defendant is convicted of violating" and inserting in lieu thereof "of which the defendant is convicted".

The purpose of this amendment is to clarify the commentary. The effective date of this amendment is November 1, 1989.

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

	<u>"Loss</u>	<u>Increase in Level</u>
(A)	\$100 or less	no increase
(B)	\$101 - \$1,000	add 1
(C)	\$1,001 - \$2,000	add 2
(D)	\$2,001 - \$5,000	add 3
(E)	\$5,001 - \$10,000	add 4
(F)	\$10,001 - \$20,000	add 5
(G)	\$20,001 - \$50,000	add 6
(H)	\$50,001 - \$100,000	add 7
(I)	\$100,001 - \$200,000	add 8
(J)	\$200,001 - \$500,000	add 9
(K)	\$500,001 - \$1,000,000	add 10
(L)	\$1,000,001 - \$2,000,000	add 11
(M)	\$2,000,001 - \$5,000,000	add 12
(N)	over \$5,000,000	add 13",

and inserting in lieu thereof:

	<u>"Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$100 or less	no increase
(B)	More than \$100	add 1
(C)	More than \$1,000	add 2
(D)	More than \$2,000	add 3
(E)	More than \$5,000	add 4
(F)	More than \$10,000	add 5
(G)	More than \$20,000	add 6
(H)	More than \$40,000	add 7
(I)	More than \$70,000	add 8
(J)	More than \$120,000	add 9
(K)	More than \$200,000	add 10

(L)	More than \$350,000	add 11
(M)	More than \$500,000	add 12
(N)	More than \$800,000	add 13
(O)	More than \$1,500,000	add 14
(P)	More than \$2,500,000	add 15
(Q)	More than \$5,000,000	add 16
(R)	More than \$10,000,000	add 17
(S)	More than \$20,000,000	add 18
(T)	More than \$40,000,000	add 19
(U)	More than \$80,000,000	add 20."

The purposes of this amendment are to conform the theft and fraud loss tables to the tax evasion table in order to remove an unintended inconsistency between these tables in cases where the amount is greater than \$40,000, to increase the offense levels for larger losses to provide additional deterrence and better reflect the seriousness of the conduct, and to eliminate minor gaps in the loss table. **The effective date of this amendment is November 1, 1989.**

100. Section 2B1.1(b)(6) is amended by deleting "organized criminal activity" and inserting in lieu thereof "an organized scheme to steal vehicles or vehicle parts".

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

- "8. 'Organized criminal activity' refers to operations such as car theft rings or 'chop shops,' where the scope of the activity is clearly significant."

and inserting in lieu thereof:

- "8. Subsection (b)(6), referring to an 'organized scheme to steal vehicles or vehicle parts,' provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or 'chop shop.' 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft."

The Commentary to §2B1.1 captioned "Background" is amended in the last paragraph by deleting:

"A minimum offense level of 14 is provided for organized criminal activity, i.e., operations such as car theft rings or 'chop shops,' where the scope of the activity is clearly significant but difficult to estimate. The guideline is structured so that if reliable information enables the court to estimate a volume of property loss that would result in a higher offense level, the higher offense level would govern."

and inserting in lieu thereof:

"A minimum offense level of 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial (i.e., the value of the stolen property, combined with an enhancement for 'more than minimal planning' would itself result in an offense level of at least 14), but the value of the property is particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of 'organized scheme' is used as an alternative to 'loss' in setting the offense level."

The purpose of this amendment is to clarify the coverage of a specific offense characteristic. **The effective date of this amendment is November 1, 1989.**

101. The Commentary to §2B1.1 captioned "Background" is amended in the first paragraph by

deleting "§5A1.1" and inserting in lieu thereof "Chapter Five, Part A".

The purpose of this amendment is to correct a clerical error. **The effective date of this amendment is November 1, 1989.**

102. Section 2B1.2 is amended in the title by inserting ", Transporting, Transferring, Transmitting, or Possessing" immediately after "Receiving".

Section 2B1.2(b)(3)(A) is amended by inserting "receiving and" immediately before "selling".

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

- "1. If the defendant is convicted of transporting stolen property, either §2B1.1 or this guideline would apply, depending upon whether the defendant stole the property.",

and by renumbering Notes 2 and 3 as Notes 1 and 2 respectively.

The purpose of this amendment is to clarify the nature of the cases to which this guideline applies. **The effective date of this amendment is November 1, 1989.**

103. Section 2B1.2 is amended by renumbering subsection (b)(4) as (b)(5), and by inserting the following new subsection (b)(4):

- "(4) If the property included undelivered United States mail and the offense level as determined above is less than level 6, increase to level 6."

The Commentary to §2B1.2 captioned "Application Notes", as amended, is further amended by inserting the following additional note:

- "3. 'Undelivered United States mail' means mail that has not actually been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mail box)."

The purpose of this amendment is to add a specific offense characteristic where stolen property involved "undelivered mail" to conform to §2B1.1. **The effective date of this amendment is November 1, 1989.**

104. Section 2B1.2(b)(5)[formerly (b)(4)] is amended by deleting "organized criminal activity" and inserting in lieu thereof "an organized scheme to receive stolen vehicles or vehicle parts".

The Commentary to §2B1.2 captioned "Application Notes" is amended by inserting the following additional note:

- "4. Subsection (b)(5), referring to an 'organized scheme to receive stolen vehicles or vehicle parts,' provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or 'chop shop.' 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft. See Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)."

The purpose of this amendment is to clarify the coverage of a specific offense characteristic. **The effective date of this amendment is November 1, 1989.**

105. Section 2B2.1(b)(2) is amended by deleting:

<u>"Loss</u>	<u>Increase in Level</u>
(A) \$2,500 or less	no increase
(B) \$2,501 - \$10,000	add 1
(C) \$10,001 - \$50,000	add 2
(D) \$50,001 - \$250,000	add 3
(E) \$250,001 - \$1,000,000	add 4
(F) \$1,000,001 - \$5,000,000	add 5
(G) more than \$5,000,000	add 6",

and inserting in lieu thereof:

<u>"Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) \$2,500 or less	no increase
(B) More than \$2,500	add 1
(C) More than \$10,000	add 2
(D) More than \$50,000	add 3
(E) More than \$250,000	add 4
(F) More than \$800,000	add 5
(G) More than \$1,500,000	add 6
(H) More than \$2,500,000	add 7
(I) More than \$5,000,000	add 8."

The purposes of this amendment are to eliminate minor gaps in the loss table and to conform the offense levels for larger losses to the amended loss table at §2B1.1. **The effective date of this amendment is November 1, 1989.**

106. Section 2B2.1(b)(4) is amended by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The Commentary to §2B2.1 captioned "Application Notes" is amended in Note 4 by deleting "with respect to a firearm or other dangerous weapon" and inserting in lieu thereof "to possession of a dangerous weapon (including a firearm) that was".

The purpose of this amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

107. Section 2B2.2(b)(4) is amended by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The Commentary to §2B2.2 captioned "Application Notes" is amended in Note 4 by deleting "with respect to a firearm", and inserting in lieu thereof "to possession of a dangerous weapon (including a firearm) that was".

The purpose of this amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

108. Section 2B2.3(b)(2) is amended by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

109. Section 2B2.3(b) is amended by deleting "Characteristic" and inserting in lieu thereof

"Characteristics".

The Commentary to §2B2.3 captioned "Statutory Provisions" is amended by deleting "Provisions" and inserting in lieu thereof "Provision", and by deleting "18 U.S.C. §§ 1382, 1854" and inserting in lieu thereof "42 U.S.C. § 7270b".

The purposes of this amendment are to correct a clerical error, to delete a reference to a petty offense and an incorrect statutory reference, and to insert an additional statutory reference. **The effective date of this amendment is November 1, 1989.**

110. Section 2B3.1(a) is amended by deleting "18" and inserting in lieu thereof "20".

Section 2B3.1(b) is amended by deleting subdivisions (1) and (2) as follows:

"(1) If the loss exceeded \$2,500, increase the offense level as follows:

<u>Loss</u>	<u>Increase in Level</u>
(A) \$2,500 or less	no increase
(B) \$2,501 - \$10,000	add 1
(C) \$10,001 - \$50,000	add 2
(D) \$50,001 - \$250,000	add 3
(E) \$250,001 - \$1,000,000	add 4
(F) \$1,000,001 - \$5,000,000	add 5
(G) more than \$5,000,000	add 6

Treat the loss for a financial institution or post office as at least \$5,000.

(2) (A) If a firearm was discharged increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by 3 levels."

and inserting in lieu thereof:

"(1) If the offense involved robbery or attempted robbery of the property of a financial institution or post office, increase by 2 levels.

(2) (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished, displayed, or possessed, increase by 3 levels; or (D) if an express threat of death was made, increase by 2 levels."

and by inserting the following additional subdivision:

"(6) If the loss exceeded \$10,000, increase the offense level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) \$10,000 or less	no increase
(B) More than \$10,000	add 1
(C) More than \$50,000	add 2
(D) More than \$250,000	add 3
(E) More than \$800,000	add 4
(F) More than \$1,500,000	add 5
(G) More than \$2,500,000	add 6
(H) More than \$5,000,000	add 7."

The Commentary to §2B3.1 captioned "Application Notes" is amended by deleting:

"2. Pursuant to the last sentence of §2B3.1(b)(1), robbery or attempted robbery of a bank or post office results in a minimum one-level enhancement. There is no special enhancement for banks and post offices if the loss exceeds \$10,000, however.",
and inserting in lieu thereof:

"2. When an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon for the purposes of subsection (b)(2)(C)."

The Commentary to §2B3.1 captioned "Application Notes" is amended by inserting the following additional note:

"8. An 'express threat of death,' as used in subsection (b)(2)(D), may be in the form of an oral or written statement, act, gesture, or combination thereof. For example, an oral or written demand using words such as 'Give me the money or I will kill you', 'Give me the money or I will pull the pin on the grenade I have in my pocket', 'Give me the money or I will shoot you', 'Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)', or 'Give me the money or you are dead' would constitute an express threat of death. The court should consider that the intent of the underlying provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, significantly greater fear than that necessary to constitute an element of the offense of robbery."

The Commentary to §2B3.1 captioned "Background" is amended in the first paragraph by deleting the third sentence as follows:

"Banks and post offices carry a minimum 1 level enhancement for property loss because such institutions generally have more cash readily available, and whether the defendant obtains more or less than \$2,500 is largely fortuitous."

The purposes of this amendment are to increase the offense level for robbery to better reflect the seriousness of the offense and past practice, to provide an increased enhancement for the robbery of the property of a financial institution or post office, to provide an enhancement for an express threat of death, and to provide that an object that appeared to be a dangerous weapon is to be treated as a dangerous weapon for the purposes of subsection (b)(2)(C). The effective date of this amendment is November 1, 1989.

111. Section 2B3.1(b)(3) is amended by inserting the following additional subdivisions:

"(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The Commentary to §2B3.1 captioned "Application Notes" is amended by deleting:

"4. If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate."

and by renumbering Notes 5-8 as 4-7, respectively.

The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury. The effective date of this amendment is November 1, 1989.

112. Section 2B3.2 is amended in subsection (b)(2)(B) by deleting "a firearm or a dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)", and in subsection (b)(2)(C) by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in language between specific offense characteristic subdivisions (b)(2)(B) and (b)(2)(C). The effective date of this amendment is November 1, 1989.

113. Section 2B3.2(b)(3) is amended by inserting the following additional subdivisions:

- "(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or
- (E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The Commentary to §2B3.2 captioned "Application Notes" is amended by deleting:

- "4. If the degree of bodily injury falls between two injury categories, use of the intervening level (i.e., interpolation) is appropriate."

and by renumbering Notes 5 and 6 as 4 and 5, respectively.

The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury. The effective date of this amendment is November 1, 1989.

114. Section 2B3.3(b) is amended by deleting "Characteristics" and inserting in lieu thereof "Characteristic".

The purpose of this amendment is to correct a clerical error. The effective date of this amendment is November 1, 1989.

115. Section 2B5.1 is amended in the title by inserting "Bearer" immediately before "Obligations".

The Commentary to §2B5.1 captioned "Application Notes" is amended by renumbering Note 2 as Note 3, and by inserting the following new note 2:

- "2. 'Counterfeit,' as used in this section, means an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under §2B5.2."

The Commentary to §2B5.1 captioned "Application Notes" is amended in the renumbered Note 3 by deleting ", paste corners of notes on notes of a different denomination," immediately before "or otherwise produce".

The purpose of this amendment is to clarify the coverage and operation of this guideline. The amendment revises the title of §2B5.1 to make the coverage of the guideline clear from the title, and adopts the definition of "counterfeit" used in 18 U.S.C. § 513. "Altered" obligations (e.g., the corner of a note of one denomination pasted on a note of a different

denomination) are covered under §2B5.2. **The effective date of this amendment is November 1, 1989.**

116. Section 2B5.2 is amended in the title by inserting "Altered or" immediately following "Involving" and by inserting "Counterfeit Bearer" immediately following "Other than".

The purpose of this amendment is to clarify the coverage of this guideline. The effective date of this amendment is November 1, 1989.

117. Section 2B6.1(b) is amended by renumbering subsection (b)(2) as (b)(3) and inserting the following new subsection (b)(2):

"(2) If the defendant was in the business of receiving and selling stolen property, increase by 2 levels."

The purpose of this amendment is to resolve an inconsistency between this section and §2B1.2 created by the lack of an enhancement in this section for a person in the business of selling stolen property. This amendment eliminates this inconsistency by adding a 2-level increase if the defendant was in the business of selling stolen property. Two levels rather than four levels is the applicable increase to conform to §2B1.2 because the base offense level of §2B6.1 already incorporates the adjustment for more than minimal planning. The effective date of this amendment is November 1, 1989.

118. Section 2B6.1(b)(3)[formerly (b)(2)] is amended by deleting "organized criminal activity" and inserting in lieu thereof "an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts".

The Commentary to §2B6.1 captioned "Application Note" is amended by deleting:

"1. See Commentary to §2B1.1 (Larceny, Embezzlement, and other Forms of Theft) regarding the adjustment in subsection (b)(2) for organized criminal activity, such as car theft rings and 'chop shop' operations."

and inserting in lieu thereof:

"1. Subsection (b)(3), referring to an 'organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts,' provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or 'chop shop.' 'Vehicles' refers to all forms of vehicles, including aircraft and watercraft. See Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)."

The purpose of this amendment is to clarify the coverage of a specific offense characteristic. The effective date of this amendment is November 1, 1989.

119. Section 2B6.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics".

The Commentary to §2B6.1 captioned "Statutory Provisions" and "Background" is amended by deleting "2320" wherever it appears and inserting in lieu thereof in each instance "2321".

The purpose of this amendment is to correct clerical errors. The effective date of this amendment is November 1, 1989.

120. Section 2C1.1(b)(1) is amended by deleting "action received" and inserting in lieu thereof "benefit received, or to be received,".

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 2 in the first sentence by deleting "action received" and inserting in lieu thereof "benefit received, or to be received," and by deleting "action (*i.e.*, benefit or favor)" and inserting in lieu thereof "benefit"; in the second sentence by deleting "action received in return" and inserting in lieu thereof "benefit received or to be received", and by deleting "such action" and inserting in lieu thereof "such benefit"; and in the third sentence by deleting "action" and inserting in lieu thereof "benefit".

The purpose of this amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

121. Section 2C1.1(b) is amended by deleting "(1)" and "(2)" and inserting in lieu thereof "(A)" and "(B)" respectively; and by deleting "Apply the greater" and inserting in lieu thereof:

- "(1) If the offense involved more than one bribe, increase by 2 levels.
(2) (If more than one applies, use the greater);".

The Commentary to §2C1.1 captioned "Application Notes" is amended by deleting the text of Note 6 as follows:

"When multiple counts are involved, each bribe is to be treated as a separate, unrelated offense not subject to §3D1.2(d) or §3D1.3(b). Instead, apply §3D1.4. However, if a defendant makes several payments as part of a single bribe, that is to be treated as a single bribery offense involving the total amount of the bribe.",

and inserting in lieu thereof:

"Related payments that, in essence, constitute a single bribe (*e.g.*, a number of installment payments for a single action) are to be treated as a single bribe, even if charged in separate counts."

Section 2C1.2(b) is amended by deleting "(1)" and "(2)" and inserting in lieu thereof "(A)" and "(B)" respectively; and by deleting "Apply the greater" and inserting in lieu thereof:

- "(1) If the offense involved more than one gratuity, increase by 2 levels.
(2) (If more than one applies, use the greater);".

The Commentary to §2C1.2 captioned "Application Notes" is amended by deleting the text of Note 4 as follows:

"When multiple counts of receiving a gratuity are involved, each count is to be treated as a separate, unrelated offense not subject to §3D1.2(d) or §3D1.3(b). Instead, apply §3D1.4.",

and inserting in lieu thereof:

"Related payments that, in essence, constitute a single gratuity (*e.g.*, separate payments for airfare and hotel for a single vacation trip) are to be treated as a single gratuity, even if charged in separate counts."

Section 3D1.2(d) is amended in the listing of offense sections in the third paragraph by deleting "§2C1.1," and in the listing of offense sections in the second paragraph by inserting in order by section number "§§2C1.1, 2C1.2;".

The Introductory Commentary to Chapter Three, Part D, is amended in the fifth paragraph by deleting ", robbery, and bribery" and inserting in lieu thereof "and robbery", and in the seventh paragraph by deleting ", robbery, or bribery" and inserting in lieu thereof "or robbery".

Under the current bribery guideline, there is no enhancement for repeated instances of bribery if the conduct involves the same course of conduct or common scheme or plan and the same victim (as frequently is the case where the government is the victim) because such cases are grouped under §3D1.2(b). In contrast, the fraud and theft guidelines generally provide a 2-level increase in cases of repeated instances under the second prong of the "more than minimal planning" definition.

Unlike the theft and fraud guidelines, it is arguable that the value of any bribe that was part of the same course of conduct or a common scheme or plan as the offense of conviction, but not included in the count of conviction, is excluded from consideration. This is because §1B1.3(a)(2), which authorizes consideration of conduct not expressly included in the offense of conviction but part of the same course of conduct or common scheme or plan, applies only to offenses grouped under §3D1.2(d). Thus, if the defendant pleads to one count of a bribery offense involving one \$10,000 bribe in satisfaction of a 15 count indictment involving an additional \$80,000 in separate bribes that were part of the same course of conduct, the current bribery guideline, unlike the theft and fraud guidelines, would not take into account the additional \$80,000, and there would be no increase for repeated instances.

The current guideline may also create various anomalies because the multiple count rule (which applies only where the offenses are not grouped under §3D1.2(b)) increases the offense level differently than the monetary table. For example, an elected public official who takes three unrelated \$200 bribes has an offense level of 21; the same defendant who took two unrelated \$500,000 bribes would have an offense level of 20.

The purpose of this amendment is to address the above noted issues. A specific offense characteristic is added to provide a 2-level increase where the offense involved more than one bribe or gratuity. In addition, such offenses will be grouped under §3D1.2(d) which allows for aggregation of the amount of the bribes from the same course of conduct or common scheme or plan under §1B1.3(a)(2) (as in theft and fraud offenses). **The effective date of this amendment is November 1, 1989.**

122. The Commentary to §2C1.1 captioned "Background" is amended in the eighth paragraph by deleting "extortions, conspiracies, and attempts" and inserting in lieu thereof "extortion, or attempted extortion,".

The purpose of this amendment is to correct a technical error. This section expressly covers extortion and attempted extortion; conspiracy is covered through the operation of §2X1.1. **The effective date of this amendment is November 1, 1989.**

123. Section 2D1.1(a) is amended by deleting:

"(a) Base Offense Level:

- (1) 43, for an offense that results in death or serious bodily injury with a prior conviction for a similar drug offense; or
- (2) 38, for an offense that results in death or serious bodily injury and involved controlled substances (except Schedule III, IV, and V controlled substances and less than: (A) fifty kilograms of marijuana, (B) ten kilograms of hashish, and (C) one kilogram of hashish oil); or
- (3) For any other offense, the base offense level is the level specified in the Drug Quantity Table below."

and inserting in lieu thereof:

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

- (1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or
- (2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 1 by deleting "Similar drug offense" as used in §2D1.1(a)(1) means a prior conviction as described in 21 U.S.C. §§ 841(b) or 962(b).", and inserting in lieu thereof "Mixture or substance" as used in this guideline has the same meaning as in 21 U.S.C. § 841."

The purpose of this amendment is to provide that subsections (a)(1) and (a)(2) apply only in the case of a conviction under circumstances specified in the statutes cited. The amendment also clarifies that the term "mixture or substance" has the same meaning as it has in the statute. **The effective date of this amendment is November 1, 1989.**

124. Section 2D1.1(b) is amended by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The purpose of the amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

125. Section 2D1.1 is amended by deleting the "Drug Quantity Table" in its entirety, including the title and footnotes, as follows:

"DRUG QUANTITY TABLE

<u>Controlled Substances and Quantity*</u>	<u>Base Offense Level</u>
10 KG Heroin or equivalent Schedule I or II Opiates, 50 KG Cocaine or equivalent Schedule I or II Stimulants, 500 G Cocaine Base, 10 KG PCP or 1 KG Pure PCP, 100 G LSD or equivalent Schedule I or II Hallucinogens, 4 KG Fentanyl or 1 KG Fentanyl Analogue, 10,000 KG Marihuana, 100,000 Marihuana Plants, 2000 KG Hashish, 200 KG Hashish Oil (or more of any of the above)	Level 36
3-9.9 KG Heroin or equivalent Schedule I or II Opiates, 15-49.9 KG Cocaine or equivalent Schedule I or II Stimulants, 150-499 G Cocaine Base, 3-9.9 KG PCP or 300-999 G Pure PCP, 30-99 G LSD or equivalent Schedule I or II Hallucinogens, 1.2-3.9 KG Fentanyl or 300-999 G Fentanyl Analogue, 3000-9999 KG Marihuana, 30,000-99,999 Marihuana Plants, 600-1999 KG Hashish, 60-199 KG Hashish Oil	Level 34
1-2.9 KG Heroin or equivalent Schedule I or II Opiates, 5-14.9 KG Cocaine or equivalent Schedule I or II Stimulants, 50-149 G Cocaine Base, 1-2.9 KG PCP or 100-299 G Pure PCP, 10-29 G LSD or equivalent Schedule I or II Hallucinogens, 4-1.1 KG Fentanyl or 100-299 G Fentanyl Analogue, 1000-2999 KG Marihuana, 10,000-29,999 Marihuana Plants, 200-599 KG Hashish, 20-59.9 KG Hashish Oil	Level 32**

700-999 G Heroin or equivalent Schedule I or II Opiates, 3.5-4.9 KG Cocaine or equivalent Schedule I or II Stimulants, 35-49 G Cocaine Base, 700-999 G PCP or 70-99 G Pure PCP, 7-9.9 G LSD or equivalent Schedule I or II Hallucinogens, 280-399 G Fentanyl or 70-99 G Fentanyl Analogue, 700-999 KG Marihuana, 7000-9999 Marihuana Plants, 140-199 KG Hashish, 14-19.9 KG Hashish Oil	Level 30
400-699 G Heroin or equivalent Schedule I or II Opiates, 2-3.4 KG Cocaine or equivalent Schedule I or II Stimulants, 20-34.9 G Cocaine Base, 400-699 G PCP or 40-69 G Pure PCP, 4-6.9 G LSD or equivalent Schedule I or II Hallucinogens, 160-279 G Fentanyl or 40-69 G Fentanyl Analogue, 400-699 KG Marihuana, 4000-6999 Marihuana Plants, 80-139 KG Hashish, 8.0-13.9 KG Hashish Oil	Level 28
100-399 G Heroin or equivalent Schedule I or II Opiates, .5-1.9 KG Cocaine or equivalent Schedule I or II Stimulants, 5-19 G Cocaine Base, 100-399 G PCP or 10-39 G Pure PCP, 1-3.9 G LSD or equivalent Schedule I or II Hallucinogens, 40-159 G Fentanyl or 10-39 G Fentanyl Analogue, 100-399 KG Marihuana, 1000-3999 Marihuana Plants, 20-79 KG Hashish, 2.0-7.9 KG Hashish Oil	Level 26**
80-99 G Heroin or equivalent Schedule I or II Opiates, 400-499 G Cocaine or equivalent Schedule I or II Stimulants, 4-4.9 G Cocaine Base, 80-99 G PCP or 8-9.9 G Pure PCP, 800-999 MG LSD or equivalent Schedule I or II Hallucinogens, 32-39 G Fentanyl or 8-9.9 G Fentanyl Analogue, 80-99 KG Marihuana, 800-999 Marihuana Plants, 16-19.9 KG Hashish, 1.6-1.9 KG Hashish Oil	Level 24
60-79 G Heroin or equivalent Schedule I or II Opiates, 300-399 G Cocaine or equivalent Schedule I or II Stimulants, 3-3.9 G Cocaine Base, 60-79 G PCP or 6-7.9 G Pure PCP, 600 -799 MG LSD or equivalent Schedule I or II Hallucinogens, 24-31.9 G Fentanyl or 6-7.9 G Fentanyl Analogue, 60-79 KG Marihuana, 600-799 Marihuana Plants, 12-15.9 KG Hashish, 1.2-1.5 KG Hashish Oil	Level 22
40-59 G Heroin or equivalent Schedule I or II Opiates, 200-299 G Cocaine or equivalent Schedule I or II Stimulants, 2-2.9 G Cocaine Base, 40-59 G PCP or 4-5.9 G Pure PCP, 400-599 MG LSD or equivalent Schedule I or II Hallucinogens, 16-23.9 G Fentanyl or 4-5.9 G Fentanyl Analogue, 40-59 KG Marihuana, 400-599 Marihuana Plants, 8-11.9 KG Hashish, .8-1.1 KG Hashish Oil, 20 KG+ Schedule III or other Schedule I or II controlled substances	Level 20
20-39 G Heroin or equivalent Schedule I or II Opiates, 100-199 G Cocaine or equivalent Schedule I or II Stimulants, 1-1.9 G Cocaine Base, 20-39 G PCP or 2-3.9 G Pure PCP, 200-399 MG LSD or equivalent Schedule I or II Hallucinogens, 8-15.9 G Fentanyl or 2-3.9 G Fentanyl Analogue, 20-39 KG Marihuana, 200-399 Marihuana Plants, 5-7.9 KG Hashish, 500-799 G Hashish Oil, 10-19 KG Schedule III or other Schedule I or II controlled substances	Level 18
10-19 G Heroin or equivalent Schedule I or II Opiates, 50-99 G Cocaine or equivalent Schedule I or II Stimulants, 500-999 MG Cocaine Base, 10-19.9 G PCP or 1-1.9 G Pure PCP, 100-199 MG LSD or equivalent Schedule I or II Hallucinogens, 4-7.9 G Fentanyl or 1-1.9 G Fentanyl Analogue, 10-19 KG Marihuana, 100-199 Marihuana Plants, 2-4.9 KG Hashish, 200-499 G Hashish Oil, 5-9.9 KG Schedule III or other Schedule I or II controlled substances	Level 16
5-9.9 G Heroin or equivalent Schedule I or II Opiates, 25-49 G Cocaine or equivalent Schedule I or II Stimulants, 250-499 MG Cocaine Base, 5-9.9 G PCP or 500-999 MG Pure PCP, 50-99 MG LSD or equivalent Schedule I or II Hallucinogens, 2-3.9 G Fentanyl or .5-9 G Fentanyl Analogue, 5-9.9 KG Marihuana, 50-99 Marihuana Plants, 1-1.9 KG Hashish, 100-199 G Hashish Oil, 2.5-4.9 KG Schedule III or other Schedule I or II controlled substances	Level 14
Less than the following: 5 G Heroin or equivalent Schedule I or II Opiates, 25 G Cocaine or equivalent Schedule I or II Stimulants, 250 MG Cocaine Base, 5 G PCP or 500 MG Pure PCP, 50 MG LSD or equivalent Schedule I or II Hallucinogens, 2 G Fentanyl or 500 MG Fentanyl Analogue; 2.5-4.9 KG Marihuana, 25-49 Marihuana Plants, 500-999 G Hashish, 50-99 G Hashish Oil, 1.25-2.4 KG Schedule III or other Schedule I or II controlled substances, 20 KG+ Schedule IV	Level 12
1-2.4 KG Marihuana, 10-24 Marihuana Plants, 200-499 G Hashish, 20-49 G Hashish Oil, .50-1.24 KG Schedule III or other Schedule I or II controlled substances, 8-19 KG Schedule IV	Level 10
250-999 G Marihuana, 3-9 Marihuana Plants, 50-199 G Hashish, 10-19 G Hashish Oil, 125-449 G Schedule III or other Schedule I or II controlled substances, 2-7.9 KG Schedule IV, 20 KG+ Schedule V	Level 8

Less than the following: 250 G Marihuana, 3 Marihuana Plants, 50 G Hashish, 10 G Hashish Oil, 125 G Schedule III or other Schedule I or II controlled substances, 2 KG Schedule IV, 20 KG Schedule V

Level 6

* The scale amounts for all controlled substances refer to the total weight of the controlled substance. Consistent with the provisions of the Anti-Drug Abuse Act, if any mixture of a compound contains any detectable amount of a controlled substance, the entire amount of the mixture or compound shall be considered in measuring the quantity. If a mixture or compound contains a detectable amount of more than one controlled substance, the most serious controlled substance shall determine the categorization of the entire quantity.

** Statute specifies a mandatory minimum sentence."

and inserting in lieu thereof:

"(c) DRUG QUANTITY TABLE

<u>Controlled Substances and Quantity*</u>	<u>Base Offense Level</u>
(1) 300 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 1500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 15 KG or more of Cocaine Base; 300 KG or more of PCP, or 30 KG or more of Pure PCP; 300 KG or more of Methamphetamine, or 30 KG or more of Pure Methamphetamine; 3 KG or more of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); 120 KG or more of Fentanyl; 30 KG or more of a Fentanyl Analogue; 300,000 KG or more of Marihuana; 60,000 KG or more of Hashish; 6,000 KG or more of Hashish Oil.	Level 42
(2) At least 100 KG but less than 300 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); At least 500 KG but less than 1500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); At least 5 KG but less than 15 KG of Cocaine Base; At least 100 KG but less than 300 KG of PCP, or at least 10 KG but less than 30 KG of Pure PCP; At least 100 KG but less than 300 KG of Methamphetamine, or at least 10 KG but less than 30 KG of Pure Methamphetamine; At least 1 KG but less than 3 KG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens); At least 40 KG but less than 120 KG of Fentanyl; At least 10 KG but less than 30 KG of a Fentanyl Analogue;	Level 40

At least 100,000 KG but less than 300,000 KG of Marihuana;

At least 20,000 KG but less than 60,000 KG of Hashish;

At least 2,000 KG but less than 6,000 KG of Hashish Oil.

- (3) At least 30 KG but less than 100 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 38

At least 150 KG but less than 500 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

At least 1.5 KG but less than 5 KG of Cocaine Base;

At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of Pure PCP;

At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Pure Methamphetamine;

At least 300 G but less than 1 KG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

At least 12 KG but less than 40 KG of Fentanyl;

At least 3 KG but less than 10 KG of a Fentanyl Analogue;

At least 30,000 KG but less than 100,000 KG of Marihuana;

At least 6,000 KG but less than 20,000 KG of Hashish;

At least 600 KG but less than 2,000 KG of Hashish Oil.

- (4) At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 36

At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

At least 500 G but less than 1.5 KG of Cocaine Base;

At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of Pure PCP;

At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG of Pure Methamphetamine;

At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

At least 4 KG but less than 12 KG of Fentanyl;

At least 1 KG but less than 3 KG of a Fentanyl Analogue;

At least 10,000 KG but less than 30,000 KG of Marihuana;

At least 2,000 KG but less than 6,000 KG of Hashish;

At least 200 KG but less than 600 KG of Hashish Oil.

- (5) At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 34

At least 15 KG but less than 50 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);

At least 150 G but less than 500 G of Cocaine Base;

At least 3 KG but less than 10 KG of PCP, or at least 300
G but less than 1 KG of Pure PCP;

At least 3 KG but less than 10 KG of Methamphetamine,
or at least 300 G but less than 1 KG of Pure
Methamphetamine;

At least 30 G but less than 100 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);

At least 1.2 KG but less than 4 KG of Fentanyl;

At least 300 G but less than 1 KG of a Fentanyl Analogue;

At least 3,000 KG but less than 10,000 KG of Marihuana;

At least 600 KG but less than 2,000 KG of Hashish;

At least 60 KG but less than 200 KG of Hashish Oil.

- (6) At least 1 KG but less than 3 KG of Heroin Level 32
(or the equivalent amount of other Schedule I or II
Opiates);

At least 5 KG but less than 15 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);

At least 50 G but less than 150 G of Cocaine Base;

At least 1 KG but less than 3 KG of PCP, or at least 100
G but less than 300 G of Pure PCP;

At least 1 KG but less than 3 KG of Methamphetamine, or
at least 100 G but less than 300 G of Pure
Methamphetamine;

At least 10 G but less than 30 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);

At least 400 G but less than 1.2 KG of Fentanyl;

At least 100 G but less than 300 G of a Fentanyl Analogue;

At least 1,000 KG but less than 3,000 KG of Marihuana;

At least 200 KG but less than 600 KG of Hashish;

At least 20 KG but less than 60 KG of Hashish Oil.

- (7) At least 700 G but less than 1 KG of Heroin Level 30
(or the equivalent amount of other Schedule I or II
Opiates);

At least 3.5 KG but less than 5 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);

At least 35 G but less than 50 G of Cocaine Base;

At least 700 G but less than 1 KG of PCP, or at least 70 G
but less than 100 G of Pure PCP;

At least 700 G but less than 1 KG of Methamphetamine, or at
least 70 G but less than 100 G of Pure Methamphetamine;

At least 7 G but less than 10 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);

At least 280 G but less than 400 G of Fentanyl;

At least 70 G but less than 100 G of a Fentanyl Analogue;

At least 700 KG but less than 1,000 KG of Marihuana;

At least 140 KG but less than 200 KG of Hashish;

At least 14 KG but less than 20 KG of Hashish Oil.

- (8) At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 28

At least 2 KG but less than 3.5 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);

At least 20 G but less than 35 G of Cocaine Base;

At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of Pure PCP;

At least 400 G but less than 700 G of Methamphetamine,
or at least 40 G but less than 70 G of Pure Methamphetamine;

At least 4 G but less than 7 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);

At least 160 G but less than 280 G of Fentanyl;

At least 40 G but less than 70 G of a Fentanyl Analogue;

At least 400 KG but less than 700 KG of Marihuana;

At least 80 KG but less than 140 KG of Hashish;

At least 8 KG but less than 14 KG of Hashish Oil.

- (9) At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 26

At least 500 G but less than 2 KG of Cocaine
(or the equivalent amount of other Schedule I or II Stimulants);

At least 5 G but less than 20 G of Cocaine Base;

At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of Pure PCP;

At least 100 G but less than 400 G of Methamphetamine,
or at least 10 G but less than 40 G of Pure Methamphetamine;

At least 1 G but less than 4 G of LSD
(or the equivalent amount of other Schedule I or II Hallucinogens);

At least 40 G but less than 160 G of Fentanyl;

At least 10 G but less than 40 G of a Fentanyl Analogue;

At least 100 KG but less than 400 KG of Marihuana;

At least 20 KG but less than 80 KG of Hashish;

At least 2 KG but less than 8 KG of Hashish Oil.

- (10) At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 24
- At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 4 G but less than 5 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of Pure PCP;
- At least 80 G but less than 100 G of Methamphetamine, or at least 8 G but less than 10 G of Pure Methamphetamine;
- At least 800 MG but less than 1 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil.
- (11) At least 60 G but less than 80 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 22
- At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 3 G but less than 4 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of Pure PCP;
- At least 60 G but less than 80 G of Methamphetamine, or at least 6 G but less than 8 G of Pure Methamphetamine;
- At least 600 MG but less than 800 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
- At least 24 G but less than 32 G of Fentanyl;
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil.
- (12) At least 40 G but less than 60 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 20
- At least 200 G but less than 300 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
- At least 2 G but less than 3 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but

less than 6 G of Pure PCP;

At least 40 G but less than 60 G of Methamphetamine, or at least 4 G but less than 6 G of Pure Methamphetamine;

At least 400 MG but less than 600 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

At least 16 G but less than 24 G of Fentanyl;

At least 4 G but less than 6 G of a Fentanyl Analogue;

At least 40 KG but less than 60 KG of Marihuana;

At least 8 KG but less than 12 KG of Hashish;

At least 800 G but less than 1.2 KG of Hashish Oil;

20 KG or more of Schedule I or II Depressants or Schedule III substances.

- (13) At least 20 G but less than 40 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 18

At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

At least 1 G but less than 2 G of Cocaine Base;

At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of Pure PCP;

At least 20 G but less than 40 G of Methamphetamine, or at least 2 G but less than 4 G of Pure Methamphetamine;

At least 200 MG but less than 400 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

At least 8 G but less than 16 G of Fentanyl;

At least 2 G but less than 4 G of a Fentanyl Analogue;

At least 20 KG but less than 40 KG of Marihuana;

At least 5 KG but less than 8 KG of Hashish;

At least 500 G but less than 800 G of Hashish Oil;

At least 10 KG but less than 20 KG of Schedule I or II Depressants or Schedule III substances.

- (14) At least 10 G but less than 20 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 16

At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);

At least 500 MG but less than 1 G of Cocaine Base;

At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of Pure PCP;

At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Pure Methamphetamine;

At least 100 MG but less than 200 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

At least 4 G but less than 8 G of Fentanyl;
At least 1 G but less than 2 G of a Fentanyl Analogue;
At least 10 KG but less than 20 KG of Marihuana;
At least 2 KG but less than 5 KG of Hashish;
At least 200 G but less than 500 G of Hashish Oil;
At least 5 KG but less than 10 KG of Schedule I or II Depressants
or Schedule III substances.

- (15) At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 14
At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
At least 250 MG but less than 500 MG of Cocaine Base;
At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of Pure PCP;
At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Pure Methamphetamine;
At least 50 MG but less than 100 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
At least 2 G but less than 4 G of Fentanyl;
At least 500 MG but less than 1 G of a Fentanyl Analogue;
At least 5 KG but less than 10 KG of Marihuana;
At least 1 KG but less than 2 KG of Hashish;
At least 100 G but less than 200 G of Hashish Oil;
At least 2.5 KG but less than 5 KG of Schedule I or II Depressants or Schedule III substances.

- (16) Less than 5 G Heroin (or the equivalent amount of other Schedule I or II Opiates); Level 12
Less than 25 G Cocaine (or the equivalent amount of other Schedule I or II Stimulants);
Less than 250 MG of Cocaine Base;
Less than 5 G of PCP, or less than 500 MG of Pure PCP;
Less than 5 G of Methamphetamine, or less than 500 MG of Pure Methamphetamine;
Less than 50 MG of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);
Less than 2 G of Fentanyl;
Less than 500 MG of a Fentanyl Analogue;
At least 2.5 KG but less than 5 KG of Marihuana;
At least 500 G but less than 1 KG of Hashish;
At least 50 G but less than 100 G of Hashish Oil;

At least 1.25 KG but less than 2.5 KG of Schedule I or II
Depressants or Schedule III substances;

20 KG or more of Schedule IV substances.

- (17) At least 1 KG but less than 2.5 KG of Marihuana; Level 10
At least 200 G but less than 500 G of Hashish;
At least 20 G but less than 50 G of Hashish Oil;
At least 500 G but less than 1.25 KG of Schedule I or II
Depressants or Schedule III substances;
At least 8 KG but less than 20 KG of Schedule IV substances.
- (18) At least 250 G but less than 1 KG of Marihuana; Level 8
At least 50 G but less than 200 G of Hashish;
At least 5 G but less than 20 G of Hashish Oil;
At least 125 G but less than 500 G of Schedule I or II
Depressants or Schedule III substances;
At least 2 KG but less than 8 KG of Schedule IV substances;
20 KG or more of Schedule V substances.
- (19) Less than 250 G of Marihuana; Level 6
Less than 50 G of Hashish;
Less than 5 G of Hashish Oil;
Less than 125 G of Schedule I or II Depressants or
Schedule III substances;
Less than 2 KG of Schedule IV substances;
Less than 20 KG of Schedule V substances.

*Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level. In the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater.

In the case of an offense involving marihuana plants, if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants, treat each plant as equivalent to 100 G of marihuana. Provided, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 9 by inserting immediately before the period at the end of the first sentence of the first paragraph:

", except in the case of PCP or methamphetamine for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table)",

and by deleting the second paragraph as follows:

"Congress provided an exception to purity considerations in the case of phencyclidine (PCP). 21 U.S.C. § 841(b)(1)(A). The legislation designates amounts of pure PCP and mixtures in establishing mandatory sentences. The first row of the table illustrates this distinction as one kilogram of PCP or 100 grams of pure PCP. Allowance for higher sentences based on purity is not appropriate for PCP."

The Commentary to §2D1.1 captioned "Application Notes" is amended in the first paragraph of Note 10 by inserting "methamphetamine, fentanyl," immediately following "i.e., heroin, cocaine, PCP," and by deleting:

"one gram of a substance containing methamphetamine, a Schedule I stimulant, is to be treated as the equivalent of two grams of a substance containing cocaine in applying the Drug Quantity Table.",

and inserting in lieu thereof:

"one gram of a substance containing oxymorphone, a Schedule I opiate, is to be treated as the equivalent of five grams of a substance containing heroin in applying the Drug Quantity Table."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10, in the subdivision of the "Drug Equivalency Tables" captioned "Cocaine and Other Schedule I & II Stimulants" by deleting "2.0 gm. of cocaine/0.4 gm of heroin" immediately following "1 gm of Methamphetamine =" and inserting in lieu thereof "5.0 gm of cocaine/1.0 gm of heroin", and by deleting:

"1 gm of Phenylacetone/P₂P
(amphetamine precursor) = 0.375 gm of cocaine/0.075 gm of heroin

1 gm of Phenylacetone/P₂P
(methamphetamine precursor) = 0.833 gm of cocaine/0.167 gm of heroin",

and inserting in lieu thereof:

"1 gm Phenylacetone/P₂P
(when possessed for the
purpose of manufacturing
methamphetamine) = 2.08 gm of cocaine/0.418 gm of heroin

1 gm Phenylacetone/P₂P
(in any other case) = 0.375 gm of cocaine/0.075 gm of heroin".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10, in the subdivision of the "Drug Equivalency Tables" captioned "Schedule I Marihuana" by deleting:

"1 Marihuana/Cannabis Plant = 0.1 gm of heroin/100 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the second paragraph by deleting "Other Schedule I or II Substances" and inserting in lieu thereof "Schedule I or II Depressants", and in the "Drug Equivalency Tables" by deleting "Other Schedule I or II Substances" and inserting in lieu thereof "Schedule I or II Depressants".

The Commentary to 2D1.1 captioned "Background" is amended in the third paragraph by deleting "with two asterisks represent mandatory minimum sentences established by the Anti-Drug Abuse Act of 1986. These levels reflect sentences" and inserting in lieu thereof "at levels 26 and 32 establish guideline ranges", and by deleting "requirement" and inserting in lieu thereof "minimum".

The purposes of this amendment are to expand the Drug Quantity Table to reflect offenses involving extremely large quantities of controlled substances, to eliminate minor gaps in the Drug Quantity Table, to reflect the statutory change with respect to methamphetamine (Section 6470 of the Anti-Drug Abuse Act of 1988) by inserting specific references to the quantity of this substance for each offense level set forth in the table, to reflect the statutory change with respect to fifty or more marihuana plants (Section 6479 of the Anti-Drug Abuse Act of 1988), to correct anomaly in the relationship of hashish oil to hashish in levels 6 and 8 of the Drug Quantity Table, to delete an unnecessary footnote, and to clarify the operation of the guideline. **The effective date of this amendment is November 1, 1989.**

126. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "Schedule I or II Opiates" on the line beginning "piperidinyl] Propanamide) =" by deleting "31.25 gm" and inserting in lieu thereof "2.5 gm"; on the line beginning "1 gm of Alpha-Methylfentanyl" by deleting "100 gm" and inserting in lieu thereof "10 gm"; and on the line beginning "1 gm of 3-Methylfentanyl" by deleting "125 gm" and inserting in lieu thereof "10 gm".

The purpose of this amendment is to conform the equivalency for fentanyl and fentanyl analogues to that set forth in the Drug Quantity Table and statute. **The effective date of this amendment is November 1, 1989.**

127. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of "Dosage Equivalency Table" captioned "Hallucinogens" by deleting "STP (DOM) Dimethoxyamphetamine" and inserting in lieu thereof "2, 5-Dimethoxy-4-methylamphetamine (STP, DOM)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Dosage Equivalency Table" captioned "Stimulants" by deleting "Preludin 25 mg" and inserting in lieu thereof "Phenmetrazine (Preludin) 75 mg".

The purposes of this amendment are to substitute generic names for two substances and to conform the dosage of Phenmetrazine to that currently being manufactured. **The effective date of this amendment is November 1, 1989.**

128. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Schedule III Substances" by deleting:

"1 gm of Thiohexethal = 2 mg of heroin/2 gm of marihuana",

in the "Dosage Equivalency Table" in the subdivision captioned "Hallucinogens" by deleting:

"Anhalamine	300 mg",
"Anhalonide	300 mg",
"Anhalonine	300 mg",
"Lophophorine	300 mg",
"Pelotone	300 mg",

and in the "Dosage Equivalency Table" in the subdivision captioned "Depressants" by deleting:

"Brallobarbital	30 mg",
"Eldoral	100 mg",
"Eunarcon	100 mg",
"Hexethel	100 mg",
"Thiohexethal	60 mg".

The purpose of this amendment is to delete substances that either are not controlled substances or are no longer manufactured. **The effective date of this amendment is November 1, 1989.**

129. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants" by inserting the following as the eighth and ninth entries:

"1 gm of 4-Methylaminorex ('Euphoria') =	0.5 gm of cocaine/0.1 gm of heroin",
"1 gm of Methylphenidate (Ritalin) =	0.5gm of cocaine/0.1 gm of heroin",

in the subdivision captioned "LSD, PCP, and Other Schedule I and II Hallucinogens" by inserting the following as the twentieth entry:

"1 gm of 3, 4-Methylenedioxy N ethylamphetamine/MDEA =	0.03 gm of heroin or PCP",
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in the subdivision captioned "Schedule III Substances" by inserting the following as the fourth entry:

"1 gm of Benzphetamine =	4 mg of heroin/4 gm of marihuana",
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and in the "Dosage Equivalency Table" in the subdivision captioned "Depressants" by inserting the following in the appropriate place in alphabetical order:

"Glutethimide (Doriden)	500 mg".
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The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Dosage Equivalency Table" by inserting the following immediately after the subdivision captioned "Depressants":

"Marihuana

1 marihuana cigarette	0.5 gm".
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The purpose of this amendment is to make the Drug Equivalency Tables and Dosage Equivalency Table more comprehensive. **The effective date of this amendment is November 1, 1989.**

130. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Schedule III Substances" by deleting "2 mg of heroin/2 gm of marihuana" immediately following "1 gm of Glutethimide = " and inserting in lieu thereof "0.4 mg of heroin/0.4 gm of marihuana", and by deleting:

"1 gm of Paregoric = 2 mg of heroin/2 gm of marihuana

1 gm of Hydrocodone
Cough Syrups = 2 mg of heroin/2 gm of marihuana",

and inserting in lieu thereof:

"1 ml of Paregoric = 0.25 mg of heroin/0.25 gm of marihuana

1 ml of Hydrocodone
Cough Syrup = 1 mg of heroin/1 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Dosage Equivalency Table" in the subdivision captioned "Hallucinogens" by deleting ".1 mg" in the line beginning "LSD (Lysergic acid diethylamide)" and inserting in lieu thereof ".05 mg", by deleting "LSD tartrate .05 mg", by deleting "Peyote 12 mg", and by inserting the following in the appropriate place in alphabetical order:

"Peyote (dry)	12 gm",
"Peyote (wet)	120 gm",
"Psilocybe mushrooms (dry)	5 gm",
"Psilocybe mushrooms (wet)	50 gm".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Dosage Equivalency Table" in the subdivision captioned "Stimulants" by deleting "Ethylamphetamine HCL 12 mg" and "Ethylamphetamine SO₄ 12 mg", by deleting "Amphetamines" and inserting in lieu thereof "Amphetamine", by deleting "Methamphetamines" and inserting in lieu thereof "Methamphetamine", and by deleting "Methamphetamine combinations 5 mg".

The purposes of this amendment are to provide more accurate approximations of the equivalencies and dosages for certain controlled substances, and to eliminate unnecessary references. **The effective date of this amendment is November 1, 1989.**

131. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "LSD, PCP, and Other Schedule I and II Hallucinogens" by deleting:

"1 gm of Liquid phencyclidine = 0.1 gm of heroin or PCP".

The purpose of this amendment is to delete an incorrect equivalency. **The effective date of this amendment is November 1, 1989.**

132. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" by inserting immediately following the captions "Cocaine and Other Schedule I and II Stimulants" and "LSD, PCP, and Other Hallucinogens" in each instance "(and their immediate precursors)".

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

133. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by deleting:

"The following dosage equivalents for certain common drugs are provided by the Drug Enforcement Administration to facilitate the application of §2D1.1 of the guidelines in cases where the number of doses, but not the weight of the controlled substances are known. The dosage equivalents provided in these tables reflect the amount of the pure drug contained in an average dose.

DOSAGE EQUIVALENCY TABLE",

and inserting in lieu thereof:

- "11. If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose to estimate the total weight of the controlled substance (e.g., 100 doses of Bufotenine at 1 mg per dose = 100 mg of Bufotenine). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for common controlled substances.

TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE".

The Commentary to §2D1.1 captioned "Application Notes" is amended by renumbering the current Note 11 as Note 12.

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

134. Section 2D1.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics", and by inserting the following additional specific offense characteristic:

- "(2) If the defendant is convicted of violating 21 U.S.C. §960(a) under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.";

The Commentary to §2D1.1 captioned "Application Notes" is amended by inserting the following additional note:

- "13. If subsection (b)(2)(B) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).";

The Commentary to §2D1.1 captioned "Background" is amended by inserting the following additional paragraph between the third and fourth paragraphs:

- " Specific Offense Characteristic (b)(2) is mandated by Section 6453 of the Anti-Drug Abuse Act of 1988."

The purpose of this amendment is to implement the directive to the Commission in Section 6453 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

135. Sections 2D1.2 and 2D1.3 are amended by deleting, in each instance, the entire guideline and accompanying commentary as follows:

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

- (a) Base Offense Level:
- (1) Level from §2D1.1, corresponding to triple the drug amount involved, but in no event less than level 13, for involving an individual fourteen years of age or less; or
 - (2) Level from §2D1.1, corresponding to double the drug amount involved, for involving an individual at least fifteen years of age and less than eighteen years of age.

Commentary

Statutory Provision: 21 U.S.C. § 845b.

Application Notes:

1. If multiple drugs or offenses occur and all or some of them involve juveniles, double or triple the drug amounts for those offenses involving juveniles before totalling the amounts. For example, if there are three drug offenses of conviction and only one involves juveniles in trafficking, add the amount from the first and second offense, double the amount for the offense involving juveniles, and total. Use that total to determine the base offense level.
2. The reference to the level from §2D1.1 includes the base offense level plus the specific offense characteristic dealing with a weapon. Under §2D1.1(b)(1) there is a 2-level increase for possession of a firearm or other dangerous weapon during commission of the offense.

Background: The statute addressed by this section punishes any person eighteen years of age or older who knowingly employs or uses any person younger than eighteen to violate or to conceal any violation of any provision of Title 21. Section 845b provides a minimum mandatory period of imprisonment of one year. 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).

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

- (a) Base Offense Level:
- (1) Level from §2D1.1, corresponding to double the drug amount involved, but in no event less than level 13, for distributing a controlled substance to a pregnant woman;
 - (2) (A) Level from §2D1.1, corresponding to double the drug amount involved, but in no event less than level 13, for distributing a controlled substance other than five grams or less of marihuana to an individual under the age of twenty-one years; or
(B) Level from §2D1.1, corresponding to double the

drug amount involved, but in no event less than level 13, for distributing or manufacturing a controlled substance other than five grams or less of marihuana within 1000 feet of a schoolyard.

Commentary

Statutory Provisions: 21 U.S.C. §§ 845, 845a.

Application Notes:

1. The provisions addressed by this section contain a mandatory minimum period of imprisonment of one year. The base offense level is determined as in §2D1.2. 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. However, only one of the enhancements in §2D1.3(a)(2) shall apply in a given case.
2. If multiple drugs or offenses occur, determine the offense level as described in the Commentary to §2D1.2.
3. The reference to the level from §2D1.1 includes the base offense level plus the specific offense characteristic dealing with a weapon. Under §2D1.1(b)(1) there is a 2-level increase for possession of a firearm, or other dangerous weapon during the commission of the offense.

Background: The guideline sentences for distribution of controlled substances to individuals under twenty-one years of age or within 1000 feet of a school or college treat the distribution of less than five grams of marihuana less harshly than other controlled substances. This distinction is based on the statutory provisions that specifically exempt convictions for the distribution of less than five grams of marihuana from the mandatory minimum one-year imprisonment requirement.",

and inserting in lieu thereof:

"§2D1.2. Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals

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

- (1) 2 plus the offense level from §2D1.1; or
- (2) 26, if the offense involved a person less than eighteen years of age; or
- (3) 13, otherwise.

Commentary

Statutory Provisions: 21 U.S.C. §§ 845, 845a, 845b.

Background: This section implements the direction to the Commission in Section 6454 of the Anti-Drug Abuse Act of 1988.",

The purposes of this amendment are to implement the directive in Section 6454 of the Anti-Drug Abuse Act of 1988, and to expand the coverage of the guideline to include the provision of Sections 6458 and 6459 of that Act. The amendment also covers the provisions of 21 U.S.C. § 845, 845a, and 845b not included in the statutory direction to the Commission. **The effective date of this amendment is November 1, 1989.**

136. The Commentary to §2D1.4 captioned "Application Notes" is amended in Note 1 by deleting:

"Where the defendant was not reasonably capable of producing the negotiated amount, the court may depart and impose a sentence lower than the sentence that would otherwise result.",

and inserting in lieu thereof:

"However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing."

Application Note 1 currently provides that the "weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount." The instruction then provides "Where the defendant was not reasonably capable of producing the negotiated amount the court may depart and impose a sentence lower than the sentence that would otherwise result." This provision may result in inflated offense levels in uncompleted offenses where a defendant is merely "puffing," even though the court is then authorized to address the situation by a downward departure. The purpose of this amendment is to provide a more direct procedure for calculating the offense level where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount. **The effective date of this amendment is November 1, 1989.**

137. The Commentary to §2D1.4 captioned "Application Notes" is amended in Note 1 by deleting "the sentence should be imposed only on the basis of the defendant's conduct or the conduct of co-conspirators in furtherance of the conspiracy that was known to the defendant or was reasonably foreseeable" and inserting in lieu thereof "see Application Note 1 to §1B1.3 (Relevant Conduct)".

The purpose of this amendment is to conform this commentary to the revision of §1B1.3. **The effective date of this amendment is November 1, 1989.**

138. Section 2D1.4(a) is amended by deleting "participating in an incomplete" and inserting in lieu thereof "a".

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

139. Section 2D1.5 is amended by deleting: "(a) Base Offense Level: 36" and inserting in lieu thereof:

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

- (1) 4 plus the offense level from §2D1.1 applicable to the underlying offense; or
- (2) 38."

The Commentary to §2D1.5 captioned "Application Notes" is amended in Note 2 by deleting "if the quantity of drugs substantially exceeds that required for level 36 in the drug quantity table," immediately before "or if", and by deleting "is extremely" and inserting in lieu thereof "was extremely".

The Commentary to §2D1.5 captioned "Background" is amended in the first paragraph by deleting "base offense level of 36" and inserting in lieu thereof "minimum base offense level of 38", and in the second paragraph by deleting "for second convictions" and inserting in lieu thereof "for the first conviction, a 30-year minimum mandatory penalty for a second conviction,".

The purpose of this amendment is to reflect the increased mandatory minimum penalty for this offense pursuant to Section 6481 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

140. Chapter Two, Part D is amended by inserting the following additional guideline and accompanying commentary:

"§2D1.10. Endangering Human Life While Illegally Manufacturing a Controlled Substance

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

- (1) 3 plus the offense level from the Drug Quantity Table in §2D1.1; or
- (2) 20.

Commentary

Statutory Provision: 21 U.S.C. § 858."

The purpose of this amendment is to create a guideline covering the new offense in Section 6301 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

141. Section 2D2.3 is amended by deleting : "(a) Base Offense Level: 8" and inserting in lieu thereof:

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

- (1) 26, if death resulted; or
- (2) 21, if serious bodily injury resulted; or
- (3) 13, otherwise.

(b) Special Instruction:

- (1) If the defendant is convicted of a single count involving the death or serious bodily injury of more than one person, apply Chapter Three, Part D (Multiple Counts) as if the defendant had been convicted of a separate count for each such victim."

The Commentary to §2D2.3 is amended by inserting at the end:

"Background: This section implements the direction to the Commission in Section 6482 of the Anti-Drug Abuse Act of 1988. Offenses covered by this guideline may vary widely with regard to harm and risk of harm. The offense levels assume that the offense involved the operation of a common carrier carrying a number of passengers, e.g., a bus. If no or only a few passengers were placed at risk, a downward departure may be warranted. If the offense resulted in the death or serious bodily injury of a large number of persons, such that the resulting offense level under subsection (b) would not adequately reflect the seriousness of the offense, an upward departure may be warranted."

The purpose of this amendment is to implement the directive to the Commission in Section 6482 of the Anti-Drug Abuse Act of 1988. In addition, the base offense level under subsection (a)(3) is increased to reflect the seriousness of the offense. **The effective date of this amendment is November 1, 1989.**

142. The Commentary to §2E1.1 captioned "Application Notes" is amended by inserting the following additional note:

"4. Certain conduct may be charged in the count of conviction as part of a 'pattern of racketeering activity' even though the defendant has previously been sentenced for that conduct. Where such previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, treat as a prior sentence under §4A1.2(a)(1) and not as part of the instant offense. This treatment is designed to produce a result consistent with the distinction between the instant offense and criminal history found throughout the guidelines. If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted."

The purpose of this amendment is to clarify the treatment of certain conduct for which the defendant previously has been sentenced as either part of the instant offense or prior criminal record. **The effective date of this amendment is November 1, 1989.**

143. The Commentary to §2E1.3 captioned "Statutory Provision" is amended by deleting "1952B" and inserting in lieu thereof "1959 (formerly 18 U.S.C. § 1952B)".

The purpose of this amendment is to reflect the redesignation of this statute. **The effective date of this amendment is November 1, 1989.**

144. The Commentary to §2E1.4 captioned "Statutory Provision" is amended by deleting "1952A" and inserting in lieu thereof "1958 (formerly 18 U.S.C. § 1952A)".

The purpose of this amendment is to reflect the redesignation of this statute. **The effective date of this amendment is November 1, 1989.**

145. Section 2E1.5 is amended by deleting "the guideline provision for extortion or robbery" and inserting in lieu thereof "§2B3.1 (Robbery), §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), §2B3.3 (Blackmail and Similar Forms of Extortion), or §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right)".

The Commentary to §2E1.5 captioned "Application Note" is amended by deleting:

"Application Note:

1. Apply the guideline most applicable to the underlying conduct, which may include §2B3.1(Robbery), §2B3.2 (Extortion by Force or Threat of Injury or

Serious Damage), §2B3.3 (Blackmail and Similar Forms of Extortion), or §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe).".

The purpose of this amendment is to move material from the commentary to the guideline where it more appropriately belongs. **The effective date of this amendment is November 1, 1989.**

146. Section 2E2.1 is amended in subsection (b)(1)(B) by deleting "a firearm or a dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)", and in subsection (b)(1)(C) by deleting "a firearm or other dangerous weapon" and inserting in lieu thereof "a dangerous weapon (including a firearm)".

The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in language between specific offense characteristic subdivisions (b)(1)(B) and (b)(1)(C). **The effective date of this amendment is November 1, 1989.**

147. Section 2E2.1(b)(2) is amended by inserting the following additional subdivisions:

- "(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or
- (E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels."

The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury. **The effective date of this amendment is November 1, 1989.**

148. Section 2E2.1(b)(3)(A) is amended by inserting "or" immediately following "4 levels;".

The purpose of this amendment is to correct a clerical error. **The effective date of this amendment is November 1, 1989.**

149. Section 2E5.1 is amended in the title by deleting "Bribery or Gratuity" and inserting in lieu thereof "Offering, Accepting, or Soliciting a Bribe or Gratuity".

The purpose of amending the title of this section is to ensure that attempts and solicitations are expressly covered by this guideline. **The effective date of this amendment is November 1, 1989.**

150. Section 2E5.2 is amended by deleting:

- "(a) Base Offense Level: 4
- (b) Specific Offense Characteristics
 - (1) If the offense involved more than minimal planning, increase by 2 levels.
 - (2) If the defendant had a fiduciary obligation under the Employee Retirement Income Security Act, increase by 2 levels.
 - (3) Increase by corresponding number of levels from the table in §2B1.1

(Larceny, Embezzlement, and Other Forms of Theft) according to the loss.",

and inserting in lieu thereof:

"Apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).".

The Commentary to §2E5.2 captioned "Application Notes" is amended by deleting:

- "1. 'More than minimal planning' is defined in the Commentary to §1B1.1 (Application Instructions). Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)." and
- "3. If the adjustment for a fiduciary obligation at §2E5.2(b)(2) is applied, do not apply the adjustment at §3B1.3 (Abuse of a Position of Trust or Use of a Special Skill).",

and by inserting in lieu of Note 1:

- "1. In the case of a defendant who had a fiduciary obligation under the Employee Retirement Income Security Act, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) would apply."

The Commentary to §2E5.2 captioned "Background" is amended by deleting the second and third sentences as follows:

"The base offense level corresponds to the base offense level for other forms of theft. Specific offense characteristics address whether a defendant has a fiduciary relationship to the benefit plan, the sophistication of the offense, and the scale of the offense."

The purpose of this amendment is to simplify application of the guidelines. **The effective date of this amendment is November 1, 1989.**

151. Section 2E5.3(a)(2) is amended by deleting "false records were used for criminal conversion of funds or a scheme" and inserting in lieu thereof "the offense was committed to facilitate or conceal a theft or embezzlement, or an offense".

The Commentary to §2E5.3 captioned "Application Note" is amended by deleting:

"Application Note:

1. 'Criminal conversion' means embezzlement."

The purpose of this amendment is to ensure that subsection (a)(2) covers any conduct engaged in for the purpose of facilitating or concealing a theft or embezzlement, or an offense involving a bribe or gratuity. **The effective date of this amendment is November 1, 1989.**

152. Section 2E5.4 is amended by deleting:

- "(a) Base Offense Level: 4
- (b) Specific Offense Characteristics

- (1) If the offense involved more than minimal planning, increase by 2 levels.
- (2) If the defendant was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. § 501(a), increase by 2 levels.
- (3) Increase by the number of levels from the table in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) corresponding to the loss."

and inserting in lieu thereof:

"Apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)."

The Commentary to §2E5.4 captioned "Application Notes" is amended by deleting:

1. 'More than minimal planning' is defined in the Commentary to §1B1.1 (Applicable Instructions). Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).
2. If the adjustment for being a union officer or occupying a position of trust in a union at §2E5.4(b)(2) is applied, do not apply the adjustment at §3B1.3 (Abuse of a Position of Trust or Use of a Special Skill)."

and inserting in lieu thereof:

1. In the case of a defendant who was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. § 501(a), an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) would apply."

and by deleting in the caption "Notes" and inserting in lieu thereof "Note".

The Commentary to §2E5.4 captioned "Background" is amended by deleting the last sentence as follows:

"The seriousness of this offense is determined by the amount of money taken, the sophistication of the offense, and the nature of the defendant's position in the union."

The purpose of this amendment is to simplify application of the guidelines. **The effective date of this amendment is November 1, 1989.**

153. Section 2E5.5(a)(2) is amended by deleting "false records were used for criminal conversion of funds or a scheme" and inserting in lieu thereof "the offense was committed to facilitate or conceal a theft or embezzlement, or an offense".

The purpose of this amendment is to ensure that subsection (a)(2) covers any conduct engaged in for the purpose of facilitating or concealing a theft or embezzlement, or an offense involving a bribe or gratuity. **The effective date of this amendment is November 1, 1989.**

154. Section 2F1.1(b)(1) is amended by deleting:

<u>Loss</u>	<u>Increase in Level</u>
(A) \$2,000 or less	no increase
(B) \$2,001 - \$5,000	add 1
(C) \$5,001 - \$10,000	add 2

(D)	\$10,001 - \$20,000	add 3
(E)	\$20,001 - \$50,000	add 4
(F)	\$50,001 - \$100,000	add 5
(G)	\$100,001 - \$200,000	add 6
(H)	\$200,001 - \$500,000	add 7
(I)	\$500,001 - \$1,000,000	add 8
(J)	\$1,000,001 - \$2,000,000	add 9
(K)	\$2,000,001 - \$5,000,000	add 10
(L)	over \$5,000,000	add 11",

and inserting in lieu thereof:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$2,000 or less	no increase
(B)	More than \$2,000	add 1
(C)	More than \$5,000	add 2
(D)	More than \$10,000	add 3
(E)	More than \$20,000	add 4
(F)	More than \$40,000	add 5
(G)	More than \$70,000	add 6
(H)	More than \$120,000	add 7
(I)	More than \$200,000	add 8
(J)	More than \$350,000	add 9
(K)	More than \$500,000	add 10
(L)	More than \$800,000	add 11
(M)	More than \$1,500,000	add 12
(N)	More than \$2,500,000	add 13
(O)	More than \$5,000,000	add 14
(P)	More than \$10,000,000	add 15
(Q)	More than \$20,000,000	add 16
(R)	More than \$40,000,000	add 17
(S)	More than \$80,000,000	add 18."

The purposes of this amendment are to conform the theft and fraud loss tables to the tax evasion table in order to remove an unintended inconsistency between these tables in cases where the amount is greater than \$40,000, to increase the offense levels for offenses with larger losses to provide additional deterrence and better reflect the seriousness of the conduct, and to eliminate minor gaps in the loss table. **The effective date of this amendment is November 1, 1989.**

155. The Commentary to §2F1.1 captioned "Application Notes" is amended beginning in Note 14 by deleting:

"In such instances, although §2F1.1 applies, a departure may be warranted.

15. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state law arson where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. In such cases the most analogous guideline (in the above case, §2K1.4) is to be applied."

and by inserting at the end of Note 14:

"In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other

offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than §2F1.1. Otherwise, in such cases, §2F1.1 is to be applied, but a departure from the guidelines may be considered."

The Commentary to §2F1.1 captioned "Application Notes" is amended in the second sentence of Note 14 by deleting "in which" and inserting in lieu thereof "for which".

The purposes of this amendment are to ensure that this guideline is interpreted in a manner consistent with §1B1.2 and to correct a clerical error. **The effective date of this amendment is November 1, 1989.**

156. Section 2F1.1(b)(2) is amended by deleting "; (B)" and inserting in lieu thereof ", or (B)", and by deleting "; (C) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (D) violation of any judicial or administrative order, injunction, decree or process; increase by 2 levels, but if the result is less than level 10, increase to level 10" and inserting in lieu thereof ", increase by 2 levels".

Section 2F1.1(b)(3) is renumbered as (b)(5), and the following are inserted as new subsections:

- "(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree or process, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.
- (4) If the offense involved the conscious or reckless risk of serious bodily injury, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13."

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by inserting "1031," immediately following "1029,".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 4 by deleting "(b)(2)(C)" and inserting in lieu thereof "(b)(3)(A)", in Note 5 by deleting "(b)(2)(D)" and inserting in lieu thereof "(b)(3)(B)", and in Note 9(c) by deleting "or risked" immediately following "caused".

The Commentary to §2F1.1 captioned "Background" is amended in the third paragraph by deleting "not only" immediately following "Accordingly, the guideline", by deleting ", but also specifies that the minimum offense level in such cases shall be 10" immediately following "is present", and by deleting the last sentence as follows:

"A number of special cases are specifically broken out under subdivision (b)(2) to ensure that defendants in such cases are adequately punished."

The Commentary to §2F1.1 captioned "Application Notes" is amended by deleting:

- "10. The adjustments for loss do not distinguish frauds involving losses greater than \$5,000,000. Departure above the applicable guideline may be warranted if the loss substantially exceeds that amount."

and by renumbering Notes 11-14 as 10-13 respectively.

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 1 by deleting "(b)(2)" and inserting in lieu thereof "(b)(3)", by deleting "several" and inserting in lieu thereof "both", and by deleting "upward" and inserting in lieu thereof "an upward".

The purpose of this amendment is to reflect the instruction to the Commission in Section 2(b) of the Major Fraud Act of 1988. The Commission has concluded that a 2-level enhancement with a minimum offense level of 13 should apply to all fraud cases involving a conscious or reckless risk of serious bodily injury. In addition, the amendment divides former subsection (b)(2) into two separate specific offenses characteristics to better reflect their separate nature. **The effective date of this amendment is November 1, 1989.**

157. Section 2G1.1(b)(1) is amended by deleting "defendant used" and inserting in lieu thereof "offense involved the use of", and by deleting "drugs or otherwise" and inserting in lieu thereof "threats or drugs or in any manner".

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 2 by deleting "by drugs or otherwise" immediately following "coercion".

The purpose of this amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

158. Section 2G1.1 is amended by inserting the following additional subsection:

"(c) Special Instruction

- (1) If the offense involves the transportation of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the transportation of each person had been contained in a separate count of conviction."

The purpose of this amendment is to provide a special instruction for the application of the multiple count rule in cases involving the transportation of more than one person. **The effective date of this amendment is November 1, 1989.**

159. Section 2G1.2(b)(1) is amended by deleting "drugs or otherwise" and inserting in lieu thereof "threats or drugs or in any manner".

Section 2G1.2(b)(2) and (3) is amended by deleting "conduct" whenever it appears and inserting in lieu thereof in each instance "offense".

The Commentary to §2G1.2 captioned "Application Notes" is amended in Note 2 by deleting "by drugs or otherwise" immediately following "coercion", and in the caption by deleting "Note" and inserting in lieu thereof "Notes".

The purpose of this amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

160. Section 2G1.2 is amended by inserting the following additional subsection:

"(c) Special Instruction

- (1) If the offense involves the transportation of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the transportation of each person had been contained in a separate count of conviction."

The purpose of this amendment is to provide a special instruction for the application of the multiple count rule in cases involving the transportation of more than one person. **The effective date of this amendment is November 1, 1989.**

161. The Commentary to §2G2.1 captioned "Application Note" is amended in Note 1 by deleting ", distinct offense, even if several are exploited simultaneously," and inserting in lieu thereof "victim. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts)."

The purpose of this amendment is to clarify that multiple counts involving different minors are not grouped under §3D1.2. **The effective date of this amendment is November 1, 1989.**

162. Chapter Two, Part G, is amended by inserting the following additional guideline and accompanying commentary:

"§2G2.3. Selling or Buying of Children for Use in the Production of Pornography

(a) Base Offense Level: 38

Commentary

Statutory Provision: 18 U.S.C. § 2251A.

Background: The statutory minimum sentence for a defendant convicted under 18 U.S.C. § 2251A is twenty years imprisonment."

The purpose of this amendment is to create a guideline covering the new offense in Section 7512 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

163. The Commentary to §2G3.1 captioned "Statutory Provisions" is amended by deleting "§§1461-1465" and inserting in lieu thereof "§§1460-1463, 1465-1466".

The purposes of this amendment are to conform the Statutory Provisions to the revision of §2G3.2 and to make them more comprehensive. **The effective date of this amendment is November 1, 1989.**

164. Section 2G3.2 is amended by deleting the entire guideline and accompanying commentary as follows:

"§2G3.2. Obscene or Indecent Telephone Communications

(a) Base Offense Level: 6

Commentary

Statutory Provision: 47 U.S.C. § 223.

Background: This offense is a misdemeanor for which the maximum term of imprisonment authorized by statute is six months.",

and inserting in lieu thereof:

"§2G3.2. Obscene Telephone Communications for a Commercial Purpose; Broadcasting Obscene Material

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristics
 - (1) If a person who received the telephonic communication was less than eighteen years of age, or if a broadcast was made between six o'clock in the morning and eleven o'clock at night, increase by 4 levels.
 - (2) If 6 plus the offense level from the table at 2F1.1(b)(1) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1464, 1468; 47 U.S.C. § 223(b)(1)(A).

Background: Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it. Subsection (b)(2) provides an enhancement for large-scale "dial-a-porn" or obscene broadcasting operations that results in an offense level comparable to the offense level for such operations under 2G3.1 (Importing, Mailing, or Transporting Obscene Matter). The extent to which the obscene material was distributed is approximated by the volume of commerce attributable to the defendant."

The purposes of this amendment are to delete a guideline covering a petty offense; and to insert a guideline covering felony offenses, including two offenses created by Sections 7523 and 7524 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

165. The title to §2H1.3 is amended by inserting at the end "; Damage to Religious Real Property".

The Commentary to §2H1.3 captioned "Application Notes" is amended in Note 3 by deleting "the adjustment at" immediately before "§3B1.3".

The Commentary to §2H1.3 captioned "Background" is amended in the third sentence by deleting "injury occurs, ten years if injury occurs," and inserting in lieu thereof "bodily injury results, ten years if bodily injury results".

The Commentary to §2H1.3 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. § 245" and inserting in lieu thereof "18 U.S.C. §§ 245, 247".

The purposes of this amendment are to include a recently enacted offense (18 U.S.C. § 247) expressly in the title of this guideline and to make editorial improvements. **The effective date of this amendment is November 1, 1989.**

166. Section 2H1.4(a)(2) is amended by deleting "2 plus" and inserting in lieu thereof "6 plus".

The Commentary to §2H1.4 captioned "Application Notes" is amended in Note 1 by deleting "2 plus" and inserting in lieu thereof "6 plus", and by deleting "is defined" and inserting in lieu thereof "means 6 levels above the offense level for any underlying criminal conduct. See the discussion".

The Commentary to §2H1.4 captioned "Background" is amended in the first paragraph by deleting ", except where death results, in which case the maximum term of imprisonment authorized is life imprisonment" and inserting in lieu thereof "if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results", by deleting "Given this one-year statutory maximum, a" and inserting in lieu thereof "A", by inserting "one-year" immediately following "near the", and by inserting "or bodily injury" immediately following "resulting in death".

The Commentary to §2H1.4 captioned "Background" is amended by inserting the following sentences at the end of the first paragraph:

"The 6-level increase under subsection (a)(2) reflects the 2-level increase that is applied to other offenses covered in this Part plus a 4-level increase for the commission of the offense under actual or purported legal authority. This 4-level increase is inherent in the base offense level of 10 under subsection (a)(1)."

The purpose of this amendment is to correct an anomaly between the offense level under this section and §2H1.5 when the offense level is determined under subsection (a)(2). Section 2H1.4 is similar to §2H1.5 in that it may or may not involve the use of force. Under §2H1.4, however, the offense must involve the abuse of actual or purported legal authority. The base offense level of 10 used in 2H1.4(a)(1) has a built-in 4-level enhancement (which corresponds to the base offense level of 6 under §2H1.5(a)(1) plus the 4-level increase for a public official). There is an anomaly, however, when the base offense level from (a)(2) is used. In such cases, §2H1.4 results in an offense level that is 4 levels less than §2H1.5 when the offense is committed by a public official. The Commentary to §2H1.4 is also amended to reflect the increase in the maximum authorized sentence from one to ten years in cases involving bodily injury. **The effective date of this amendment is November 1, 1989.**

167. The Commentary to §2H1.5 captioned "Application Notes" is amended in Note 1 by deleting "explained" and inserting in lieu thereof "defined".

The Commentary to §2H1.5 captioned "Application Notes" is amended in Note 2 by deleting "§2H1.4(b)(1)" and inserting in lieu thereof "§2H1.5(b)(1)", and by deleting "the adjustment at" immediately before "§3B1.3".

The purposes of this amendment are to correct a clerical error and to make editorial improvements. **The effective date of this amendment is November 1, 1989.**

168. Section 2H2.1(a)(1) is amended by deleting "persons" and inserting in lieu thereof "person(s)".

The Commentary to §2H2.1 captioned "Background" is amended by deleting "Specific offense characteristics" and inserting in lieu thereof "Alternative base offense levels".

The purpose of this amendment is to correct two clerical errors. **The effective date of this**

amendment is November 1, 1989.

169. Section 2H3.1 is amended by deleting:

- "(a) Base Offense Level (Apply the greater):
 - (1) 9; or
 - (2) If the purpose of the conduct was to facilitate another offense, apply the guideline applicable to an attempt to commit that offense.
- (b) Specific Offense Characteristic
 - (1) If the purpose of the conduct was to obtain direct or indirect commercial advantage or economic gain not covered by §2H3.1(a)(2) above, increase by 3 levels."

and inserting in lieu thereof:

- "(a) Base Offense Level: 9
- (b) Specific Offense Characteristic
 - (1) If the purpose of the conduct was to obtain direct or indirect commercial advantage or economic gain, increase by 3 levels.
- (c) Cross Reference
 - (1) If the purpose of the conduct was to facilitate another offense, apply the guideline applicable to an attempt to commit that offense, if the resulting offense level is greater than that determined above."

The purpose of this amendment is to correct an anomaly in §2H3.1. Currently, specific offense characteristic (b)(1) applies only to base offense level (a)(1). Consequently, conduct facilitating an offense for economic gain of level 8 or 9 would result in a greater offense level (11 or 12) than conduct facilitating a more serious (level 10 or 11) offense. **The effective date of this amendment is November 1, 1989.**

170. Section 2J1.1 is amended by deleting:

"If the defendant was adjudged guilty of contempt, the court shall impose a sentence based on stated reasons and the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).",

and inserting in lieu thereof:

"Apply §2X5.1 (Other Offenses).".

The Commentary to §2J1.1 captioned "Application Note" is amended in Note 1 by deleting "See, however, §2X5.1 (Other Offenses)." and inserting in lieu thereof "In certain cases, the offense conduct will be sufficiently analogous to §2J1.2 (Obstruction of Justice) for that guideline to apply."

This section is designated as a guideline, but it is not a guideline contemplated by the Sentencing Reform Act. The purpose of this amendment is to clarify the Commission's original intent by referencing this section to §2X5.1 (Other Offenses). **The effective date of**

this amendment is November 1, 1989.

171. The Commentary to §2J1.1 captioned "Statutory Provisions" is amended by deleting "Provisions" and inserting in lieu thereof "Provision", and by deleting "\$" and ", 402".

The purpose of this amendment is to delete a reference to a petty offense. **The effective date of this amendment is November 1, 1989.**

172. Section 2J1.2(b)(1) is amended by deleting "defendant obstructed or attempted to obstruct the administration of justice by" and inserting in lieu thereof "offense involved", and by deleting "or property," and inserting in lieu thereof ", or property damage, in order to obstruct the administration of justice".

Section 2J1.2(b)(2) is amended by deleting "defendant substantially interfered" and inserting in lieu thereof "offense resulted in substantial interference".

Section 2J1.2(c)(1) is amended by deleting "conduct was" and inserting in lieu thereof "offense involved", and by deleting "such" and inserting in lieu thereof "that".

The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 1 by deleting "Substantially interfered" and inserting in lieu thereof "Substantial interference", and by deleting "offense conduct resulting in" immediately before "a premature".

The purposes of this amendment are to clarify the guideline and to ensure that an attempted obstruction is not excluded from subsection (c) because of the non-parallel language between (b)(1) and (c)(1). **The effective date of this amendment is November 1, 1989.**

173. The Commentary to §2J1.2 captioned "Statutory Provisions" is amended by deleting "1503-" and inserting in lieu thereof "1503, 1505-".

The purpose of this amendment is to delete a reference to a petty offense. **The effective date of this amendment is November 1, 1989.**

174. The Commentary to §2J1.2 captioned "Statutory Provisions" is amended by inserting ", 1516" immediately following "1513".

The purpose of this amendment is to expand the coverage of an existing guideline to include a new offense (Obstruction of a Federal Audit) created by Section 7078 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

175. Section 2J1.3 is amended in the caption by inserting "or Subornation of Perjury" immediately following "Perjury".

Section 2J1.3 (b)(1) is amended by deleting "defendant suborned perjury by" and inserting in lieu thereof "offense involved", and by deleting "or property" and inserting in lieu thereof ", or property damage, in order to suborn perjury".

Section 2J1.3 (b)(2) is amended by deleting "defendant's" immediately following "If the", and by deleting "substantially interfered" and inserting in lieu thereof "resulted in substantial interference".

Section 2J1.3 (c)(1) is amended by deleting "conduct was perjury" and inserting in lieu thereof "offense involved perjury or subornation of perjury", and by deleting "such" and

inserting in lieu thereof "that".

The Commentary to §2J1.3 captioned "Application Notes" is amended in Note 1 by deleting "Substantially interfered" and inserting in lieu thereof "Substantial interference", and by deleting "offense conduct resulting in" immediately before "a premature".

The purposes of this amendment are to clarify the guideline and to ensure that subornation of perjury is not excluded from subsection (c) due to a lack of parallel wording in the subsections. **The effective date of this amendment is November 1, 1989.**

176. Section 2J1.4(b)(1) is amended by deleting:

"If the defendant falsely represented himself as a federal officer, agent or employee to demand or obtain any money, paper, document, or other thing of value or to conduct an unlawful arrest or search, increase by 6 levels.",

and inserting in lieu thereof:

"If the impersonation was committed for the purpose of conducting an unlawful arrest, detention, or search, increase by 6 levels."

Section 2J1.4 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If the impersonation was to facilitate another offense, apply the guideline for an attempt to commit that offense, if the resulting offense level is greater than the offense level determined above."

The purpose of this amendment is to relate the offense levels more directly to the underlying offense where the impersonation is committed for the purpose of facilitating another offense. **The effective date of this amendment is November 1, 1989.**

177. Section 2J1.5 (b)(1) is amended by deleting "substantially interfered" and inserting in lieu thereof "resulted in substantial interference".

The Commentary to §2J1.5 captioned "Application Notes" is amended in Note 1 by deleting "Substantially interfered" and inserting in lieu thereof "Substantial interference", and by deleting "offense conduct resulting in" immediately before "a premature".

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

178. Section 2J1.7 is amended by deleting the entire guideline and accompanying commentary as follows:

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

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the offense committed while on release is punishable by death or imprisonment for a term of fifteen years or more, increase by 6 levels.

- (2) If the offense committed while on release is punishable by a term of imprisonment of five or more years, but less than fifteen years, increase by 4 levels.
- (3) If the offense committed while on release is a felony punishable by a maximum term of less than five years, increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. § 3147.

Application Notes:

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.

Background: Because defendants convicted under this section will generally have a prior criminal history, the guideline sentences provided are greater than they otherwise might appear.",

and inserting in lieu thereof:

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

If an enhancement under 18 U.S.C. § 3147 applies, add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.

Commentary

Statutory Provision: 18 U.S.C. § 3147.

Application Notes:

1. Because 18 U.S.C. § 3147 is an enhancement provision, rather than an offense, this section provides a specific offense characteristic to increase the offense level for the offense committed while on release.
2. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the 'total punishment' (*i.e.*, the sentence for the offense committed while on release plus the sentence enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if the applicable adjusted guideline range is 30-37 months and the court determines 'total punishment' of 36 months is

appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.

Background: An enhancement under 18 U.S.C. § 3147 may be imposed only upon application of the government; it cannot be imposed on the court's own motion. In this respect, it is similar to a separate count of conviction and, for this reason, is placed in Chapter Two of the guidelines.

Legislative history indicates that the mandatory nature of the penalties required by 18 U.S.C. § 3147 was to be eliminated upon the implementation of the sentencing guidelines. 'Section 213(h) [renumbered as §200(g) in the Crime Control Act of 1984] amends the new provision in title I of this Act relating to consecutive enhanced penalties for committing an offense on release (new 18 U.S.C. § 3147) by eliminating the mandatory nature of the penalties in favor of utilizing sentencing guidelines.' (Senate Report 98-225 at 186). Not all of the phraseology relating to the requirement of a mandatory sentence, however, was actually deleted from the statute. Consequently, it appears that the court is required to impose a consecutive sentence of imprisonment under this provision, but there is no requirement as to any minimum term. This guideline is drafted to enable the court to determine and implement a combined 'total punishment' consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement. Guideline provisions that prohibit the grouping of counts of conviction requiring consecutive sentences (*e.g.*, the introductory paragraph of §3D1.2; §5G1.2(a)) do not apply to this section because 18 U.S.C. § 3147 is an enhancement, not a count of conviction."

The purpose of this amendment is to reflect the fact that 18 U.S.C. § 3147 is an enhancement provision, not a distinct offense. Created in 1984 as part of the Comprehensive Crime Control Act, the statute contained interim provisions (mandatory consecutive sentences that were subject to the parole and good time provisions of prior law) that were to be in effect until the sentencing guidelines took effect. The Senate Report to S.1762 indicates that the mandatory nature of the interim provisions was to be eliminated when the sentencing guidelines took effect ("Section 213(h) [220(g) of the CCA of 1984] amends the new provision in title I of this Act relating to consecutive enhanced penalties for committing an offense while on release (new 18 U.S.C. § 3147)) by eliminating the mandatory nature of the penalties in favor of utilizing sentencing guidelines" (Senate Report 98-225 at 186). The statute, as amended, however, did not actually eliminate all language referring to mandatory penalties. A mandatory consecutive term of imprisonment is required but, unlike other mandatory provisions, there is no minimum required.

The amendment converts this section into an offense level adjustment for the offense committed while on release, a treatment that is considerably more consistent with the treatment of other offense/offender characteristics. **The effective date of this amendment is November 1, 1989.**

179. Section 2J1.8(b)(1) is amended by deleting "substantially interfered" and inserting in lieu thereof "resulted in substantial interference".

Section 2J1.8(c)(1) is amended by deleting "conduct was" and inserting in lieu thereof "offense involved", and by deleting "such" and inserting in lieu thereof "that".

The Commentary to §2J1.8 captioned "Application Notes" is amended in Note 1 by deleting "Substantially interfered" and inserting in lieu thereof "Substantial interference", and by deleting "offense conduct resulting in" immediately before "a premature".

The Commentary to §2J1.8 captioned "Application Notes" is amended in Note 2 by deleting the first sentence as follows: "This section applies only in the case of a conviction under the above referenced (or equivalent) statute."

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

180. The Commentary to §2J1.9 captioned "Application Notes" is amended in Note 2 by deleting the first sentence as follows: "This section applies only in the case of a conviction under the above referenced (or equivalent) statute."

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

181. Section 2J1.9(b)(1) is amended by deleting "for refusing to testify" and inserting in lieu thereof "made or offered for refusing to testify or for the witness absenting himself to avoid testifying".

The Commentary to §2J1.9 captioned "Application Notes" is amended by deleting:

- "1. 'Refusing to testify' includes absenting oneself for the purpose of avoiding testifying.",

and by renumbering Notes 2 and 3 as 1 and 2 respectively.

The purpose of this amendment is to move material from the commentary to the guideline itself where it more properly belongs. **The effective date of this amendment is November 1, 1989.**

182. Sections 2K1.4(c) and 2K1.5(c) are amended by deleting "higher" whenever it appears and inserting in lieu thereof "greater".

The purpose of this amendment is to correct a clerical error. **The effective date of this amendment is November 1, 1989.**

183. Section 2K1.3(b) is amended by deleting "any of the following" and inserting in lieu thereof "more than one".

Section 2K1.3(b)(5) is amended by deleting "firearm offense" and inserting in lieu thereof "offense involving explosives".

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

184. Section 2K1.4(b) is amended by deleting "any of the following" and inserting in lieu thereof "more than one".

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

185. Section 2K1.4 is amended by inserting the following additional subsection:

"(d) Note

- (1) The specific offense characteristic in subsection (b)(4) applies only in the case of an offense committed prior to November 18, 1988."

The Commentary to §2K1.4 captioned "Statutory Provisions" is amended by inserting "(only in the case of an offense committed prior to November 18, 1988)" immediately following "(h)".

The Commentary to §2K1.4 captioned "Background", is amended by deleting "used fire or an explosive in the commission of a felony," immediately before "used a destructive device", and by inserting the following additional sentences at the end of the paragraph:

"As amended by Section 6474(b) of the Anti-Drug Abuse Act of 1988 (effective November 18, 1988), 18 U.S.C. § 844(h) sets forth a mandatory sentencing enhancement of five years for the first offense and ten years for subsequent offenses if the defendant was convicted of using fire or an explosive to commit a felony or of carrying an explosive during the commission of a felony. See §2K1.7."

The purpose of this amendment is to conform the guideline to a statutory revision to 18 U.S.C. § 844(h). **The effective date of this amendment is November 1, 1989.**

186. Section 2K1.5(b) is amended by deleting "any of the following" and inserting in lieu thereof "more than one".

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

187. Section 2K1.5(b)(1) is amended by deleting "(i.e., the defendant is convicted under 49 U.S.C. § 1472(l)(2)" immediately following "human life", and by inserting "is convicted under 49 U.S.C. § 1472(l)(2) (i.e., the defendant" immediately before "acted".

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

188. Chapter Two, Part K is amended by inserting the following additional guideline and accompanying commentary:

"§2K1.7. Use of Fire or Explosives to Commit a Federal Felony

If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. § 844(h), the term of imprisonment is that required by statute.

Commentary

Statutory Provision: 18 U.S.C. § 844(h).

Application Notes:

1. The statute requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
2. Imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release)."

The purpose of this amendment is to conform the guideline to a statutory revision of 18 U.S.C. § 844(h). **The effective date of this amendment is November 1, 1989.**

189. Section 2K2.1 is amended by deleting the entire guideline and accompanying commentary,

except for the commentary captioned "Background", as follows:

"§2K2.1. Receipt, Possession, or Transportation of Firearms and Other Weapons by Prohibited Persons

- (a) Base Offense Level: 9
- (b) Specific Offense Characteristics
 - (1) If the firearm was stolen or had an altered or obliterated serial number, increase by 1 level.
 - (2) If the defendant obtained or possessed the firearm solely for sport or recreation, decrease by 4 levels.
- (c) Cross Reference
 - (1) If the defendant used the firearm in committing or attempting another offense, apply the guideline in respect to such other offense, or §2X1.1 (Attempt or Conspiracy) if the resulting offense level is higher than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)(6), (g), (h).

Application Note:

- 1. Under §2K2.1(b)(2), intended lawful use, as determined by the surrounding circumstances, provides a decrease in offense level. Relevant circumstances include, among others, the number and type of firearms (sawed-off shotguns, for example, have few legitimate uses) and ammunition, the location and circumstances of possession, the nature of the defendant's criminal history (e.g., whether involving firearms), and the extent to which possession is restricted by local law."

and inserting in lieu thereof:

"§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition

- (a) Base Offense Level (Apply the greatest):
 - (1) 16, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861; or
 - (2) 12, if the defendant is convicted under 18 U.S.C. § 922(g), (h), or (n); or if the defendant, at the time of the offense, had been convicted in any court of an offense punishable by imprisonment for a term exceeding one year; or
 - (3) 6, otherwise.
- (b) Specific Offense Characteristics
 - (1) If the defendant obtained or possessed the firearm or ammunition solely for lawful sporting purposes or

collection, decrease the offense level determined above to level 6.

- (2) If the firearm was stolen or had an altered or obliterated serial number, increase by 2 levels.

(c) Cross References

- (1) If the offense involved the distribution of a firearm or possession with intent to distribute, apply §2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms) if the resulting offense level is greater than that determined above.
- (2) If the defendant used or possessed the firearm in connection with commission or attempted commission of another offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 922(a)(1), (a)(3), (a)(4), (a)(6), (e), (f), (g), (h), (i), (j), (k), (l), (n), and (o); 26 U.S.C. § 5861(b), (c), (d), (h), (i), (j), and (k).

Application Notes:

1. The definition of 'firearm' used in this section is that set forth in 18 U.S.C. § 921(a)(3) (if the defendant is convicted under 18 U.S.C. § 922) and 26 U.S.C. § 5845(a) (if the defendant is convicted under 26 U.S.C. § 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to §1B1.1 (Application Instructions). Under 18 U.S.C. § 921(a)(3), the term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. § 5845(a), the term 'firearm' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon made from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.
2. Under §2K2.1(b)(1), intended lawful use, as determined by the surrounding circumstances, provides a decrease in the offense level. Relevant circumstances include, among others, the number and type of firearms (sawed-off shotguns, for example, have few legitimate uses) and ammunition, the location and circumstances of possession, the nature of the defendant's criminal history (e.g., whether involving firearms), and the extent to which possession was restricted by local law."

The Commentary to §2K2.1 captioned "Background" is amended in the last paragraph by deleting "§2K2.1(c)" and inserting in lieu thereof "§2K2.1(c)(2)".

Sections 2K2.2 and 2K2.3 are amended by deleting, in each instance, the entire guideline and accompanying commentary as follows:

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

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristics
 - (1) If the firearm was stolen or had an altered or obliterated serial number, increase by 1 level.
 - (2) If the firearm was a silencer, increase by 4 levels.
 - (3) If the defendant obtained or possessed the firearm solely for sport, recreation or collection, decrease by 6 levels.
- (c) Cross Reference
 - (1) If the defendant used the firearm in committing or attempting another offense, apply the guideline for such other offense or §2X1.1 (Attempt or Conspiracy), if the resulting offense level is higher than that determined above.

Commentary

Statutory Provisions: 26 U.S.C. §§ 5861(b) through (l).

Application Notes:

1. Under §2K2.2(b)(3), intended lawful use, as determined by the surrounding circumstances, provides a decrease in offense level. Relevant circumstances include, among others, the number and type of firearms (sawed-off shotguns, for example, have few legitimate uses) and ammunition, the location and circumstances of possession, the nature of the defendant's criminal history (e.g., whether involving firearms), and the extent to which possession is restricted by local law.
2. Subsection (c)(1) refers to any situation in which the defendant possessed a firearm to facilitate another offense that he committed or attempted.

Background: 26 U.S.C. § 5861 prohibits the unlicensed receipt, possession, transportation, or manufacture of certain firearms, such as machine guns, silencers, rifles and shotguns with shortened barrels, and destructive devices. As with §2K2.1, there is considerable variation in the conduct included under this statutory provision and some violations may be relatively technical.

§2K2.3. Prohibited Transactions in or Shipment of Firearms and Other Weapons

- (a) Base Offense Level:
 - (1) 12, if convicted under 26 U.S.C. § 5861; or
 - (2) 6, otherwise.
- (b) Specific Offense Characteristics
 - (1) If the number of firearms unlawfully dealt in exceeded

5, increase as follows:

	<u>Number of Firearms</u>	<u>Increase in Level</u>
(A)	6 - 10	add 1
(B)	11 - 20	add 2
(C)	21 - 50	add 3
(D)	51 - 100	add 4
(E)	101 - 200	add 5
(F)	more than 200	add 6

(2) If any of the following applies, use the greatest:

- (A) If the defendant knew or had reason to believe that a purchaser was a person prohibited by federal law from owning the firearm, increase by 2 levels.
- (B) If the defendant knew or had reason to believe that a purchaser resided in another state in which he was prohibited from owning the firearm, increase by 1 level.
- (C) If the defendant knew or had reason to believe that a firearm was stolen or had an altered or obliterated serial number, increase by 1 level.

(c) Cross Reference

- (1) If the defendant provided the firearm to another for the purpose of committing another offense, or knowing that he planned to use it in committing another offense, apply §2X1.1 (Attempt or Conspiracy) in respect to such other offense, if the resulting offense level is higher.

Commentary

Statutory Provisions: 18 U.S.C. § 922 (a)(1), (a)(5), (b)(2), (b)(3), (d), (i), (j), (k), (l); 26 U.S.C. § 5861(a).

Background: This section applies to a variety of offenses involving prohibited transactions in or transportation of firearms and certain other weapons."

and inserting in lieu thereof:

"§2K2.2. Unlawful Trafficking and Other Prohibited Transactions Involving Firearms

(a) Base Offense Level:

- (1) 16, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861;
- (2) 6, otherwise.

(b) Specific Offense Characteristics

- (1) If the offense involved distribution of a firearm, or possession with intent to distribute, and the number of

firearms unlawfully distributed, or to be distributed, exceeded two, increase as follows:

<u>Number of Firearms</u>	<u>Increase in Level</u>
(A) 3 - 4	add 1
(B) 5 - 7	add 2
(C) 8 - 12	add 3
(D) 13 - 24	add 4
(E) 25 - 49	add 5
(F) 50 or more	add 6.

(2) If any of the firearms was stolen or had an altered or obliterated serial number, increase by 2 levels.

(3) If more than one of the following applies, use the greater:

(A) If the defendant is convicted under 18 U.S.C. § 922(d), increase by 6 levels; or

(B) If the defendant is convicted under 18 U.S.C. § 922(b)(1) or (b)(2), increase by 1 level.

(c) Cross Reference

(1) If the defendant, at the time of the offense, had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, apply §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 922(a)(1), (a)(2), (a)(5), (b), (c), (d), (e), (f), (i), (j), (k), (l), (m), (o); 26 U.S.C. § 5861(a), (e), (f), (g), (j), and (l).

Application Notes:

1. The definition of 'firearm' used in this section is that set forth in 18 U.S.C. § 921(a)(3) (if the defendant is convicted under 18 U.S.C. § 922) and 26 U.S.C. § 5845(a) (if the defendant is convicted under 26 U.S.C. § 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to §1B1.1 (Application Instructions). Under 18 U.S.C. § 921(a)(3), the term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. § 5845(a), the term 'firearm' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon made from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.
2. If the number of weapons involved exceeded fifty, an upward departure may be warranted. An upward departure especially may be warranted in the case of large numbers of military type weapons (e.g., machine guns, automatic

weapons, assault rifles).

Background: This guideline applies to a variety of offenses involving firearms, ranging from unlawful distribution of silencers, machine guns, sawed-off shotguns and destructive devices, to essentially technical violations.

§2K2.3. Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense

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

- (1) The offense level from §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the offense that the defendant intended or knew was to be committed with the firearm; or
- (2) The offense level from §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), or §2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms), as applicable; or
- (3) 12.

Commentary

Statutory Provisions: 18 U.S.C. § 924(b), (f), (g)."

This amendment addresses a number of diverse substantive and technical issues, as well as the creation of several new offenses, and increased statutory maximum penalties for certain other offenses. Because there exist a large number of overlapping statutory provisions, the three basic guidelines, §2K2.1 (Possession by a prohibited person), §2K2.2 (Possession of certain types of weapons), and §2K2.3 (Unlawful trafficking) are not closely tied to the actual conduct. The amendment addresses this issue by consolidating the current three guidelines into two guidelines: (1) unlawful possession, receipt, or transportation, and (2) unlawful trafficking; and by more carefully drawing the distinctions between the base offense levels provided. The third guideline in this amendment is a new guideline to address transfer of a weapon with intent or knowledge that it will be used to commit another offense (formerly covered in a cross reference) and a new offense added by the Anti-Drug Abuse Act of 1988 (Section 6211)(Interstate travel to acquire a firearm for a criminal purpose).

The base offense level for conduct covered by the current §2K2.1 is increased in the amendment from 9 to 12. The statutorily authorized maximum sentence for the conduct covered under §2K2.1 was increased from five to ten years by the Anti-Drug Abuse Act of 1988 (Section 6462). Note, however, that the most aggravated conduct under §2K2.1 (possession of a weapon during commission of another offense) is handled by the cross-reference at subsection (c) and is based upon the offense level for an attempt to commit the underlying offense. See Background Commentary to current §2K2.1. The offense level for unlawful possession of a machine gun, sawed off shotgun, or destructive device is increased from 12 to 16. In addition, the amendment raises the enhancement for stolen weapons or obliterated serial numbers from 1 to 2 levels to better reflect the seriousness of this conduct. The numbers currently used in the table for the distribution of multiple weapons in §2K2.2 are amended to increase the offense level more rapidly for sale of multiple weapons. The effective date of this amendment is November 1, 1989.

190. Section 2K2.4 is amended by deleting "penalties are those" and inserting in lieu thereof "term of imprisonment is that".

The Commentary to §2K2.4 captioned "Application Notes" is amended by inserting the following additional note:

- "3. Imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release).".

Section 2K2.4 is amended by inserting "(a)" immediately before "If", and by inserting the following additional subsection:

- "(b) Special Instructions for Fines
 - (1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section."

The Commentary to §2K2.4 captioned "Application Notes" is amended by inserting the following additional note:

- "4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 924(c) or 929(a). This is because the offense level for the underlying offense may be reduced when there is also a conviction under 18 U.S.C. § 924(c) or 929(a) in that any specific offense characteristic for possession, use, or discharge of a firearm is not applied (see Application Note 2). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense."

The purpose of this amendment is to address the imposition of a fine or term of supervised release when this guideline applies. The effective date of this amendment is November 1, 1989.

191. Chapter Two, Part K is amended by inserting the following additional guideline and accompanying commentary:

"§2K2.5. Possession of Firearms and Dangerous Weapons in Federal Facilities

- (a) Base Offense Level: 6
- (b) Cross Reference
 - (1) If the defendant possessed the firearm or other dangerous weapon with intent to use it in the commission of another offense, apply §2X1.1 (Attempt, Solicitation or Conspiracy) in respect to that other offense if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. § 930."

The purpose of this amendment is to reflect a new offense enacted by Section 6215 of the Anti-Drug Abuse Act of 1988. A base offense level of 6 is provided for the misdemeanor

portion of this statute. The felony portion of this statute (possession with intent to commit another offense) is treated as if an attempt to commit that other offense. **The effective date of this amendment is November 1, 1989.**

192. Section 2L1.1(b) is amended by inserting the following additional subsection:

- "(3) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, and the offense level determined above is less than level 8, increase to level 8."

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 6 by deleting "enhancement at §2L1.1(b)(1) does not apply" and inserting in lieu thereof "reduction at §2L1.1(b)(1) applies".

The purposes of this amendment are to provide an offense level that is no less than that provided under §2L1.2 in the case of a defendant who is a previously deported alien, and to conform Application Note 6 of the Commentary to §2L1.1 to the January 1988 revision of §2L1.1. **The effective date of this amendment is November 1, 1989.**

193. Section 2L1.2 is amended by inserting the following additional subsection:

"(b) Specific Offense Characteristic

- (1) If the defendant previously was deported after sustaining a conviction for a felony, other than a felony involving violation of the immigration laws, increase by 4 levels."

The Commentary to §2L1.2 captioned "Application Notes" is amended by inserting the following additional notes:

- "3. A 4-level increase is provided under subsection (b)(1) in the case of a defendant who was previously deported after sustaining a conviction for a felony, other than a felony involving a violation of the immigration laws. In the case of a defendant previously deported after sustaining a conviction for an aggravated felony as defined in 8 U.S.C. § 1101(a), or for any other violent felony, an upward departure may be warranted.
4. The adjustment under §2L1.2(b)(1) is in addition to any criminal history points added for such conviction in Chapter 4, Part A (Criminal History)."

The purpose of this amendment is to add a specific offense characteristic to provide an increase in the case of an alien previously deported after conviction of a felony other than an immigration law violation. This specific offense characteristic is in addition to, and not in lieu of, criminal history points added for the prior sentence. The amendment provides for consideration of an upward departure where the previous deportation was for an "aggravated felony" or for any other violent felony. **The effective date of this amendment is November 1, 1989.**

194. Section 2L1.3 is amended by deleting the entire guideline and accompanying commentary as follows:

"§2L1.3. Engaging in a Pattern of Unlawful Employment of Aliens

- (a) Base Offense Level: 6

Commentary

Statutory Provision: 8 U.S.C. § 1324a(f)(1).

Background: The offense covered under this section is a misdemeanor for which the maximum term of imprisonment authorized by statute is six months."

The purpose of this amendment is to delete a guideline applying only to a petty offense. Petty offenses were deleted from coverage of the guidelines by the adoption of §1B1.9 (effective June 15, 1988). **The effective date of this amendment is November 1, 1989.**

195. Section 2L2.1(a) is amended by deleting "6" and inserting in lieu thereof "9".

Section 2L2.1(b)(1) is amended by deleting "for profit, increase by 3 levels" and inserting in lieu thereof "other than for profit, decrease by 3 levels".

The purpose of this amendment is to conform the structure of this guideline to that of §2L1.1. **The effective date of this amendment is November 1, 1989.**

196. Section 2L2.2 is amended by inserting the following additional subsection:

"(b) Specific Offense Characteristic

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

The Commentary to §2L2.2 captioned "Application Notes" is amended by deleting:

- "1. In the case of a defendant who is an unlawful alien and has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, the Commission recommends an upward departure of 2 levels in order to provide a result equivalent to §2L1.2.",

by renumbering Note 2 as Note 1, and by deleting "Notes" and inserting in lieu thereof "Note".

The purpose of this amendment is to convert a departure recommendation into a specific offense characteristic. **The effective date of this amendment is November 1, 1989.**

197. Section 2L2.3(a) is amended by deleting "6" and inserting in lieu thereof "9".

Section 2L2.3(b)(1) is amended by deleting "for profit, increase by 3 levels" and inserting in lieu thereof "other than for profit, decrease by 3 levels".

The purpose of this amendment is to conform the structure of this guideline to that of §2L1.1. **The effective date of this amendment is November 1, 1989.**

198. Section 2L2.4 is amended by inserting the following additional subsection:

"(b) Specific Offense Characteristic

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

The Commentary to §2L2.4 captioned "Application Notes" is amended by deleting:

- "1. In the case of a defendant who is an unlawful alien and has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, the Commission recommends an upward departure of 2 levels in order to provide a result equivalent to §2L1.2.",

by renumbering Note 2 as Note 1, and by deleting "Notes" and inserting in lieu thereof "Note".

The purpose of this amendment is to convert a departure recommendation into a specific offense characteristic. **The effective date of this amendment is November 1, 1989.**

199. Section 2N3.1 is amended by deleting:

- "(b) If more than one vehicle was involved, apply §2F1.1 (Offenses Involving Fraud or Deceit).",

and inserting in lieu thereof:

- "(b) Cross Reference
 - (1) If the offense involved more than one vehicle, apply §2F1.1 (Fraud and Deceit)."

The purposes of this amendment are to correct a clerical error and to conform the phraseology of this subsection to that used elsewhere in the guidelines. **The effective date of this amendment is November 1, 1989.**

200. Section 2P1.1(a) is amended by deleting:

- "(1) 13, if from lawful custody resulting from a conviction or as a result of a lawful arrest for a felony;
- (2) 8, if from lawful custody awaiting extradition, pursuant to designation as a recalcitrant witness or as a result of a lawful arrest for a misdemeanor.",

and inserting in lieu thereof:

- "(1) 13, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense;
- (2) 8, otherwise."

The purpose of this amendment is to clarify the language of the guideline by making it conform more closely to that used in 18 U.S.C. § 751, the statute from which it was derived. **The effective date of this amendment is November 1, 1989.**

201. Section 2P1.1(b)(3) is amended by deleting:

- "If the defendant committed the offense while a correctional officer or other employee of the Department of Justice, increase by 2 levels.",

and inserting in lieu thereof:

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

The current specific offense characteristic (b)(3) applies only to correctional officers or Justice Department employees, and not to local or state law enforcement officers who might have custody of a federal prisoner, or even to federal law enforcement officers who are not employed by the Department of Justice (e.g., Secret Service agents are employed by the Treasury Department). It also does not appear to apply to law enforcement or correctional employees who are not sworn officers unless they are Justice Department employees. The purpose of this amendment is to correct this anomaly. **The effective date of this amendment is November 1, 1989.**

202. Section 2P1.2(b)(1) is amended by deleting:

"If the defendant committed the offense while a correctional officer or other employee of the Department of Justice, increase by 2 levels.",

and inserting in lieu thereof:

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

The current specific offense characteristic (b)(1) applies only to correctional officers or Justice Department employees, and not to local or state law enforcement officers who might have custody of a federal prisoner, or even to federal law enforcement officers who are not employed by the Department of Justice (e.g., Secret Service agents are employed by the Treasury Department). It also does not appear to apply to law enforcement or correctional employees who are not sworn officers unless they are Justice Department employees. The purpose of this amendment is to correct this anomaly. **The effective date of this amendment is November 1, 1989.**

203. Section 2P1.2 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If the defendant is convicted under 18 U.S.C. § 1791(a)(1) and is punishable under 18 U.S.C. § 1791(b)(1), the offense level is 2 plus the offense level from §2D1.1, but in no event less than level 26."

The Commentary to §2P1.2 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional note:

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

The purpose of this amendment is to implement the direction to the Commission in Section 6468 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

204. Section 2P1.4 is amended by deleting the entire guideline and accompanying commentary as follows:

"§2P1.4. Trespass on Bureau of Prisons Facilities

(a) Base Offense Level: 6

Commentary

Statutory Provision: 18 U.S.C. § 1793."

The purpose of this amendment is to delete a guideline applying only to a petty offense. Petty offenses were deleted from coverage of the guidelines by the adoption of §1B1.9 (effective June 15, 1988). **The effective date of this amendment is November 1, 1989.**

205. The Commentary to §2Q1.3 captioned "Statutory Provisions" is amended by deleting "§4912,".

The purpose of this amendment is to delete a reference to a petty offense. **The effective date of this amendment is November 1, 1989.**

206. Section 2Q1.4(b)(1) is amended by inserting "bodily" immediately preceding "injury".

The Commentary to §2Q1.4 captioned "Application Note" is amended by deleting:

"1. 'Serious injury' means serious bodily injury as defined in the Commentary to §1B1.1 (Applicable Instructions).",

and inserting in lieu thereof:

"1. 'Serious bodily injury' is defined in the Commentary to §1B1.1 (Application Instructions).".

The purpose of this amendment is to correct a clerical error. **The effective date of this amendment is November 1, 1989.**

207. Section 2Q1.5(b) is amended by deleting:

"(2) If the purpose of the offense was to influence government action or to extort money, increase by 8 levels.",

and by inserting the following additional subsection:

"(c) Cross Reference

(1) If the purpose of the offense was to influence government action or to extort money, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).".

Section 2Q1.5(b) is amended by deleting "Characteristics" and inserting in lieu thereof "Characteristic".

The purposes of this amendment are to convert a specific offense characteristic to a cross-reference and render the guidelines internally more consistent. **The effective date of this amendment is November 1, 1989.**

208. Chapter Two, Part Q, Subpart 1, is amended by inserting the following additional guideline and accompanying commentary:

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

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

- (1) If the intent was to violate the Controlled Substance Act, apply §2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances);
- (2) If the intent was to obstruct the harvesting of timber, and property destruction resulted, apply §2B1.3 (Property Damage or Destruction (Other Than by Arson or Explosives));
- (3) If the offense involved reckless disregard to the risk that another person would be placed in danger of death or serious bodily injury under circumstances manifesting extreme indifference to such risk, the offense level from §2A2.2 (Aggravated Assault);
- (4) 6, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 1864.

Background: The statute covered by this guideline proscribes a wide variety of conduct, ranging from placing nails in trees to interfere with harvesting equipment to placing anti-personnel devices capable of causing death or serious bodily injury to protect the unlawful production of a controlled substance. Subsections (a)(1)-(a)(3) cover the more serious forms of this offense. Subsection (a)(4) provides a minimum offense level of 6 where the intent was to obstruct the harvesting of timber and little or no property damage resulted."

The purpose of this amendment is to reflect a new offense created by Section 6254(f) of the Anti-Drug Abuse Act of 1988. The effective date of this amendment is November 1, 1989.

209. Section 2Q2.1 is amended in the title by inserting at the end "; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants".

The Commentary to §2Q2.1 captioned "Statutory Provisions" is amended by inserting immediately before the period at the end ", 3373(d); 18 U.S.C. § 545".

The Commentary to §2Q2.1 captioned "Background" is amended by deleting "and the Fur Seal Act. These statutes provide special protection to particular species of fish, wildlife and plants." and inserting in lieu thereof "the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants."

Section 2Q2.2 is amended by deleting the entire guideline and accompanying commentary as follows:

"§2Q2.2. Lacey Act; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants

(a) Base Offense Level:

- (1) 6, if the defendant knowingly imported or exported fish, wildlife, or plants, or knowingly engaged in conduct

involving the sale or purchase of fish, wildlife, or plants with a market value greater than \$350; or

(2) 4.

(b) Specific Offense Characteristics

(1) If the offense involved a commercial purpose, increase by 2 levels.

(2) If the offense involved fish, wildlife, or plants that were not quarantined as required by law, increase by 2 levels.

(3) Apply the greater:

(A) If the market value of the fish, wildlife, or plants exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or

(B) If the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by 4 levels.

Commentary

Statutory Provisions: 16 U.S.C. § 3773(d); 18 U.S.C. § 545.

Application Note:

1. This section applies to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants. In other cases, see §§2T3.1 and 2T3.2.

Background: This section applies to violations of the Lacey Act Amendments of 1981, 16 U.S.C. § 3373(d), and to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants. These are the principal enforcement statutes utilized to combat interstate and foreign commerce in unlawfully taken fish, wildlife, and plants. The adjustments for specific offense characteristics are identical to those in §2Q2.1."

The purpose of this amendment is to consolidate two guidelines that cover very similar offenses. **The effective date of this amendment is November 1, 1989.**

210. Section 2Q2.1(b)(3) is amended by deleting "Apply the greater:" and inserting in lieu thereof "(If more than one applies, use the greater):".

The purpose of this amendment is to conform the guideline to the style of other guidelines. **The effective date of this amendment is November 1, 1989.**

211. Section 2R1.1(b)(2) is amended in the first column of the table by deleting:

"Volume of Commerce

- (A) less than \$1,000,000
- (B) \$1,000,000 - \$4,000,000
- (C) \$4,000,001 - \$15,000,000

- (D) \$15,000,001 - \$50,000,000
- (E) over \$50,000,000",

and inserting in lieu thereof:

"Volume of Commerce (Apply the Greatest)

- (A) Less than \$1,000,000
- (B) \$1,000,000 - \$4,000,000
- (C) More than \$4,000,000
- (D) More than \$15,000,000
- (E) More than \$50,000,000".

The purpose of this amendment is to eliminate minor gaps in the loss table. **The effective date of this amendment is November 1, 1989.**

212. Section 2S1.1(b)(2) is amended in the first column of the table by deleting:

"Value

- (A) \$100,000 or less
- (B) \$100,001 - \$200,000
- (C) \$200,001 - \$350,000
- (D) \$350,001 - \$600,000
- (E) \$600,001 - \$1,000,000
- (F) \$1,000,001 - \$2,000,000
- (G) \$2,000,001 - \$3,500,000
- (H) \$3,500,001 - \$6,000,000
- (I) \$6,000,001 - \$10,000,000
- (J) \$10,000,001 - \$20,000,000
- (K) \$20,000,001 - \$35,000,000
- (L) \$35,000,001 - \$60,000,000
- (M) \$60,000,001 - \$100,000,000
- (N) more than \$100,000,000".

and inserting in lieu thereof:

"Value (Apply the Greatest)

- (A) \$100,000 or less
- (B) More than \$100,000
- (C) More than \$200,000
- (D) More than \$350,000
- (E) More than \$600,000
- (F) More than \$1,000,000
- (G) More than \$2,000,000
- (H) More than \$3,500,000
- (I) More than \$6,000,000
- (J) More than \$10,000,000
- (K) More than \$20,000,000
- (L) More than \$35,000,000
- (M) More than \$60,000,000
- (N) More than \$100,000,000".

The purpose of this amendment is to eliminate minor gaps in the value table. **The effective date of this amendment is November 1, 1989.**

213. The Commentary to §2S1.1 captioned "Background" is amended in the third paragraph by inserting the following additional sentences at the end: "Effective November 18, 1988, 18 U.S.C. § 1956(a)(1)(A) contains two subdivisions. The base offense level of 23 applies to § 1956(a)(1)(A)(i) and (ii).".

The purpose of this amendment is to reflect a statutory revision made by Section 6471 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

214. The Commentary to §2S1.1 captioned "Background" is amended in the fourth paragraph by deleting "scope of the criminal enterprise as well as the degree of the defendant's involvement" and inserting in lieu thereof "magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise".

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

215. Section 2S1.2(b)(1)(A) is amended by inserting at the end "or".

The Commentary to §2S1.2 captioned "Background" is amended in the third paragraph by deleting "(b)(1)" and inserting in lieu thereof "(b)(1)(B)".

The purpose of this amendment is to correct clerical errors. **The effective date of this amendment is November 1, 1989.**

216. Section 2S1.3(a)(1)(C) is amended by deleting "the proceeds of criminal activity" and inserting in lieu thereof "criminally derived property", and in subsection (b)(1) by inserting "property" immediately following "criminally derived".

The Commentary to §2S1.3 captioned "Application Note" is amended by deleting:

- "1. As used in this guideline, funds or other property are the 'proceeds of criminal activity' or 'criminally derived' if they are 'criminally derived property,' within the meaning of 18 U.S.C. § 1957.",

and inserting in lieu thereof:

- "1. 'Criminally derived property' means any property constituting, or derived from, proceeds obtained from a criminal offense. See 18 U.S.C. § 1957(f)(2).".

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

217. The Commentary to §2S1.3 captioned "Statutory Provisions" is amended by inserting "26 U.S.C. § 7203 (if a willful violation of 26 U.S.C. § 6050J);" immediately before "31 U.S.C.".

The purpose of this amendment is to conform the guideline to a revision of the relevant statute. **The effective date of this amendment is November 1, 1989.**

218. Section 2S1.3(a)(1)(A) is amended by inserting "or" immediately following "requirements";

Section 2S1.3(a)(1)(B) is amended by deleting "activity" and inserting in lieu thereof "evasion of reporting requirements".

The Commentary to §2S1.3 captioned "Application Note" is amended in the caption by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional note:

- "2. Subsection (a)(1)(C) applies where a reasonable person would have believed from the circumstances that the funds were criminally derived property. Subsection (b)(1) applies if the defendant knew or believed the funds were criminally derived property. Subsection (b)(1) applies in addition to, and not in lieu of, subsection (a)(1)(C). Where subsection (b)(1) applies, subsection (a)(1)(C) also will apply. It is possible that a defendant 'believed' or 'reasonably should have believed' that the funds were criminally derived property even if, in fact, the funds were not so derived (e.g., in a 'sting' operation where the defendant is told the funds were derived from the unlawful sale of controlled substances).".

The Commentary to §2S1.3 captioned "Background" is amended in the second paragraph by deleting:

"The base offense level is set at 13 for the great majority of cases. However, the base offense level is set at 5 for those cases in which these offenses may be committed with innocent motives and the defendant reasonably believed that the funds were from legitimate sources. The higher base offense level applies in all other cases. The offense level is increased by 5 levels if the defendant knew that the funds were criminally derived."

and inserting in lieu thereof:

"A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements, made false statements to conceal or disguise the activity, or reasonably should have believed that the funds were criminally derived property. A lower alternative base offense level of 5 is provided in all other cases. The Commission anticipates that such cases will involve simple recordkeeping or other more minor technical violations of the regulatory scheme governing certain monetary transactions committed by defendants who reasonably believe that the funds at issue emanated from legitimate sources.

Where the defendant actually knew or believed that the funds were criminally derived property, subsection (b)(1) provides for a 5 level increase in the offense level."

The Commentary to §2S1.3 captioned "Background" is amended in the last paragraph by deleting "The dollar value of the the transactions not reported is an important sentencing factor, except in rare cases. It is an" and inserting in lieu thereof "Except in rare cases, the dollar value of the transactions not reported is an important".

The Commentary to §2S1.3 captioned "Statutory Provisions" is amended by inserting "18 U.S.C. § 1005;" immediately following "Provisions".

The purposes of this amendment are to clarify the guideline and commentary, to provide more complete statutory references, and to conform the format of the guideline to that used in other guidelines. **The effective date of this amendment is November 1, 1989.**

219. Section 2T1.1(a) is amended by deleting the last sentence as follows: "When more than one year is involved, the tax losses are to be added."

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 2 by deleting:

"The court is to determine this amount as it would any other guideline factor."

and inserting in lieu thereof:

"Although the definition of tax loss corresponds to what is commonly called the 'criminal deficiency,' its amount is to be determined by the same rules applicable in determining any other sentencing factor."

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 3 by deleting:

"Although the definition of tax loss corresponds to what is commonly called the 'criminal deficiency,' its amount is to be determined by the same rules applicable in determining any other sentencing factor. In accordance with the 'relevant conduct' approach adopted by the guidelines, tax losses resulting from more than one year are to be added whether or not the defendant is convicted of multiple counts.",

and inserting in lieu thereof:

"In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: (a) there is a continuing pattern of violations of the tax laws by the defendant; (b) the defendant uses a consistent method to evade or camouflage income, e.g., backdating documents or using off-shore accounts; (c) the violations involve the same or a related series of transactions; (d) the violation in each instance involves a false or inflated claim of a similar deduction or credit; and (e) the violation in each instance involves a failure to report or an understatement of a specific source of income, e.g., interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive."

The purposes of this amendment are to clarify the determination of tax loss and to make this instruction consistent among §§2T1.1-2T1.3. **The effective date of this amendment is November 1, 1989.**

220. Section 2T1.1(a) is amended by deleting ", including interest to the date of filing an indictment or information" immediately following "attempted to evade".

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 2 in the first sentence by deleting ", plus interest to the date of the filing of an indictment or information" immediately following "attempted to evade", and in the second sentence by inserting "interest or" immediately before "penalties."

The purpose of this amendment is to simplify the application of the guideline by deleting interest from the calculation of tax loss. **The effective date of this amendment is November 1, 1989.**

221. Section 2T1.1(b)(1) is amended by deleting "(A)" immediately before "the defendant failed", by deleting ", or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income" immediately following "criminal activity", by inserting "or to correctly identify the source of" immediately after "report", and by deleting "per" and inserting in lieu thereof "in any".

The purposes of this amendment are to provide a more objective test for application of this enhancement, and to make clear that this enhancement applies if the defendant fails to report or disguises income exceeding \$10,000 from criminal activity in any year. **The effective date of this amendment is November 1, 1989.**

222. The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 6 by deleting:

"Whether 'sophisticated means' were employed (§2T1.1(b)(2)) requires a subjective determination similar to that in §2F1.1(b)(2).",

and inserting in lieu thereof:

"'Sophisticated means,' as used in §2T1.1(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case."

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

223. The Commentary to §2T1.1 captioned "Background" is amended in the second paragraph by deleting "Tax Table" wherever it appears and inserting in lieu thereof in each instance "Sentencing Table".

The purpose of this amendment is to correct a clerical error. **The effective date of this amendment is November 1, 1989.**

224. Section 2T1.2(b)(1) is amended by deleting "(A)" immediately before "the defendant failed", by deleting ", or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income" immediately following "criminal activity", by inserting "or to correctly identify the source of" immediately after "report", and by deleting "per" and inserting in lieu thereof "in any".

The purposes of this amendment are to provide a more objective test for application of this enhancement, and to make clear that this enhancement applies if the defendant fails to report or disguises income exceeding \$10,000 from criminal activity in any year. **The effective date of this amendment is November 1, 1989.**

225. Section 2T1.2 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If the defendant is convicted of a willful violation of 26 U.S.C. § 6050I, apply §2S1.3 (Failure to Report Monetary Transactions) in lieu of this guideline."

The Commentary to §2T1.2 captioned "Statutory Provision" is amended by inserting immediately before the period at the end "(other than a willful violation of 26 U.S.C. § 6050I)".

The purpose of this amendment is to reflect a revision of 26 U.S.C. § 6050I made by Section 7601 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

226. The Commentary to §2T1.2 captioned "Application Note" is amended in Note 2 by deleting:

"Whether 'sophisticated means' were employed (§2T1.2(b)(2)) requires a determination similar to that in §2F1.1(b)(2).",

and inserting in lieu thereof:

"Sophisticated means,' as used in §2T1.2(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case."

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

227. The Commentary to §2T1.2 captioned "Application Note" is amended in the caption by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional note:

"3. In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. See Application Note 3 of the Commentary to §2T1.1."

The purpose of this amendment is to clarify the determination of tax loss. **The effective date of this amendment is November 1, 1989.**

228. Section 2T1.3(b)(1) is amended by deleting "(A)" immediately before "the defendant failed", by deleting ", or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income" immediately following "criminal activity", by inserting "or to correctly identify the source of" immediately after "report", and by deleting "per" and inserting in lieu thereof "in any".

The purposes of this amendment are to provide a more objective test for application of this enhancement, and to make clear that this enhancement applies if the defendant fails to report or disguises income exceeding \$10,000 from criminal activity in any year. **The effective date of this amendment is November 1, 1989.**

229. The Commentary to §2T1.3 captioned "Application Notes" is amended in Note 2 by deleting:

"Whether 'sophisticated means' were employed (§2T1.3(b)(2)) requires a determination similar to that in §2F1.1(b)(2).",

and inserting in lieu thereof:

"'Sophisticated means,' as used in §2T1.3(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case."

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

230. The Commentary to §2T1.3 captioned "Application Notes" is amended by inserting the following additional note:

"3. In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. See Application Note 3 of the Commentary to §2T1.1."

The purpose of this amendment is to clarify the determination of tax loss. **The effective date of this amendment is November 1, 1989.**

231. The Commentary to §2T1.4 captioned "Application Notes" is amended in Note 2 by deleting:

"Whether 'sophisticated means' were employed (§2T1.1(b)(2)) requires a determination similar to that in §2F1.1(b)(2).",

and inserting in lieu thereof:

"'Sophisticated means,' as used in §2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case."

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

232. Section 2T1.6(a) is amended by deleting ", plus interest" immediately following "paid over".

The purpose of this amendment is to simplify the application of the guideline by deleting interest from the calculation of tax loss. **The effective date of this amendment is November 1, 1989.**

233. Section 2T1.9(b) is amended by deleting "either of the following adjustments" and inserting in lieu thereof "more than one".

The purpose of this amendment is to correct a clerical error. **The effective date of this amendment is November 1, 1989.**

234. The Commentary to section 2T1.9 captioned "Application Notes" is amended by deleting:

"2. The minimum base offense level is 10. If a tax loss from the conspiracy can be established under either §2T1.1 or §2T1.3 (whichever applies to the underlying conduct), and that tax loss corresponds to a higher offense level in the Tax Table (§2T4.1), use that higher base offense level.

3. The specific offense characteristics are in addition to those specified in §2T1.1 and §2T1.3.

4. Because the offense is a conspiracy, adjustments from Chapter Three, Part B (Role in the Offense) usually will apply."

and inserting in lieu thereof:

"2. The base offense level is the offense level (base offense level plus any applicable specific offense characteristics) from §2T1.1 or §2T1.3 (whichever is applicable to the underlying conduct), if that offense level is greater than 10. Otherwise, the base offense level is 10.

3. Specific offense characteristics from §2T1.9(b) are to be applied to the base offense level determined under §2T1.9(a)(1) or (2)."

The purpose of this amendment is to clarify Application Notes 2 and 3. Application Note 4 (the content of which does not appear in any of the other guidelines covering conspiracy) is deleted as unnecessary. **The effective date of this amendment is November 1, 1989.**

235. The Commentary to §2T3.1 captioned "Application Notes" is amended in Note 2 by inserting "if the increase in market value due to importation is not readily ascertainable" immediately following "United States".

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

236. The Commentary to §2T3.2 is amended by inserting at the end:

"Application Note:

1. Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, the court should impose a sentence above the guideline. A sentence based upon an alternative measure of the 'duty' evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States if the increase in market value due to importation is not readily ascertainable, might be considered."

The purpose of this amendment is to clarify the application of the guideline by adding the text from Application Note 2 of the Commentary to §2T3.1, which applies equally to this guideline section. **The effective date of this amendment is November 1, 1989.**

237. Section 2T4.1 is amended by deleting:

	<u>"Tax Loss</u>	<u>Offense Level</u>
(A)	less than \$2,000	6
(B)	\$2,000 - \$5,000	7
(C)	\$5,001 - \$10,000	8
(D)	\$10,001 - \$20,000	9
(E)	\$20,001 - \$40,000	10
(F)	\$40,001 - \$80,000	11
(G)	\$80,001 - \$150,000	12
(H)	\$150,001 - \$300,000	13
(I)	\$300,001 - \$500,000	14
(J)	\$500,001 - \$1,000,000	15
(K)	\$1,000,001 - \$2,000,000	16
(L)	\$2,000,001 - \$5,000,000	17
(M)	more than \$5,000,000	18",

and inserting in lieu thereof:

	<u>"Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(A)	\$2,000 or less	6
(B)	More than \$2,000	7
(C)	More than \$5,000	8
(D)	More than \$10,000	9
(E)	More than \$20,000	10
(F)	More than \$40,000	11
(G)	More than \$70,000	12
(H)	More than \$120,000	13
(I)	More than \$200,000	14
(J)	More than \$350,000	15

(K)	More than \$500,000	16
(L)	More than \$800,000	17
(M)	More than \$1,500,000	18
(N)	More than \$2,500,000	19
(O)	More than \$5,000,000	20
(P)	More than \$10,000,000	21
(Q)	More than \$20,000,000	22
(R)	More than \$40,000,000	23
(S)	More than \$80,000,000	24."

The purposes of this amendment are to increase the offense levels for offenses with larger losses in order to provide additional deterrence and better reflect the seriousness of the conduct, and to eliminate minor gaps in the table. **The effective date of this amendment is November 1, 1989.**

238. Section 2X1.1(b)(1) is amended by deleting "or solicitation" immediately following "If an attempt".

Section 2X1.1(b) is amended by deleting:

- "(3) If a solicitation, and the statute treats solicitation identically with the object of the offense, do not apply §2X1.1(b)(1); i.e., the offense level for solicitation is the same as that for the object offense."

and inserting in lieu thereof:

- "(3)(A) If a solicitation, decrease by 3 levels unless the person solicited to commit or aid the offense completed all the acts he believed necessary for successful completion of the object offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond such person's control.

- (B) If the statute treats solicitation of the offense identically with the object offense, do not apply subdivision (A) above; i.e., the offense level for solicitation is the same as that for the object offense."

The current subsection (b)(1) does not clearly address how a solicitation is to be treated where the person solicited to commit the offense completes all the acts necessary for the successful completion of the offense. The purpose of this amendment is to clarify the treatment of such cases in a manner consistent with the treatment of attempts and conspiracies. **The effective date of this amendment is November 1, 1989.**

239. Section 2X1.1 is amended in the title by deleting "Not Covered by a Specific Guideline" and inserting in lieu thereof "(Not Covered by a Specific Offense Guideline)".

Section 2X1.1 is amended by inserting the following additional subsection:

- "(c) Cross Reference
- (1) When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section."

The Commentary to §2X1.1 captioned "Application Notes" is amended by deleting:

- "1. Certain attempts, conspiracies, and solicitations are covered by specific guidelines (e.g., §2A2.1 includes attempt, conspiracy, or solicitation to commit murder; §2A3.1 includes attempted criminal sexual abuse; and §2D1.4 includes

attempts and conspiracies to commit controlled substance offenses). Section 2X1.1 applies only in the absence of a more specific guideline."

and inserting in lieu thereof:

- "1. Certain attempts, conspiracies, and solicitations are expressly covered by other offense guidelines.

Offense guidelines that expressly cover attempts include: §2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder); §2A3.1 (Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse); §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts); §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts); §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact); §2A4.2 (Demanding or Receiving Ransom Money); §2A5.1 (Aircraft Piracy or Attempted Aircraft Piracy); §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); §2D1.4 (Attempts and Conspiracies); §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan); §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Serious Injury); §2Q1.4 (Tampering or Attempted Tampering with Public Water System).

Offense guidelines that expressly cover conspiracies include: §2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder); §2D1.4 (Attempts and Conspiracies); §2H1.2 (Conspiracy to Interfere with Civil Rights); §2T1.9 (Conspiracy to Impair, Impede or Defeat Tax).

Offense guidelines that expressly cover solicitations include: §2A2.1 (Assault with Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder); §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan)."

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

240. The Commentary to §2X1.1 captioned "Application Notes" is amended by deleting:

- "4. If the defendant was convicted of conspiracy or solicitation and also for the completed offense, the conviction for the conspiracy or solicitation shall be imposed to run concurrently with the sentence for the object offense, except in cases where it is otherwise specifically provided for by the guidelines or by law. 28 U.S.C. § 994(1)(2)."

The purpose of this amendment is to delete an application note that does not apply to any determination under this section. The circumstances which this application note addresses are covered under Chapter Three, Part D and Chapter Five, Part G. **The effective date of this amendment is November 1, 1989.**

241. The Commentary to §2X1.1 captioned "Application Notes" is amended by inserting the following additional note:

- "4. In certain cases, the participants may have completed (or have been about to complete but for apprehension or interruption) all of the acts necessary for the successful completion of part, but not all, of the intended offense. In such cases, the offense level for the count (or group of closely-related multiple counts) is whichever of the following is greater: the offense level for the intended offense minus 3 levels (under §2X1.1(b)(1), (b)(2), or (b)(3)(A)), or the offense level for the part of the offense for which the necessary acts were completed (or about to be completed but for apprehension or interruption). For example, where the intended offense was the theft of \$800,000 but the participants completed (or were about to complete) only the acts necessary to steal \$30,000, the offense level is the offense level for the theft of \$800,000 minus 3 levels, or the offense level for the theft of \$30,000, whichever is greater.

In the case of multiple counts that are not closely-related counts, whether the 3-level reduction under §2X1.1(b)(1) or (2) applies is determined separately for each count."

The purpose of this amendment is to clarify how the guidelines are to be applied to partially completed offenses. **The effective date of this amendment is November 1, 1989.**

242. The Commentary to §2X1.1 captioned "Application Notes" is amended in the last sentence of Note 2 by deleting "intended" and inserting in lieu thereof "attempted".

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

243. The Commentary to §2X3.1 captioned "Application Notes" is amended in Note 1 by deleting:

"'Underlying offense' means the offense as to which the defendant was an accessory.",
and inserting in lieu thereof:

"'Underlying offense' means the offense as to which the defendant is convicted of being an accessory. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 1 of the Commentary to §1B1.3 (Relevant Conduct)."

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

244. The Commentary to §2X4.1 captioned "Application Notes" is amended in Note 1 by deleting:

"'Underlying offense' means the offense as to which the misprision was committed.",
and inserting in lieu thereof:

"'Underlying offense' means the offense as to which the defendant is convicted of committing the misprision. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 1 of the Commentary to §1B1.3 (Relevant Conduct)."

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

245. Section 3A1.1 is amended by deleting "the victim" wherever it appears and inserting in lieu thereof in each instance "a victim", and by inserting "otherwise" immediately before "particularly".

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

"any offense where the victim's vulnerability played any part in the defendant's decision to commit the offense",

and inserting in lieu thereof:

"offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant",

and by deleting:

"sold fraudulent securities to the general public and one of the purchasers",

and inserting in lieu thereof:

"sold fraudulent securities by mail to the general public and one of the victims".

The purpose of the amendment is to clarify the guideline and commentary. **The effective date of this amendment is November 1, 1989.**

246. Section 3A1.2 is amended by deleting:

"any law-enforcement or corrections officer, any other official as defined in 18 U.S.C. § 1114, or a member of the immediate family thereof, and",

and inserting in lieu thereof:

"a law enforcement or corrections officer; a former law enforcement or corrections officer; an officer or employee included in 18 U.S.C. § 1114; a former officer or employee included in 18 U.S.C. § 1114; or a member of the immediate family of any of the above, and".

The purpose of this amendment is to expand the coverage of this provision to reflect a statutory revision effected by Section 6487 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

247. Section 3A1.2 is amended by deleting "If the victim" and inserting in lieu thereof:

"If--

(a) the victim",

and by deleting "crime was motivated by such status, increase by 3 levels." and inserting in lieu thereof:

"offense of conviction was motivated by such status; or

(b) during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having reasonable cause to believe that a person was a law enforcement or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury,

increase by 3 levels."

The Commentary to §3A1.2 captioned "Application Notes" is amended by inserting the following additional notes:

4. 'Motivated by such status' in subdivision (a) means that the offense of conviction was motivated by the fact that the victim was a law enforcement or corrections officer or other person covered under 18 U.S.C. § 1114, or a member of the immediate family thereof. This adjustment would not apply, for example, where both the defendant and victim were employed by the same government agency and the offense was motivated by a personal dispute.
5. Subdivision (b) applies in circumstances tantamount to aggravated assault against a law enforcement or corrections officer, committed in the course of, or in immediate flight following, another offense, such as bank robbery. While this subdivision may apply in connection with a variety of offenses that are not by nature targeted against official victims, its applicability is limited to assaultive conduct against law enforcement or corrections officers that is sufficiently serious to create at least a 'substantial risk of serious bodily injury' and that is proximate in time to the commission of the offense.
6. The phrase 'substantial risk of serious bodily injury' in subdivision (b) is a threshold level of harm that includes any more serious injury that was risked, as well as actual serious bodily injury (or more serious harm) if it occurs."

The purpose of the amendment is to set forth more clearly the categories of cases to which this adjustment is intended to apply. The effective date of this amendment is November 1, 1989.

248. The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 3 by inserting the following additional sentences at the end:

"In most cases, the offenses to which subdivision (a) will apply will be from Chapter Two, Part A (Offenses Against the Person). The only offense guideline in Chapter Two, Part A that specifically incorporates this factor is §2A2.4 (Obstructing or Impeding Officers)."

The purpose of this amendment is to clarify the application of the guideline. The effective date of this amendment is November 1, 1989.

249. Section 3A1.3 is amended by deleting "the victim of a crime" and inserting in lieu thereof "a victim".

The Commentary to §3A1.3 captioned "Application Notes" is amended in Note 2 by deleting "the victim" and inserting in lieu thereof "a victim".

The purpose of this amendment is to clarify the guideline. The effective date of this amendment is November 1, 1989.

250. The Commentary to §3A1.3 captioned "Application Notes" is amended by inserting the following additional note:

3. If the restraint was sufficiently egregious, an upward departure may be warranted. See §5K2.4 (Abduction or Unlawful Restraint)."

The purpose of this amendment is to clarify the relationship between §3A1.3 and §5K2.4. The effective date of this amendment is November 1, 1989.

251. Section 3C1.1 is amended by deleting "from Chapter Two" immediately following "the offense level".

The purpose of this amendment is to delete an incorrect reference. The effective date of this amendment is November 1, 1989.

252. The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 by deleting:

" , except in determining the combined offense level as specified in Chapter Three, Part D (Multiple Counts). Under §3D1.2(e), a count for obstruction will be grouped with the count for the underlying offense. Ordinarily, the offense level for that Group of Closely Related Counts will be the offense level for the underlying offense, as increased by the 2-level adjustment specified by this section. In some instances, however, the offense level for the obstruction offense may be higher, in which case that will be the offense level for the Group. See §3D1.3(a). In cases in which a significant further obstruction occurred during the investigation or prosecution of an obstruction offense itself (one of the above listed offenses), an upward departure may be warranted (e.g., where a witness to an obstruction offense is threatened during the course of the prosecution for the obstruction offense).",

and inserting in lieu thereof:

"to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely-Related Counts). The offense level for that Group of Closely-Related Counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater."

The purpose of this amendment is to resolve an inconsistency between the commentary in this section and the Commentaries in Chapter Two, Part J. The effective date of this amendment is November 1, 1989.

253. Section 3D1.2(b)(3) is amended by deleting "§ 994(u)" and inserting in lieu thereof "§ 994(v)".

Section 3D1.2(d) is amended in the second paragraph by deleting ", 2D1.3", and in the third paragraph by deleting ", 2G3.2" and ", 2P1.4".

The purposes of this amendment are to correct an erroneous reference, and to delete references to two guidelines covering petty offenses that have been deleted and to a guideline that has been deleted by consolidation with another guideline. The effective date of this amendment is November 1, 1989.

254. The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 3 by deleting "(6)", "(7)", and "(8)" and inserting in lieu thereof "(5)", "(6)", and "(7)" respectively.

The purpose of this amendment is to correct a clerical error. The effective date of this

amendment is November 1, 1989.

255. The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 9 by inserting immediately following the second sentence: "See §1B1.2(d) and accompanying commentary."

The purpose of this amendment is to cross reference the newly created guideline subsection dealing with a multiple object conspiracy. **The effective date of this amendment is November 1, 1989.**

256. The Commentary to §3D1.2 captioned "Background" is amended in the second paragraph by deleting:

"In general, counts are grouped together only when they involve both the same victim (or societal harm in 'victimless' offenses) and the same or contemporaneous transactions, except as provided in §3D1.2(c) or (d).",

and inserting in lieu thereof:

"Counts involving different victims (or societal harms in the case of 'victimless' crimes) are grouped together only as provided in subsection (c) or (d).".

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

257. Section 3D1.3(b) is amended in the second sentence by deleting "varying" immediately following "involve", and by inserting "of the same general type to which different guidelines apply (e.g., theft and fraud)" immediately following "offenses".

The purpose of this amendment is to enhance the clarity of the guideline. **The effective date of this amendment is November 1, 1989.**

258. The Commentary to §3E1.1 captioned "Application Notes" is amended by deleting:

"4. An adjustment under this section is not warranted where a defendant perjures himself, suborns perjury, or otherwise obstructs the trial or the administration of justice (see §3C1.1), regardless of other factors.",

and inserting in lieu thereof:

"4. Conduct resulting in an enhancement under §3C1.1 (Willfully Obstructing or Impeding Proceedings) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply."

The purposes of this amendment are to provide for extraordinary cases in which adjustments under both §3C1.1 and §3E1.1 are appropriate, and to clarify the reference to obstructive conduct. **The effective date of this amendment is November 1, 1989.**

259. Section 4A1.1(e) is amended by inserting "or while in imprisonment or escape status on such a sentence" immediately before the period at the end of the first sentence.

The Commentary to §4A1.1 captioned "Application Notes" is amended in the second sentence of Note 5 by deleting "still in confinement" and inserting in lieu thereof "in imprisonment or escape status".

The purpose of this amendment is to clarify that subsection (e) applies to defendants who are still in confinement status at the time of the instant offense (e.g., a defendant who commits the instant offense while in prison or on escape status). **The effective date of this amendment is November 1, 1989.**

260. The Commentary to §4A1.1 captioned "Application Notes" is amended in Note 4 by inserting the following additional sentence at the end: "For the purposes of this item, a 'criminal justice sentence' means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History).".

The purpose of this amendment is to clarify the application of the guideline. **The effective date of this amendment is November 1, 1989.**

261. The Commentary to §4A1.1 captioned "Background" is amended in the third paragraph by inserting "a" immediately before "criminal", and by deleting "control" and inserting in lieu thereof "sentence".

The purpose of this amendment is to conform the commentary to the guideline. **The effective date of this amendment is November 1, 1989.**

262. Section 4A1.2(e)(1) is amended by inserting ", whenever imposed," immediately before "that resulted", and by deleting "defendant's incarceration" and inserting in lieu thereof "defendant being incarcerated".

The purpose of this amendment is to clarify that "resulted in the defendant's incarceration" applies to any part of the defendant's imprisonment and not only to the commencement of the defendant's imprisonment. **The effective date of this amendment is November 1, 1989.**

263. Section 4A1.2(e) is amended by inserting the following additional subdivision:

"(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by §4A1.2(d)(2).".

The purpose of this amendment is to clarify the relationship between §4A1.2(d)(2) and (e). **The effective date of this amendment is November 1, 1989.**

264. Section 4A1.2(f) is amended by inserting ", or a plea of nolo contendere," immediately following "admission of guilt".

The purpose of this amendment is to clarify that a plea of nolo contendere is equivalent to a finding of guilt for the purpose of §4A1.2(f). **The effective date of this amendment is November 1, 1989.**

265. The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 8 by deleting "4A1.2(e)" and inserting in lieu thereof "4A1.2(d)(2) and (e)", and by inserting immediately following the first sentence:

"As used in §4A1.2(d)(2) and (e), the term 'commencement of the instant offense' includes any relevant conduct. See §1B1.3 (Relevant Conduct).".

The purposes of this amendment are to correct a clerical error by inserting a reference to §4A1.2(d)(2), and to clarify that "commencement of the instant offense" includes any relevant conduct. **The effective date of this amendment is November 1, 1989.**

266. Section 4B1.1 is amended by deleting "Offense Level" and inserting in lieu thereof "Offense Level*", and by inserting at the end:

"*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by 2 levels."

The purpose of this amendment is to authorize the application of §3E1.1 (Acceptance of Responsibility) to the determination of the offense level under this section to provide an incentive for the acceptance of responsibility by defendants subject to the career offender provision. **The effective date of this amendment is November 1, 1989.**

267. The Commentary to §4B1.1 captioned "Application Note" is amended in Note 1 by deleting "felony conviction" and inserting in lieu thereof "two prior felony convictions".

The Commentary to §4B1.1 captioned "Application Note" is amended by inserting the following additional note:

- "2. 'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest maximum term of imprisonment."

and in the caption by deleting "Note" and inserting in lieu thereof "Notes".

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

"128 Cong. Rec. 12792, 97th Cong., 2d Sess. (1982) ('Career Criminals' amendment No. 13 by Senator Kennedy), 12796 (explanation of amendment), and 12798 (remarks by Senator Kennedy)",

and inserting in lieu thereof:

"128 Cong. Rec. 26, 511-12 (1982) (text of 'Career Criminals' amendment by Senator Kennedy), 26, 515 (brief summary of amendment), 26, 517-18 (statement of Senator Kennedy)".

The purposes of this amendment are to clarify the operation of the guideline and to provide a citation to the more readily available edition of the Congressional Record. **The effective date of this amendment is November 1, 1989.**

268. Section 4B1.2(1) is amended by deleting "as used in this provision is defined under 18 U.S.C. § 16" and inserting in lieu thereof:

"means any offense under federal or state law punishable by imprisonment for a term exceeding one year that --

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another".

Section 4B1.2(2) is amended by deleting "as used in this provision" immediately before "means", and by deleting "identified in 21 U.S.C. §§841, 845(b), 856, 952(a), 955, 955(a), 959;

and similar offenses" and inserting in lieu thereof:

"under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute".

The Commentary to §4B1.2 captioned "Application Notes" is amended by deleting:

1. 'Crime of violence' is defined in 18 U.S.C. § 16 to mean an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that by its nature involves a substantial risk that physical force against the person or property of another may be used in committing the offense. The Commission interprets this as follows: murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery are covered by this provision. Other offenses are covered only if the conduct for which the defendant was specifically convicted meets the above definition. For example, conviction for an escape accomplished by force or threat of injury would be covered; conviction for an escape by stealth would not be covered. Conviction for burglary of a dwelling would be covered; conviction for burglary of other structures would not be covered.
2. 'Controlled substance offense' includes any federal or state offense that is substantially similar to any of those listed in subsection (2) of the guideline. These offenses include manufacturing, importing, distributing, dispensing, or possessing with intent to manufacture, import, distribute, or dispense, a controlled substance (or a counterfeit substance). This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed.",

and inserting in lieu thereof:

1. The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.
2. 'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use attempted use, or threatened use, of physical force against the person of another, or (B) the conduct set forth in the count of which the defendant was convicted involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another."

The caption of §4B1.2 is amended by deleting "Definitions" and inserting in lieu thereof "Definitions of Terms Used in Section 4B1.1".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 4 by deleting "§4A1.2(e) (Applicable Time Period), §4A1.2(h) (Foreign Sentences), and §4A1.2(j) (Expunged Convictions)" and inserting in lieu thereof "§4A1.2 (Definitions and Instructions for Computing Criminal History)", and by deleting the last sentence as follows: "Also applicable is the Commentary to §4A1.2 pertaining to invalid convictions."

The purpose of this amendment is to clarify the definitions of crime of violence and controlled substance offense used in this guideline. The definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e). In addition, the amendment clarifies that all pertinent definitions and instructions in §4B1.2 apply to this section. **The effective date of this amendment is November 1, 1989.**

269. Section 4B1.3 is amended by deleting "from which he derived a substantial portion of his income" and inserting in lieu thereof "engaged in as a livelihood".

The Commentary to §4B1.3 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional note:

- "2. 'Engaged in as a livelihood' means that (1) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law (currently 2,000 times the hourly minimum wage under federal law is \$6,700); and (2) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period (e.g., the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for his criminal conduct).".

The Commentary to §4B1.3 captioned "Application Notes" is amended in Note 1 by deleting the last sentence as follows: "This guideline is not intended to apply to minor offenses."

The Commentary to §4B1.3 captioned "Background" is amended by deleting "proportion" and inserting in lieu thereof "portion".

The purpose of this amendment is to provide a better definition of the intended scope of this enhancement. Compare, for example, U.S. v. Kerr, 686 F. Supp. 1174 (W.D. Penn. 1988) with U.S. v. Rivera, 694 F. Supp. 1105 (S.D. N.Y. 1988). The first prong of the definition in application Note 2 above is derived from former 18 U.S.C. § 3575, the provision from which the statutory instruction underlying this guideline (28 U.S.C. § 994 (i)(2)) was itself derived. **The effective date of this amendment is November 1, 1989.**

270. Chapter Five, Part A, is amended in the Sentencing Table by deleting "0-1, 0-2, 0-3, 0-4, and 0-5" wherever it appears, and inserting in each instance "0-6".

Chapter Five, Part A, is amended in the Sentencing Table by inserting "(in months of imprisonment)" immediately under the title "Sentencing Table", by inserting "(Criminal History Points)" immediately following the caption "Criminal History Category", and by enclosing in parentheses each of the six sets of criminal history points displayed under that caption.

This amendment provides that the maximum of the guideline range is six months wherever the minimum of the guideline range is zero months. The court has discretion to impose a sentence of up to 6 months imprisonment for a Class B misdemeanor (Class B or C misdemeanors and infractions are not covered by the guidelines; see §1B1.9). It appears anomalous that the Commission guidelines allow less discretion for certain felonies and Class A misdemeanors. In fact, in certain cases, a plea to a reduced charge of a Class B misdemeanor could result in a higher potential sentence because the sentence for the felony or Class A misdemeanor might be restricted to less than 6 months by the guidelines. This can happen when the Sentencing Table provides a guideline range of 0-1 month, 0-2 months, 0-3, 0-4, or 0-5 months. These very narrow ranges are not required by statute, which allows a 6 month guideline range in such cases. This anomaly is removed by amending the guideline table to provide that whenever the lower limit of the guideline range is 0 months, the upper limit of the guideline range is six months.

In addition, this amendment makes minor editorial improvements to the title and caption of the Sentencing Table. **The effective date of this amendment is November 1, 1989.**

271. Section 5B1.4(b)(20) is amended by inserting ", but only as a substitute for imprisonment" immediately following "release".

Section 5C2.1(c)(2) is amended by deleting "or community confinement" and inserting in lieu thereof ", community confinement, or home detention".

Section 5C2.1(c)(3) is amended by inserting "or home detention" immediately following "community confinement".

Section 5C2.1(d)(2) is amended by inserting "or home detention" immediately following "community confinement".

Section 5C2.1(e) is amended by inserting the following additional subdivision:

"(3) One day of home detention for one day of imprisonment.",

and by deleting the period at the end of subsection (e)(2) and inserting a semicolon in lieu thereof.

The Commentary to §5C2.1 captioned "Application Notes" is amended in the first sentence of the second subparagraph of Note 3 by deleting "intermittent confinement or community confinement, or combination of intermittent and community confinement," and inserting in lieu thereof "intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention,".

The Commentary to §5C2.1 captioned "Application Notes" is amended in the second sentence of the second subparagraph of Note 3 by deleting "intermittent or community confinement" and inserting in lieu thereof "intermittent confinement, community confinement, or home detention".

The Commentary to §5C2.1 captioned "Application Notes" is amended in the third subparagraph of Note 3 by inserting "or home detention" immediately following "community confinement", wherever the latter appears.

The Commentary to §5C2.1 captioned "Application Notes" is amended in the last paragraph of Note 3 by inserting "or home detention" immediately following "community confinement", wherever the latter appears.

The Commentary to §5C2.1 captioned "Application Notes" is amended in Note 4 by inserting "or home detention" immediately following "community confinement", wherever the latter appears.

The Commentary to §5C2.1 captioned "Application Notes" is amended in Note 5 by deleting the last sentence as follows: "Home detention may not be substituted for imprisonment.".

Section 5F5.2 is amended by inserting ", but only as a substitute for imprisonment" immediately following "release".

The Commentary to §5F5.2 captioned "Application Notes" is amended in Note 1 by deleting:

"'Home detention' means a program of confinement and supervision that restricts the defendant to his place of residence continuously, or during specified hours, enforced by appropriate means of surveillance by the probation office. The judge may also impose other conditions of probation or supervised release appropriate to effectuate home detention. If the confinement is only during specified hours, the defendant shall engage exclusively in gainful employment, community service or treatment during the non-residential hours.",

and inserting in lieu thereof:

"'Home detention' means a program of confinement and supervision that restricts the

defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention. However, alternative means of surveillance may be used so long as they are as effective as electronic monitoring."

The Commentary to §5F5.2 captioned "Application Notes" is amended in Note 2 by deleting:

"Home detention generally should not be imposed for a period in excess of six months. However, a longer term may be appropriate for disabled, elderly or extremely ill defendants who would otherwise be imprisoned.",

and inserting in lieu thereof:

"The court may impose other conditions of probation or supervised release appropriate to effectuate home detention. If the court concludes that the amenities available in the residence of a defendant would cause home detention not to be sufficiently punitive, the court may limit the amenities available."

The Commentary to §5F5.2 captioned "Application Notes" is amended by inserting the following additional note:

- "3. The defendant's place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence (and any other person(s) from whom consent is necessary) agrees to any conditions that may be imposed by the court, *e.g.*, conditions that a monitoring system be installed, that there will be no 'call forwarding' or 'call waiting' services, or that there will be no cordless telephones or answering machines."

The Commentary to §5F5.2 is amended by inserting at the end:

"Background: The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring. However, in some cases home detention may effectively be enforced without electronic monitoring, *e.g.*, when the defendant is physically incapacitated, or where some other effective means of surveillance is available. Accordingly, the Commission has not required that electronic monitoring be a necessary condition for home detention. Nevertheless, before ordering home detention without electronic monitoring, the court should be confident that an alternative form of surveillance will be equally effective.

In the usual case, the Commission assumes that a condition requiring that the defendant seek and maintain gainful employment will be imposed when home detention is ordered."

Section 5B1.1(a)(2) is amended by deleting "or community confinement" and inserting in lieu thereof ",community confinement, or home detention".

The Commentary to §5B1.1 captioned "Application Notes" is amended in Note 1 by inserting ",home detention," immediately after "community confinement" wherever the latter appears.

Chapter One, Part A, section 4(d) is amended in the third sentence of the third paragraph by deleting "or intermittent confinement" and inserting in lieu thereof ", intermittent confinement, or home detention", and in the fourth sentence of the third paragraph by inserting "or home detention" immediately following "of community confinement".

The purpose of this amendment is to conform the guidelines with Section 7305 of the Anti-Drug Abuse Act of 1988. The effective date of this amendment is November 1, 1989.

272. Section 5B1.4(b) is amended by inserting the following additional paragraph at the end:

"(25) Curfew

If the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant, a condition of curfew is recommended. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order."

Section 5B1.4 is amended by inserting the following commentary:

Commentary

Application Note:

1. Home detention, as defined by §5F5.3, may only be used as a substitute for imprisonment. See §5C2.1 (Imposition of a Term of Imprisonment). Under home detention, the defendant, with specified exceptions, is restricted to his place of residence during all non-working hours. Curfew, which limits the defendant to his place of residence during evening and nighttime hours, is less restrictive than home detention and may be imposed as a condition of probation whether or not imprisonment could have been ordered."

The purposes of this amendment are to set forth the conditions under which curfew is a recommended condition of probation and clarify that electronic monitoring may be used as a means of surveillance in connection with an order of curfew. The effective date of this amendment is November 1, 1989.

273. Section 5B1.3(c) is amended by inserting immediately before the period at the end of the first sentence:

", unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under 18 U.S.C. § 3563(b)".

The purpose of this amendment is to conform the guideline to a statutory revision. The effective date of this amendment is November 1, 1989.

274. Section 5B1.3(a) is amended by inserting at the end: "The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3)."

Section 5B1.3 is amended by inserting the following commentary:

"Commentary

A broader form of the condition required under 18 U.S.C. § 3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)."

The purpose of this amendment is to reference a mandatory condition of probation added by Section 7303 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

275. Section 5C2.1(e) is amended by deleting "Thirty days" and inserting in lieu thereof "One day", by deleting "one month" wherever it appears and inserting in lieu thereof in each instance "one day", and by deleting "One month" and inserting in lieu thereof "One day".

The purpose of this amendment is to enhance the internal consistency of the guidelines. **The effective date of this amendment is November 1, 1989.**

276. Section 5D3.3 is amended by deleting:

"(b) In order to fulfill any authorized purposes of sentencing, the court may impose other conditions reasonably related to (1) the nature and circumstances of the offense, and (2) the history and characteristics of the defendant. 18 U.S.C. § 3583(d).",

and inserting in lieu thereof:

"(b) The court may impose other conditions of supervised release, to the extent that such conditions are reasonably related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant, and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. §§ 3553(a)(2) and 3583(d)."

The purposes of this amendment are to clarify the guideline and conform it to the statute as amended by Section 7108 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

277. Section 5D3.3(a) is amended by inserting at the end: "The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3)."

The Commentary to §5D3.3 captioned "Background" is amended by inserting the following additional sentence at the end:

"A broader form of the condition required under 18 U.S.C. § 3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)."

The purpose of this amendment is to reference a mandatory condition of supervised release added by Section 7303 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

278. Section 5E4.1 is amended by inserting the following additional subsection:

"(c) With the consent of the victim of the offense, the court may order a defendant to perform services for the benefit of the victim in lieu of monetary restitution or in conjunction therewith. 18 U.S.C. § 3663(b)(4)."

The purpose of this amendment is to insert language previously contained in §5F5.3(b) where it had been erroneously placed. The effective date of this amendment is November 1, 1989.

279. The Commentary to §5E4.1 captioned "Background" is amended in the first paragraph by deleting:

"See S. Rep. No. 225, 98th Cong., 1st Sess. 95-96.",

and inserting in lieu thereof:

"See 18 U.S.C. § 3563(b)(3) as amended by Section 7110 of Pub. L. No. 100-690 (1988)."

This amendment replaces a reference to legislative history with a citation to a revised statute. Section 7110 of the Anti-Drug Abuse Act of 1988 confirms the authority of a sentencing court to impose restitution as a condition of probation. Previously, such authority was inferred from 18 U.S.C. §3563(b)(20) (defendant may be ordered to "satisfy such other conditions as the court may impose") and from legislative history. The effective date of this amendment is November 1, 1989.

280. Section 5E4.2(a) is amended by deleting the second sentence as follows:

"If the guideline for the offense in Chapter Two prescribes a different rule for imposing fines, that rule takes precedence over this subsection."

Section 5E4.2(b) is amended by inserting at the end:

"If, however, the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) of this section."

The purpose of this amendment is to clarify the guideline. The last sentence of current §5E4.2(a) is in the wrong place. This amendment moves the content of this sentence to subsection (b) where it belongs. The effective date of this amendment is November 1, 1989.

281. Section 5E4.2(c)(3) is amended by deleting:

"1	\$ 25	\$ 250
2-3	\$100	\$1,000
4-5	\$250	\$2,500",

and inserting in lieu thereof:

"3 and below	\$100	\$5,000
4-5	\$250	\$5,000".

The purpose of this amendment is to increase the maximum in the fine table for offense levels 5 and below to \$5,000, an amount equal to the maximum fine authorized for a petty offense. Moreover, because the guidelines now cover only felonies and class A misdemeanors, the minimum fine guideline is increased to \$100. The effective date of this amendment is November 1, 1989.

282. The Commentary to Section 5E4.3 captioned "Background" is amended in the first paragraph by inserting at the end:

"Under the Victims of Crime Act, as amended by Section 7085 of the Anti-Drug Abuse Act of 1988, the court is required to impose assessments in the following amounts with respect to offenses committed on or after November 18, 1988:

Individuals:

- \$5, if the defendant is an individual convicted of an infraction or a Class C misdemeanor;
- \$10, if the defendant is an individual convicted of a Class B misdemeanor;
- \$25, if the defendant is an individual convicted of a Class A misdemeanor; and
- \$50, if the defendant is an individual convicted of a felony.

Organizations:

- \$50, if the defendant is an organization convicted of a Class B misdemeanor;
- \$125, if the defendant is an organization convicted of a Class A misdemeanor; and
- \$200, if the defendant is an organization convicted of a felony. 18 U.S.C. §3013."

and in the second paragraph by deleting "The Act requires the court" and inserting in lieu thereof "With respect to offenses committed prior to November 18, 1988, the court is required".

The purpose of this amendment is to conform the commentary to the statute as amended by Section 7085 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

283. Section 5F5.3(a) is amended by deleting "(a)", and by inserting "and sentenced to probation" immediately following "felony".

Section 5F5.3(b) is amended by deleting:

- "(b) With the consent of the victim of the offense, the court may order a defendant to perform services for the benefit of the victim in lieu of monetary restitution. 18 U.S.C. § 3663(b)(4)."

The purposes of this amendment are to correct an erroneous statement in §5F5.3(a) and to delete §5F5.3(b), which deals with restitution, and therefore should appear at §5E4.1. **The effective date of this amendment is November 1, 1989.**

284. The Commentary to §5F5.4 captioned "Background" is amended by deleting the third paragraph as follows:

"The legislative history indicates that, although the sanction was designed to provide actual notice to victims, a court might properly limit notice to only those victims who could be most readily identified, if to do otherwise would unduly prolong or complicate the sentencing process."

The purpose of this amendment is to delete an unnecessary statement that could be subject to misinterpretation. **The effective date of this amendment is November 1, 1989.**

285. Section 5F5.5(a) is amended by deleting:

"(2) there is a risk that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted; and

(3) imposition of such a restriction is reasonably necessary to protect the public.",

and inserting in lieu thereof:

"(2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.",

and by inserting "and" at the end of subsection (a)(1).

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

286. Section 5G1.1 is amended by deleting the text of the guideline and accompanying commentary as follows:

"(a) If application of the guidelines results in a sentence above the maximum authorized by statute for the offense of conviction, the statutory maximum shall be the guideline sentence.

(b) If application of the guidelines results in a sentence below the minimum sentence required by statute, the statutory minimum shall be the guideline sentence.

(c) In any other case, the sentence imposed shall be the sentence as determined from application of the guidelines.

Commentary

If the statute requires imposition of a sentence other than that required by the guidelines, the statute shall control. The sentence imposed should be consistent with the statute but as close as possible to the guidelines.",

and inserting in lieu thereof:

"(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

(b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.

(c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence --

(1) is not greater than the statutorily authorized maximum sentence, and

(2) is not less than any statutorily required minimum sentence.

Commentary

This section describes how the statutorily authorized maximum sentence, or a statutorily required minimum sentence, may affect the determination of a sentence under the guidelines. For example, if the applicable guideline range is 51-63 months and the maximum sentence authorized by statute for the offense of conviction is 48 months, the sentence required by the guidelines under subsection (a) is 48 months; a sentence of less than 48 months would be a guideline departure. If the applicable guideline range is 41-51 months and there is a statutorily required minimum sentence of 60 months, the sentence required by the guidelines under subsection (b) is 60 months; a sentence of more than 60 months would be a guideline departure. If the applicable guideline range is 51-63 months and the maximum sentence authorized by statute for the offense of conviction is 60 months, the guideline range is restricted to 51-60 months under subsection (c)."

The purpose of this amendment is to clarify the guideline. **The effective date of this amendment is November 1, 1989.**

287. The Commentary to §5G1.2 is amended in the second paragraph by deleting "any combination of concurrent and consecutive sentences that produces the total punishment may be imposed" and inserting in lieu thereof "consecutive sentences are to be imposed to the extent necessary to achieve the total punishment".

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

288. The Commentary to §5G1.2 is amended by inserting the following additional paragraph immediately after the first paragraph:

" This section applies to multiple counts of conviction (1) contained in the same indictment or information, or (2) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding."

The purpose of this amendment is to clarify that this guideline applies in the case of separate indictments that are consolidated for purposes of sentencing. **The effective date of this amendment is November 1, 1989.**

289. Section 5G1.3 is amended by deleting the entire guideline and accompanying commentary as follows:

"§5G1.3. Convictions on Counts Related to Unexpired Sentences

If at the time of sentencing, the defendant is already serving one or more unexpired sentences, then the sentences for the instant offense(s) shall run consecutively to such unexpired sentences, unless one or more of the instant offenses(s) arose out of the same transactions or occurrences as the unexpired sentences. In the latter case, such instant sentences and the unexpired sentences shall run concurrently, except to the extent otherwise required by law.

Commentary

This section reflects the statutory presumption that sentences imposed at different times ordinarily run consecutively. See 18 U.S.C. § 3584(a). This presumption does not apply when the new counts arise out of the same transaction or occurrence as a

prior conviction.

Departure would be warranted when independent prosecutions produce anomalous results that circumvent or defeat the intent of the guidelines.",

and inserting in lieu thereof:

"§5G1.3. Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment

If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status), the sentence for the instant offense shall be imposed to run consecutively to the unexpired term of imprisonment.

Commentary

Under this guideline, the court shall impose a consecutive sentence where the instant offense (or any part thereof) was committed while the defendant was serving an unexpired term of imprisonment.

Where the defendant is serving an unexpired term of imprisonment, but did not commit the instant offense while serving that term of imprisonment, the sentence for the instant offense may be imposed to run consecutively or concurrently with the unexpired term of imprisonment. The court may consider imposing a sentence for the instant offense that results in a combined sentence that approximates the total punishment that would have been imposed under §5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time. Where the defendant is serving a term of imprisonment for a state offense, the information available may permit only a rough estimate of the total punishment that would have been imposed under the guidelines. It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process."

The purpose of this amendment is to specify the circumstances in which a consecutive sentence is required by the guidelines. **The effective date of this amendment is November 1, 1989.**

290. Section 5K1.1 is amended by deleting "made a good faith effort to provide" and inserting in lieu thereof "provided".

Section 5K1.1(a) is amended in the first sentence by deleting "conduct" immediately following "of the following".

The purpose of this amendment is to clarify the Commission's intent that departures under this policy statement be based upon the provision of substantial assistance. The existing policy statement could be interpreted as requiring only a willingness to provide such assistance. The amendment also makes an editorial correction. **The effective date of this amendment is November 1, 1989.**

291. The Commentary to §5K1.2 is deleted in its entirety as follows:

"Commentary

Background: The Commission considered and rejected the use of a defendant's refusal to assist authorities as an aggravating sentencing factor. Refusal to assist authorities based upon continued involvement in criminal activities and association with

accomplices may be considered, however, in evaluating a defendant's sincerity in claiming acceptance of responsibility."

The purpose of this amendment is to delete unnecessary commentary containing an unclear example. **The effective date of this amendment is November 1, 1989.**

292. Chapter Five, Part K, Subpart 2, is amended by inserting the following additional policy statement:

"§5K2.15 Terrorism (Policy Statement)

If the defendant committed the offense in furtherance of a terroristic action, the court may increase the sentence above the authorized guideline range."

The purpose of this amendment is to add a specific policy statement concerning consideration of an upward departure when the offense is committed for a terroristic purpose. This amendment does not make a substantive change. Such conduct is currently included in the broader policy statement at §5K2.9 (Criminal Purpose) and other policy statements. See United States v. Yu Kikumura, Crim. No. 88-166 (D. N.J. Feb. 9, 1989)(1989 U.S. Dist. LEXIS 1516). **The effective date of this amendment is November 1, 1989.**

293. Section 6A1.1 is amended in the title by inserting at the end "(Policy Statement)".

The purpose of this amendment is to designate §6A1.1 as a policy statement. Designation of this section as a policy statement is more consistent with the nature of the subject matter. **The effective date of this amendment is November 1, 1989.**

294. Section 6A1.3 is amended in the title by inserting at the end "(Policy Statement)".

The purpose of this amendment is to designate §6A1.3 as a policy statement. Designation of this section as a policy statement is more consistent with the nature of the subject matter. **The effective date of this amendment is November 1, 1989.**

295. The Commentary to §6B1.2 is amended in the second paragraph by deleting "and does not undermine the basic purposes of sentencing.", and inserting in lieu thereof "(i.e., that such departure is authorized by 18 U.S.C. § 3553(b)). See generally Chapter 1, Part A (4)(b)(Departures)".

The purpose of this amendment is to clarify the commentary. **The effective date of this amendment is November 1, 1989.**

296. Appendix A (Statutory Index) is amended in the second sentence of the "Introduction" by deleting "conduct" and inserting in lieu thereof "nature of the offense conduct charged in the count", and by deleting "select" and inserting in lieu thereof "use"; and in the third sentence of the "Introduction" by deleting "the court is to apply" and inserting in lieu thereof "use", by deleting "which is" immediately before "most applicable", and by deleting "conduct for" and inserting in lieu thereof "nature of the offense conduct charged in the count of".

The purpose of this amendment is to clarify the operation of the Statutory Index in relation to §§1B1.1 and 1B1.2(a). **The effective date of this amendment is November 1, 1989.**

297. Appendix A is amended by inserting the following additional paragraph at the end of the

Introduction:

" The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. (See §1B1.9)".

Appendix A is amended by deleting:

"7 U.S.C. § 52	2N2.1",
"7 U.S.C. § 60	2N2.1",
"10 U.S.C. § 847	2J1.1, 2J1.5",
"16 U.S.C. § 198c	2B1.1, 2B1.3, 2B2.3",
"16 U.S.C. § 204c	2B1.1, 2B1.3",
"16 U.S.C. § 604	2B1.3",
"16 U.S.C. § 606	2B1.1, 2B1.3",
"16 U.S.C. § 668dd	2Q2.1",
"16 U.S.C. § 670j(a)(1)	2B2.3",
"16 U.S.C. § 676	2B2.3",
"16 U.S.C. § 682	2B2.3",
"16 U.S.C. § 683	2B2.3",
"16 U.S.C. § 685	2B2.3",
"16 U.S.C. § 689b	2B2.3",
"16 U.S.C. § 692a	2B2.3",
"16 U.S.C. § 694a	2B2.3",
"18 U.S.C. § 113(d)	2A2.3",
"18 U.S.C. § 113(e)	2A2.3",
"18 U.S.C. § 290	2F1.1",
"18 U.S.C. § 402	2J1.1",
"18 U.S.C. § 437	2C1.3",
"18 U.S.C. § 1164	2B1.3",
"18 U.S.C. § 1165	2B2.3",
"18 U.S.C. § 1382	2B2.3",
"18 U.S.C. § 1504	2J1.2",
"18 U.S.C. § 1726	2F1.1",
"18 U.S.C. § 1752	2B2.3",
"18 U.S.C. § 1793	2P1.4",
"18 U.S.C. § 1856	2B1.3",
"18 U.S.C. § 1863	2B2.3",
"40 U.S.C. § 193e	2B1.1, 2B1.3",
"42 U.S.C. § 1995	2J1.1",
"42 U.S.C. § 2000h	2J1.1",
"42 U.S.C. § 4912	2Q1.3".

The purposes of this amendment are to clarify that the guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction, and to delete references to statutes that apply solely to such offenses. The effective date of this amendment is November 1, 1989.

298. Appendix A is amended by deleting:

"18 U.S.C. § 1512	2J1.2",
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and inserting in lieu thereof:

"18 U.S.C. § 1512(a)	2A1.1, 2A1.2, 2A2.1
18 U.S.C. § 1512(b)	2A2.2, 2J1.2
18 U.S.C. § 1512(c)	2J1.2",

The Commentary to §1B1.4 captioned "Background" is amended by deleting "3557" and inserting in lieu thereof "3577".

The Commentary to §2B3.2 captioned "Application Notes" is amended in the third sentence of Note 3 by inserting "and Racketeering" immediately before the period at the end of the sentence.

The Commentary to §2B3.2 captioned "Application Notes" is amended in Note 5 by deleting "items taken" and inserting in lieu thereof "loss".

The Commentary to §2A5.2 captioned "Background" is amended by inserting "or Aboard" immediately following "Materials While Boarding".

The Introductory Commentary to Chapter 2, Part B is amended by deleting "Order and" immediately before "Safety".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2 by deleting "(Attempt, Solicitation, or Conspiracy Not Covered by a Specific Guideline)" and inserting in lieu thereof "(Attempt, Solicitation, or Conspiracy)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 3 by deleting "§§2D1.2-2D1.4" and inserting in lieu thereof "§§2D1.2, 2D1.4, 2D1.5".

The Commentary to §2D1.1 captioned "Background" is amended in the fifth paragraph by deleting "§§5D1.1-5D1.3" and inserting in lieu thereof "Part D (Supervised Release)".

The Commentary to §2F1.1 captioned "Application Notes" is amended in the third sentence of Note 11 by deleting "Part B" and inserting in lieu thereof "Part B of this Chapter".

The Commentary to §2H1.1 captioned "Application Notes" is amended in the last sentence of Note 1 by deleting "for any" and inserting in lieu thereof "applicable to".

The Commentary to §2H1.2 captioned "Application Notes" is amended in Note 1 by deleting "explained" and inserting in lieu thereof "defined".

The Commentary to §2H1.2 captioned "Background" is amended in the second sentence by deleting ", except where death results, in which case" and inserting in lieu thereof "; except where death results,".

Section 2K1.5(c)(1) is amended by deleting "(Attempt or Conspiracy)" and inserting in lieu thereof "(Attempt, Solicitation, or Conspiracy)".

Section 2K1.6(b)(1) is amended by deleting "(Attempt or Conspiracy)" and inserting in lieu thereof "(Attempt, Solicitation, or Conspiracy)".

The Commentary to §2R1.1 captioned "Application Notes" is amended in Note 7 by inserting "Category" immediately following "Criminal History".

The Commentary to §2T1.4 captioned "Application Notes" is amended in Note 3 by inserting "Use of" immediately before "Special Skill".

The Commentary to §3B1.4 is amended by deleting "(Role in the Offense)" the first time it appears and inserting in lieu thereof "(Aggravating Role)", and by deleting "(Role in the Offense)" the second time it appears and inserting in lieu thereof "(Mitigating Role)".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 1 by deleting "25 (18 + 1 + 6) rather than 28" and inserting in lieu thereof "28 (18 + 4 + 6) rather than 31".

The Commentary to §3D1.3 captioned "Application Notes" is amended in the last sentence of Note 4 by deleting "Loss or Damage" and inserting in lieu thereof "Damage or Loss".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 1 by deleting "19" and inserting in lieu thereof "22", by deleting "1-Level" and inserting in lieu thereof "4-Level", by deleting "25." and inserting in lieu thereof "28.", by deleting "(25)" and inserting in lieu thereof "(28)", and by deleting "28" and inserting in lieu thereof "31".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in the last 2 sentences of example 3 by deleting "10" wherever it appears and inserting in lieu thereof in each instance "8".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 5 by deleting "13" wherever it appears and inserting in lieu thereof "14".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended by deleting:

"2. Defendant B, a federal housing inspector, was convicted on four counts of bribery. Counts one and two charged receiving payments of \$3,000 and \$2,000 from Landlord X in return for a single action with respect to a single property. Count three charged receipt of \$1,500 from Landlord X for taking action with respect to another property, and count four charged receipt of \$1,000 from Landlord Y for taking action with respect to a third property. Counts one and two, which arise out of the same transaction, are combined into a single Group involving a \$5,000 bribe and hence an offense level of 11 (§2C1.1(a)(1), §2F1.1). Each of the two remaining counts represents a distinct Group, at offense level 10. As there are three Count Units, the offense level for the most serious (11) is increased by 3 levels. The combined offense level is 14.",

by renumbering Illustrations 3, 4, and 5 as 2, 3, and 4, respectively, and by redesignating defendants "C", "D", and "E" as "B", "C", and "D", respectively.

The purposes of this amendment are to conform cross-references and illustrations of the operation of the guidelines to the guidelines, as amended, and to make editorial improvements. The effective date of this amendment is November 1, 1989.

304. Section 2D2.1 is amended by inserting the following additional subsection:

"(b) Cross Reference

- (1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute."

The Commentary to §2D2.1 captioned "Background" is amended by deleting the entire text as follows:

"Background: Absent a prior drug related conviction, the maximum term of imprisonment authorized by statute is one year. With a single prior drug related conviction, a mandatory minimum term of imprisonment of fifteen days is required by statute and the maximum term of imprisonment authorized is increased to two years. With two or more prior drug related convictions, a mandatory minimum term of imprisonment of ninety days is required by statute and the maximum term of

imprisonment authorized is increased to three years.",

and inserting in lieu thereof:

"Background: Mandatory minimum penalties for several categories of cases, ranging from fifteen days' to five years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. §5G1.1(b).

Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under Section 6371 of the Anti-Drug Abuse Act of 1988. Other cases for which enhanced penalties are provided under Section 6371 of the Anti-Drug Abuse Act of 1988 (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b)."

The purpose of this amendment is to reflect revisions in 21 U.S.C. § 844(a) made by Section 6371 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

305. Chapter Five, Part F, is amended by inserting the following additional section:

"§5F1.6. Denial of Federal Benefits to Drug Traffickers and Possessors

The court, pursuant to 21 U.S.C. § 853a, may deny the eligibility for certain Federal benefits of any individual convicted of distribution or possession of a controlled substance.

Commentary

Application Note:

1. 'Federal benefit' is defined in 21 U.S.C. § 853a(d) to mean 'any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States' but 'does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.'

Background: Subsections (a) and (b) of 21 U.S.C. § 853a provide that an individual convicted of a state or federal drug trafficking or possession offense may be denied certain federal benefits. Except for an individual convicted of a third or subsequent drug distribution offense, the period of benefit ineligibility, within the applicable maximum term set forth in 21 U.S.C. § 853a(a)(1) (for distribution offenses) and (a)(2)(for possession offenses), is at the discretion of the court. In the case of an individual convicted of a third or subsequent drug distribution offense, denial of benefits is mandatory and permanent under 21 U.S.C. § 853a(a)(1)(C)(unless suspended by the court under 21 U.S.C. § 853a(c)).

Subsection (b)(2) of 21 U.S.C. § 853a provides that the period of benefit ineligibility that may be imposed in the case of a drug possession offense 'shall be waived in the case of a person who, if there is a reasonable body of evidence to substantiate such declaration, declares himself to be an addict and submits himself to a long-term treatment program for addiction, or is deemed to be rehabilitated pursuant to rules established by the Secretary of Health and Human Services.'

Subsection (c) of 21 U.S.C. § 853a provides that the period of benefit ineligibility shall be suspended 'if the individual (A) completes a supervised drug rehabilitation program after becoming ineligible under this section; (B) has otherwise been rehabilitated; or (C) has made a good faith effort to gain admission to a supervised drug rehabilitation program, but is unable to do so because of inaccessibility or unavailability of such a program, or the inability of the individual to pay for such a program.'

Subsection (e) of 21 U.S.C. § 853a provides that a period of benefit ineligibility 'shall not apply to any individual who cooperates or testifies with the Government in the prosecution of a Federal or State offense or who is in a Government witness protection program.'"

The purpose of this amendment is to reflect the enactment of 21 U.S.C. § 853a by Section 5301 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1989.**

306. Chapter One, Part B, is amended by inserting the following additional policy statement:

"1B1.10. Retroactivity of Amended Guideline Range (Policy Statement)

- (a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the guidelines listed in subsection (d) below, a reduction in the defendant's term of imprisonment may be considered under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement.
- (b) In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time.
- (c) Provided, however, that a reduction in a defendant's term of imprisonment --
 - (1) is not authorized unless the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered by at least six months; and
 - (2) may, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered.
- (d) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, and 269.

Commentary

Application Note:

1. Although eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) of this section, the amended guideline range referred to in subsections (b) and (c) of this section is to be determined by applying all amendments to the guidelines (*i.e.*, as if the defendant was being sentenced under the guidelines currently in effect).

Background: Section 3582 (c)(2) of Title 18, United States Code, provides: '[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.'

This policy statement provides guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: 'If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.'

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively.

The requirement in subsection (c)(1) that the maximum of the guideline range be lowered by at least six months for a reduction to be considered is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: 'It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases.' S. Rep. 98-225, 98th Cong., 1st Sess. 180 (1983)."

The purpose of this amendment is to implement the directive in 28 U.S.C. § 994(u). The effective date of this amendment is November 1, 1989.

307. Chapter One, Part A, is amended by deleting subparts 2-5 in their entirety as follows:

- "2. The Statutory Mission

The Comprehensive Crime Control Act of 1984 foresees guidelines that will further the basic purposes of criminal punishment, *i.e.*, deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender. It delegates to the Commission broad authority to review and rationalize the federal sentencing process.

The statute contains many detailed instructions as to how this determination should be made, but the most important of them instructs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/\$2500

taken.' An offender characteristic category might be 'offender with one prior conviction who was not sentenced to imprisonment.' The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons, to be determined by coordinating the offense behavior categories with the offender characteristic categories. The statute contemplates the guidelines will establish a range of sentences for every coordination of categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum imprisonment cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

The sentencing judge must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the judge to depart from the guidelines and sentence outside the range. In that case, the judge must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to see if the guideline was correctly applied. If the judge departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act requires the offender to serve virtually all of any prison sentence imposed, for it abolishes parole and substantially restructures good behavior adjustments.

The law requires the Commission to send its initial guidelines to Congress by April 13, 1987, and under the present statute they take effect automatically on November 1, 1987. Pub. L. No. 98-473, § 235, reprinted at 18 U.S.C. § 3551. The Commission may submit guideline amendments each year to Congress between the beginning of a regular session and May 1. The amendments will take effect automatically 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The Commission, with the aid of its legal and research staff, considerable public testimony, and written commentary, has developed an initial set of guidelines which it now transmits to Congress. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines by submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts throughout the nation.

3. The Basic Approach (Policy Statement)

To understand these guidelines and the rationale that underlies them, one must begin with the three objectives that Congress, in enacting the new sentencing law, sought to achieve. Its basic objective was to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system. To achieve this objective, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by 'good time' credits. In addition, the parole commission is permitted to determine how much of the remainder of any prison sentence an offender actually will serve. This usually results in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence handed down by the court.

Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

Honesty is easy to achieve: The abolition of parole makes the sentence

imposed by the court the sentence the offender will serve. There is a tension, however, between the mandate of uniformity (treat similar cases alike) and the mandate of proportionality (treat different cases differently) which, like the historical tension between law and equity, makes it difficult to achieve both goals simultaneously. Perfect uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that lumps together armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, is far too broad.

At the same time, a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect. A bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected (and therefore may already be counted, to a different degree, in the punishment for the underlying offense); and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies, depending on how much other harm has occurred. (Thus, one cannot easily assign points for each kind of harm and simply add them up, irrespective of context and total amounts.)

The larger the number of subcategories, the greater the complexity that is created and the less workable the system. Moreover, the subcategories themselves, sometimes too broad and sometimes too narrow, will apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system of subcategories, would have to make a host of decisions about whether the underlying facts are sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different judges will apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to eliminate.

In view of the arguments, it is tempting to retreat to the simple, broad-category approach and to grant judges the discretion to select the proper point along a broad sentencing range. Obviously, however, granting such broad discretion risks correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. That is to say, such an approach risks a return to the wide disparity that Congress established the Commission to limit.

In the end, there is no completely satisfying solution to this practical stalemate. The Commission has had to simply balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the

sentencing court. Any ultimate system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the moral principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Thus, if a defendant is less culpable, the defendant deserves less punishment. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. Defendants sentenced under this scheme should receive the punishment that most effectively lessens the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of these points of view have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation. As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result.

For now, the Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point. It has analyzed data drawn from 10,000 presentence investigations, crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and resulting statistics, and data from other relevant sources, in order to determine which distinctions are important in present practice. After examination, the Commission has accepted, modified, or rationalized the more important of these distinctions.

This empirical approach has helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, is short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit many distinctions that some may believe important, yet they include most of the major distinctions that statutes and presentence data suggest make a significant difference in sentencing decisions. Important distinctions that are ignored in existing practice probably occur rarely. A sentencing judge may take this unusual case into account by departing from the guidelines.

The Commission's empirical approach has also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what punishment is deserved for a particular crime, specified in minute detail. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient, readily available data might make it difficult to say exactly what punishment will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a moral or crime-control perspective.

The Commission has not simply copied estimates of existing practice as revealed by the data (even though establishing offense values on this basis would help eliminate disparity, for the data represent averages). Rather, it has departed from the data at different points for various important reasons. Congressional statutes, for example,

may suggest or require departure, as in the case of the new drug law that imposes increased and mandatory minimum sentences. In addition, the data may reveal inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from present practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these initial guidelines are but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission has developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, and therefore effective, sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-writing process has required the Commission to resolve a host of important policy questions, typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction will briefly discuss several of those issues. Commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away damaging property during escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a real offense system. After all, the present sentencing system is, in a sense, a real offense system. The sentencing court (and the parole commission) take account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process, given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable, and, in the Commission's view, risked return to wide disparity in practice.

The Commission therefore abandoned the effort to devise a 'pure' real offense

system and instead experimented with a 'modified real offense system,' which it published for public comment in a September 1986 preliminary draft.

This version also foundered in several major respects on the rock of practicality. It was highly complex and its mechanical rules for adding harms (e.g., bodily injury added the same punishment irrespective of context) threatened to work considerable unfairness. Ultimately, the Commission decided that it could not find a practical or fair and efficient way to implement either a pure or modified real offense system of the sort it originally wanted, and it abandoned that approach.

The Commission, in its January 1987 Revised Draft and the present guidelines, has moved closer to a 'charge offense' system. The system is not, however, pure; it has a number of real elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law have forced the Commission to write guidelines that are descriptive of generic conduct rather than tracking purely statutory language. For another, the guidelines, both through specific offense characteristics and adjustments, take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken.

Finally, it is important not to overstate the difference in practice between a real and a charge offense system. The federal criminal system, in practice, deals mostly with drug offenses, bank robberies and white collar crimes (such as fraud, embezzlement, and bribery). For the most part, the conduct that an indictment charges approximates the real and relevant conduct in which the offender actually engaged.

The Commission recognizes its system will not completely cure the problems of a real offense system. It may still be necessary, for example, for a court to determine some particular real facts that will make a difference to the sentence. Yet, the Commission believes that the instances of controversial facts will be far fewer; indeed, there will be few enough so that the court system will be able to devise fair procedures for their determination. See United States v. Fatico, 579 F.2d 707 (2d Cir. 1978) (permitting introduction of hearsay evidence at sentencing hearing under certain conditions), on remand, 458 F. Supp. 388 (E.D.N.Y. 1978), aff'd, 603 F.2d 1053 (2d Cir. 1979) (holding that the government need not prove facts at sentencing hearing beyond a reasonable doubt), cert. denied, 444 U.S. 1073 (1980).

The Commission also recognizes that a charge offense system has drawbacks of its own. One of the most important is its potential to turn over to the prosecutor the power to determine the sentence by increasing or decreasing the number (or content) of the counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin, or theft of \$10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of \$30,000. Further, a sentencing court may control any inappropriate manipulation of the indictment through use of its power to depart from the specific guideline sentence. Finally, the Commission will closely monitor problems arising out of count manipulation and will make appropriate adjustments should they become necessary.

(b) Departures.

The new sentencing statute permits a court to depart from a guideline-specified sentence only when it finds 'an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission

...'. 18 U.S.C. § 3553(b). Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of §5H1.4, and the last sentence of §5K2.12, list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two basic reasons. First is the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that in the initial set of guidelines it need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time. Thus, for example, where the presence of actual physical injury currently makes an important difference in final sentences, as in the case of robbery, assault, or arson, the guidelines specifically instruct the judge to use this factor to augment the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data do not permit the Commission, at this time, to conclude that the factor is empirically important in relation to the particular offense. Of course, a factor (say physical injury) may nonetheless sometimes occur in connection with a crime (such as fraud) where it does not often occur. If, however, as the data indicate, such occurrences are rare, they are precisely the type of events that the court's departure powers were designed to cover - unusual cases outside the range of the more typical offenses for which the guidelines were designed. Of course, the Commission recognizes that even its collection and analysis of 10,000 presentence reports are an imperfect source of data sentencing estimates. Rather than rely heavily at this time upon impressionistic accounts, however, the Commission believes it wiser to wait and collect additional data from our continuing monitoring process that may demonstrate how the guidelines work in practice before further modification.

It is important to note that the guidelines refer to two different kinds of departure.

The first kind involves instances in which the guidelines provide specific guidance for departure, by analogy or by other numerical or non-numerical suggestions. For example, the commentary to §2G1.1 (Transportation for Prostitution), recommends a downward adjustment of eight levels where commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions, and that the courts of appeals may prove more likely to find departures 'unreasonable' where they fall outside suggested levels.

A second kind of departure will remain unguided. It may rest upon grounds referred to in Chapter 5, Part K (Departures), or on grounds not mentioned in the guidelines. While Chapter 5, Part K lists factors that the Commission believes may constitute grounds for departure, those suggested grounds are not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly unusual.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas, and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts have urged the Commission not to attempt any major reforms of the agreement process, on the grounds that any set of guidelines that threatens to radically change present practice also threatens to make the federal system unmanageable. Others, starting with the same facts, have argued that guidelines which fail to control and limit plea agreements would leave untouched a 'loophole' large enough to undo the good that sentencing guidelines may bring. Still other commentators make both sets of arguments.

The Commission has decided that these initial guidelines will not, in general, make significant changes in current plea agreement practices. The court will accept or reject any such agreements primarily in accordance with the rules set forth in Fed.R.Crim.P. 11(e). The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate.

The Commission nonetheless expects the initial set of guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. Insofar as a prosecutor and defense attorney seek to agree about a likely sentence or range of sentences, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which judges will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation. Since they will have before them the norm, the relevant factors (as disclosed in the plea agreement), and the reason for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to 'reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .' 28 U.S.C. § 994(j). Under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.' If the guidelines were to permit courts to impose probation instead of prison in many or all such cases, the present sentences would continue to be ineffective.

The Commission's solution to this problem has been to write guidelines that classify as 'serious' (and therefore subject to mandatory prison sentences) many offenses for which probation is now frequently given. At the same time, the guidelines will permit the sentencing court to impose short prison terms in many such cases. The Commission's view is that the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with

the status quo where probation, not prison, is the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

(e) Multi-Count Convictions.

The Commission, like other sentencing commissions, has found it particularly difficult to develop rules for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The reason it is difficult is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to life sentences of imprisonment--sentences that neither 'just deserts' nor 'crime control' theories of punishment would find justified.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment when multiple offenses that are the subjects of separate counts take place.

These rules are set out in Chapter Three, Part D. They essentially provide:

- (1) When the conduct involves fungible items, e.g., separate drug transactions or thefts of money, the amounts are added and the guidelines apply to the total amount.
- (2) When nonfungible harms are involved, the offense level for the most serious count is increased (according to a somewhat diminishing scale) to reflect the existence of other counts of conviction.

The rules have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures where necessary to produce a mitigated sentence.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These criminal statutes pose two problems. First, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it cannot

comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission has sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses are particularly important in light of the need for enforcement of the general regulatory scheme. The Commission has sought to treat these offenses in these initial guidelines. It will address the less common regulatory offenses in the future.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses, dividing them into four categories.

First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper treatment of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense is as follows:

- (1) The guideline provides a low base offense level (6) aimed at the first type of recordkeeping or reporting offense. It gives the court the legal authority to impose a punishment ranging from probation up to six months of imprisonment.
- (2) Specific offense characteristics designed to reflect substantive offenses that do occur (in respect to some regulatory offenses), or that are likely to occur, increase the offense level.
- (3) A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will be treated like the substantive offense.

The Commission views this structure as an initial effort. It may revise its approach in light of further experience and analysis of regulatory crimes.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission began by estimating the average sentences now being served within each category. It also examined the sentence specified in congressional statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's forthcoming detailed report will contain a comparison between estimates of existing sentencing practices and sentences under the guidelines.

While the Commission has not considered itself bound by existing sentencing practice, it has not tried to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences in many instances will approximate existing practice, but adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons now receive probation, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who now receive probation from those who receive more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a current sentencing practice of very wide variability

in which some defendants receive probation while others receive several years in prison for the same offense. Moreover, inasmuch as those who currently plead guilty often receive lesser sentences, the guidelines also permit the court to impose lesser sentences on those defendants who accept responsibility and those who cooperate with the government.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the new drug law and the career offender provisions of the sentencing law, require the Commission to promulgate rules that will lead to substantial prison population increases. These increases will occur irrespective of any guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum, or career offender, sentences), will lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons, estimate at approximately 10 percent, over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table. For technical and practical reasons it has 43 levels. Each row in the table contains levels that overlap with the levels in the preceding and succeeding rows. By overlapping the levels, the table should discourage unnecessary litigation. Both prosecutor and defendant will realize that the difference between one level and another will not necessarily make a difference in the sentence that the judge imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether \$10,000 or \$11,000 was obtained as a result of a fraud. At the same time, the rows work to increase a sentence proportionately. A change of 6 levels roughly doubles the sentence irrespective of the level at which one starts. The Commission, aware of the legal requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months, also wishes to permit courts the greatest possible range for exercising discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the judge within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many, rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation as to which category an offender fell within would become more likely. Where a table has many smaller monetary distinctions, it minimizes the likelihood of litigation, for the importance of the precise amount of money involved is considerably less.

5. A Concluding Note

The Commission emphasizes that its approach in this initial set of guidelines is one of caution. It has examined the many hundreds of criminal statutes in the United States Code. It has begun with those that are the basis for a significant number of prosecutions. It has sought to place them in a rational order. It has developed additional distinctions relevant to the application of these provisions, and it has applied sentencing ranges to each resulting category. In doing so, it has relied upon estimates of existing sentencing practices as revealed by its own statistical analyses, based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from existing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect,

experience with these guidelines will lead to additional information and provide a firm empirical basis for revision.

Finally, the guidelines will apply to approximately 90 percent of all cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in this initial set of guidelines. They will, however, be addressed in the near future. Their exclusion from this initial submission does not reflect any judgment about their seriousness. The Commission has also deferred promulgation of guidelines pertaining to fines, probation and other sanctions for organizational defendants, with the exception of antitrust violations. The Commission also expects to address this area in the near future.",

and inserting in lieu thereof:

"2. The Statutory Mission

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/\$2500 taken.' An offender characteristic category might be 'offender with one prior conviction not resulting in imprisonment.' The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal

courts.

3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly,

probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have in fact made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial

efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of \$10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of \$30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds 'an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), the third sentence of §5H1.4 (Physical Condition, Including Drug Dependence and Alcohol Abuse), and the last sentence of §5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. For example, the Commentary to §2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures 'unreasonable' where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a 'loophole' large enough to undo the good that sentencing guidelines would bring.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the

courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to 'reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense' 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.'

The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

(e) Multi-Count Convictions.

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to sentences of life imprisonment -- sentences that neither

just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) when the conduct involves fungible items (e.g., separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (e.g., 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)), required the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether \$10,000 or \$11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

Similarly, many of the individual guidelines refer to tables that correlate

amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment regarding their seriousness and they will be addressed as the Commission refines the guidelines over time."

This amendment updates this part to reflect the implementation of guideline sentencing on November 1, 1987, and makes various clarifying and editorial changes to enhance the usefulness of this part both as a historical overview and as an introduction to the structure and operation of the guidelines. For example, in the discussion of departures in subpart 4(b), language concerning what the Commission, in principle, might have done is deleted as unnecessary, but no substantive change is made. **The effective date of this amendment is November 1, 1990.**

308. Section 1B1.8(a) is amended by inserting "as part of that cooperation agreement" immediately following "unlawful activities of others, and"; and by deleting "so provided" and inserting in lieu thereof "provided pursuant to the agreement".

Section 1B1.8(b)(3) is amended by inserting "by the defendant" immediately before the period at the end of the sentence.

Section 1B1.8(b) is amended by renumbering subdivisions (2) and (3) as (3) and (4) respectively; and by inserting the following as subdivision (2):

"(2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);".

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 2 by deleting:

"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).",

and inserting in lieu thereof:

"Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender).".

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 3 by deleting "408" and inserting in lieu thereof "410".

This amendment clarifies the Commission's intention that the use of information concerning the defendant's prior criminal convictions and sentences not be restricted by a cooperation agreement, makes several additional clarifying changes, and corrects a clerical error. **The effective date of this amendment is November 1, 1990.**

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

"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.",

and inserting in lieu thereof:

"Offenses of a character for which §3D1.2(d) would require grouping of multiple counts,' as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply."

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 4 by renumbering example (4) as (5); and by inserting, immediately before "**But:**", the following:

"(4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under §1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting."

This amendment clarifies the intended scope of §1B1.3(a)(2) in conjunction with Chapter Three, Part D (Multiple Counts) to ensure that the latter is not read to limit the former only to conduct of which the defendant was convicted. **The effective date of this amendment is November 1, 1990.**

310. The Commentary to §2A1.1 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. § 1111" and inserting in lieu thereof "18 U.S.C. §§ 1111, 2113(e), 2118(c)(2)".

The Commentary to §2A1.1 is amended in the first paragraph of Application Note 1 by deleting "the 'willful, deliberate, malicious, and premeditated killing' to which 18 U.S.C. § 1111 applies" and inserting in lieu thereof: "premeditated killing"; and by deleting:

"However, the same statute applies when death results from certain enumerated felonies -- arson, escape, murder, kidnapping, treason, espionage, sabotage, rape, burglary, or robbery.",

and inserting in lieu thereof:

"However, this guideline also applies when death results from the commission of certain felonies."

The Commentary to §2A1.1 captioned "Background" is amended in the first paragraph by deleting:

"Prior to the applicability of the Sentencing Reform Act of 1984, a defendant convicted under this statute and sentenced to life imprisonment could be paroled (see 18 U.S.C. § 4205(a)). Because of the abolition of parole by that Act, the language of 18 U.S.C. § 1111(b) (which was not amended by the Act) appears on its face to provide a mandatory minimum sentence of life imprisonment for this offense. Other provisions of the Act, however, classify this offense as a Class A felony (see 18 U.S.C. § 3559(a)(1)), for which a term of imprisonment of any period of time is authorized as an alternative to imprisonment for the duration of the defendant's life (see 18 U.S.C. §§ 3559(b), 3581(b)(1), as amended); hence, the relevance of the discussion in Application Note 1, supra, regarding circumstances in which a sentence less than life may be appropriate for a conviction under this statute."

and inserting in lieu thereof:

"Whether a mandatory minimum term of life imprisonment is applicable to every defendant convicted of first degree murder under 18 U.S.C. § 1111 is a matter of statutory interpretation for the courts. The discussion in Application Note 1, supra, regarding circumstances in which a downward departure may be warranted is relevant in the event the penalty provisions of 18 U.S.C. § 1111 are construed to permit a sentence less than life imprisonment, or in the event the defendant is convicted under a statute that expressly authorizes a sentence of less than life imprisonment (e.g., 18 U.S.C. §§ 2113(e), 2118(c)(2), 21 U.S.C. § 848(e))."

This amendment clarifies the commentary with respect to circumstances that may warrant a departure below the guideline range for offenses to which this guideline applies. This amendment also reserves for the courts the issue of whether life imprisonment is the mandatory minimum sentence for first degree murder under 18 U.S.C. § 1111. **The effective date of this amendment is November 1, 1990.**

311. Section 2A2.1 is amended in the title by deleting "Conspiracy or Solicitation to Commit Murder;" immediately before "Attempted Murder".

Section 2A2.1 is amended by deleting:

- "(a) Base Offense Level: 20
- (b) Specific Offense Characteristics

- (1) If an assault involved more than minimal planning, increase by 2 levels.
- (2) (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.
- (3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

<u>Degree of Bodily Injury</u>	<u>Increase in Level</u>
(A) Bodily Injury	add 2
(B) Serious Bodily Injury	add 4
(C) Permanent or Life-Threatening Bodily Injury	add 6
(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or	
(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels.	

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.

- (4) If a conspiracy or assault was motivated by a payment or offer of money or other thing of value, increase by 2 levels."

and inserting in lieu thereof:

"(a) Base Offense Level:

- (1) 28, if the object of the offense would have constituted first degree murder; or
- (2) 22, otherwise.

(b) Specific Offense Characteristics

- (1) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.
- (2) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels."

The Commentary to §2A2.1 captioned "Statutory Provisions" is amended by deleting "(d), 373, 1113, 1116(a), 1117, 1751(c), (d), 1952A(a)" and inserting in lieu thereof "1113, 1116(a), 1751(c)".

The Commentary to §2A2.1 captioned "Application Note" is amended in Note 1 by deleting "'more than minimal planning,' 'firearm,' 'dangerous weapon,' 'brandished,' 'otherwise used,' 'bodily injury,' 'serious bodily injury,'" and inserting in lieu thereof "'serious bodily injury'".

The Commentary to §2A2.1 captioned "Application Note" is amended by inserting the following additional note:

- "2. 'First degree murder,' as used in subsection (a)(1), means conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111.";

and in the caption by deleting "Note" and inserting in lieu thereof "Notes".

The Commentary to §2A2.1 captioned "Background" is amended in the first paragraph by deleting ", conspiracy to commit murder, solicitation to commit murder," immediately before "and attempted murder"; and by inserting the following additional sentence at the end:

"An attempted manslaughter, or assault with intent to commit manslaughter, is covered under §2A2.2 (Aggravated Assault)."

The Commentary to §2A2.1 captioned "Background" is amended by deleting the second and third paragraphs as follows:

" The maximum term of imprisonment authorized by statute for conspiracy to murder is life imprisonment (18 U.S.C. § 1117). The maximum term of imprisonment authorized by statute for solicitation to murder is twenty years (18 U.S.C. § 373). The statutes that prohibit attempted murder, or assaults with intent to commit murder, vary widely in the maximum term of imprisonment authorized. Assault with intent to commit murder (18 U.S.C. § 113(a)) carries a maximum authorized term of twenty years imprisonment. An attempted assassination of certain essential government officials (18 U.S.C. § 351(c)) carries a maximum authorized term of life imprisonment. An attempted murder of foreign officials (18 U.S.C. § 1116(a)) carries a maximum authorized term of twenty years imprisonment. An attempt to commit murder, other than an assault with intent to commit murder covered by 18 U.S.C. § 113(a), carries a maximum term of three years imprisonment (18 U.S.C. § 1113).

Enhancements are provided for planning, weapon use, injury, and commission of the crime for hire. All of the factors can apply in the case of an assault; only the last can apply in the case of a conspiracy that does not include an assault; and none can apply in the case of a mere solicitation."

The Commentary to §2A2.2 captioned "Application Notes" is amended in Note 3 by inserting the following additional sentence as the first sentence: "This guideline also covers attempted manslaughter and assault with intent to commit manslaughter."

The Commentary to §2A2.2 captioned "Background" is amended in the first sentence of the first paragraph by deleting "where there is no intent to kill" immediately following "assaults".

Chapter Two, Part A, Subpart 1, is amended by inserting the following additional guideline and accompanying commentary:

"§2A1.5. Conspiracy or Solicitation to Commit Murder

- (a) Base Offense Level: 28
- (b) Specific Offense Characteristic
 - (1) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels.
- (c) Cross References
 - (1) If the offense resulted in the death of a victim, apply §2A1.1 (First Degree Murder).

- (2) If the offense resulted in an attempted murder or assault with intent to commit murder, apply §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder).

Commentary

Statutory Provisions: 18 U.S.C. §§ 351(d), 371, 373, 1117, 1751(d)."

Section 2E1.4(a)(1) is amended by deleting "23" and inserting in lieu thereof "32".

The Commentary to §2E1.4 captioned "Application Notes" is amended by deleting Note 2 as follows:

- "2. If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (i.e., 23), the alternative minimum base offense level is to be used.;"

and in the caption by deleting "Notes" and inserting in lieu thereof "Note".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 in the paragraph beginning "Offense guidelines that expressly cover attempts" by deleting "Conspiracy or Solicitation to Commit Murder;" immediately before "Attempted Murder"; in the paragraph beginning "Offense guidelines that expressly cover conspiracies" by deleting "§2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder)" and inserting in lieu thereof "§2A1.5 (Conspiracy or Solicitation to Commit Murder)"; and in the paragraph beginning "Offense guidelines that expressly cover solicitations" by deleting "§2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder)" and inserting in lieu thereof "§2A1.5 (Conspiracy or Solicitation to Commit Murder)".

This amendment restructures §2A2.1, and increases the offense level for attempted murder and assault with intent to commit murder where the intended offense, if successful, would have constituted first degree murder to better reflect the seriousness of this conduct. For the same reason, the enhancement for an offense involving the offer or receipt of anything of pecuniary value for undertaking the murder is increased. For greater clarity, an additional guideline (§2A1.5) is inserted to cover conspiracy or solicitation to commit murder. Section 2E1.4 is amended to conform the offense level to that of §2A1.5. **The effective date of this amendment is November 1, 1990.**

312. Section 2B1.1(b) is amended by transposing subdivisions (4) and (5); and by renumbering the transposed subdivisions accordingly.

Section 2B1.2(b) is amended by transposing subdivisions (3) and (4); and by renumbering the transposed subdivisions accordingly.

Section 2B1.3(b) is amended by transposing subdivisions (2) and (3); and by renumbering the transposed subdivisions accordingly.

This amendment reorders the specific offense characteristics in §§2B1.1, 2B1.2, and 2B1.3 that address offenses involving U.S. mail. In cases involving the theft or destruction of U.S. mail, the theft guideline (§2B1.1), stolen property guideline (§2B1.2), property destruction guideline (§2B1.3), and forgery guideline (§2B5.2) produce identical results if the amount involved more than \$1,000, or if the offense did not involve more than minimal planning. However, because of the ordering of the specific offense characteristics, there is a 1 or 2-level difference between §§2B1.1, 2B1.2 and 2B1.3 on the one hand, and §2B5.2 on the other, in cases of stolen or destroyed mail involving more than minimal planning and a loss of \$1,000 or less. In these cases, §§2B1.1, 2B1.2 and 2B1.3 produce a result that is 1 or 2-levels lower than §2B5.2. This amendment corrects this anomaly by conforming the offense

levels in §§2B1.1, 2B1.2, and 2B1.3 to that of §2B5.2 in such cases. **The effective date of this amendment is November 1, 1990.**

313. Section 2B1.3 is amended by inserting the following additional subsection:

"(c) Cross Reference

(1) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives).";

and in the title by deleting "(Other than by Arson or Explosives)" immediately following "or Destruction".

The Commentary to §2B1.3 captioned "Statutory Provisions" is amended by deleting the last sentence as follows:

"Arson is treated separately in Part K, Offenses Involving Public Order and Safety."

The Commentary to §2H1.1 captioned "Application Notes" is amended in Note 1 by deleting "(Other than by Arson or Explosives)" immediately following "or Destruction".

Section 2H3.3(a)(3) is amended by deleting "(Other than by Arson or Explosives)" immediately following "or Destruction".

The Commentary to §2H3.3 captioned "Background" is amended by deleting "(Other than by Arson or Explosives)" immediately following "or Destruction".

Section 2Q1.6(a)(2) is amended by deleting "(Other Than by Arson or Explosives)" immediately following "or Destruction".

This amendment inserts a cross reference providing that offense conduct constituting arson or property destruction by explosives is to be treated under §2K1.4 (Arson, Property Destruction by Explosives). Because arson or property damage by use of explosives is an aggravated form of property destruction, just as armed robbery is an aggravated form of robbery, the use of the same "relevant conduct" standard to determine the offense level is appropriate. **The effective date of this amendment is November 1, 1990.**

314. Section 2B3.1(b)(1) is amended by deleting "offense involved robbery or attempted robbery of the" immediately following "If the"; and by inserting "was taken, or if the taking of such property was an object of the offense" immediately before ", increase".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 6 by deleting "actually" immediately following "defendant", and by inserting "; Attempted Murder" immediately following "Assault With Intent to Commit Murder".

This amendment clarifies the guideline and Commentary. **The effective date of this amendment is November 1, 1990.**

315. Section 2B2.1(b)(3) is amended by deleting "obtaining" immediately before "a firearm", and by deleting "an object" and inserting in lieu thereof "taken, or if the taking of such item was an object".

The Commentary to §2B2.1 is amended by inserting between "Commentary" and "Application Notes" the following:

"Statutory Provision: 18 U.S.C. § 1153."

The Commentary to §2B2.1 captioned "Application Notes" is amended by deleting Note 2 as follows:

- "2. Obtaining a weapon or controlled substance is to be presumed to be an object of the offense if such an item was in fact taken.";

and by renumbering Notes 3 and 4 as 2 and 3, respectively.

Section 2B2.2(b)(3) is amended by deleting "obtaining" immediately before "a firearm"; and by deleting "an object" and inserting in lieu thereof "taken, or if the taking of such item was an object".

The Commentary to §2B2.2 captioned "Application Notes" is amended by deleting Note 2 as follows:

- "2. Obtaining a weapon or controlled substance is to be presumed to be an object of the offense if such an item was in fact taken.";

and by renumbering Notes 3 and 4 as 2 and 3, respectively.

Section 2B3.1(b)(5) is amended by deleting "obtaining" immediately before "a firearm"; and by deleting "the object" and inserting in lieu thereof "taken, or if the taking of such item was an object".

The Commentary to §2B3.1 captioned "Application Notes" is amended by deleting Note 5 as follows:

- "5. Obtaining a weapon or controlled substance is to be presumed to be an object of the offense if such an item was in fact taken.";

and by renumbering Notes 6, 7, and 8 as 5, 6, and 7 respectively.

The Commentary to §2B3.1 captioned "Background" is amended by deleting the second paragraph as follows:

" Obtaining drugs or other controlled substances is often the motive for robberies of a Veterans Administration Hospital, a pharmacy on a military base, or a similar facility. A specific offense characteristic is included for robberies where drugs or weapons were the object of the offense to take account of the dangers involved when such items are taken."

This amendment provides that the specific offense characteristic related to the taking of a firearm or controlled substance applies whenever such item is taken or is an object of the offense. Also, it inserts additional Commentary to §2B2.1 referencing a statutory provision contained in Appendix A (Statutory Index) to conform the format of this guideline to that of other offense guidelines. **The effective date of this amendment is November 1, 1990.**

316. Section 2B3.2(b)(1) is amended by deleting "§2B3.1" and inserting in lieu thereof "§2B2.1(b)(2)".

This amendment references the loss table to §2B2.1(b)(2) rather than §2B3.1. The amendment to the loss table in §2B3.1, effective November 1, 1989, inadvertently reduced the offense level for certain cases under this guideline by one level. **The effective date of this amendment is November 1, 1990.**

317. Section 2B1.1(b) is amended by inserting the following additional subdivision:

- "(7) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24."

The Commentary to §2B1.1 captioned "Application Notes" is amended by inserting the following additional notes:

- "9. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 215, 656-657, 1005-1008, 1014, and 1344; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.
10. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations."

The Commentary to §2B1.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

- " Subsection (b)(7) implements, in a broader form, the statutory directive to the Commission in Section 961(m) of Public Law 101-73."

Section 2B4.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics"; and by inserting the following additional subdivision:

- "(2) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24."

The Commentary to §2B4.1 captioned "Statutory Provisions" is amended by deleting "§§ 1," and inserting in lieu thereof "§§".

The Commentary to §2B4.1 captioned "Application Notes" is amended by inserting the following additional notes:

- "3. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 215, 656-657, 1005-1008, 1014, and 1344; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or

not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

4. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations."

The Commentary to §2B4.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

" Subsection (b)(2) implements, in a broader form, the statutory directive to the Commission in Section 961(m) of Public Law 101-73."

Section 2F1.1(b) is amended by inserting the following additional subdivision:

- "(6) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24."

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by deleting "290" and inserting in lieu thereof "289".

The Commentary to §2F1.1 captioned "Application Notes" is amended by inserting the following additional notes:

- "14. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 215, 656-657, 1005-1008, 1014, and 1344; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.
15. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations."

The Commentary to §2F1.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

" Subsection (b)(6) implements, in a broader form, the statutory directive to the Commission in Section 961(m) of Public Law 101-73."

This amendment implements, in a broader form, the following statutory directive in Section 961(m) of Public Law 101-73: "Pursuant to section 994 of title 28, United States Code, and section 21 of the Sentencing Act of 1987, the United States Sentencing Commission shall promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution." In addition, this amendment deletes an incorrect statutory provision in the Commentary to §2B4.1, and deletes a reference to a petty offense in the Commentary to §2F1.1 that was inadvertently retained when other references to petty offenses were deleted. **The effective date of this amendment is November 1, 1990.**

318. The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)" by inserting the following additional entry as the seventh entry: "1 gm of Methamphetamine (Pure) = 50 gm of cocaine/10 gm of heroin".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)" in the twelfth (formerly eleventh) entry by deleting "0.418 gm" and inserting in lieu thereof "0.416 gm".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "Schedule IV Substances" by deleting the sixth entry as follows:

"1 gm of Mephobarbital = 0.125 mg of heroin/0.125 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 11 by inserting "in the table below" immediately before "to estimate"; by deleting "Bufotenine at 1 mg per dose = 100 mg of Bufotenine" and inserting in lieu thereof "Mescaline at 500 mg per dose = 50 gms of mescaline"; and by deleting "common controlled substances" and inserting in lieu thereof "certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 11 by deleting the following from the table captioned "Typical Weight Per Unit (Dose, Pill, or Capsule) Table":

"Bufotenine	1 mg
Diethyltryptamine	60 mg
Dimethyltryptamine	50 mg",
"Barbiturates	100 mg
Glutethimide (Doriden)	500 mg",
"Thiobarbital	50 mg";

by inserting an asterisk immediately after each of the following:

"LSD (Lysergic acid diethylamide)", "MDA", "PCP", "Psilocin", "Psilocybin", "2,5-Dimethoxy-4-methylamphetamine (STP, DOM)", "Methaqualone", "Amphetamine", "Methamphetamine", "Phenmetrazine (Preludin)";

and by inserting the following at the end:

****For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.****

This amendment provides an additional equivalency to reflect the distinction between methamphetamine and pure methamphetamine in the Drug Quantity Table at §2D1.1(c), corrects an error in the equivalency for Phenylacetone/P₂P, and deletes a duplicate listing for Mephobarbital.

In addition, this amendment clarifies that the "Typical Weight Per Unit Table" in Note 11 of the Commentary to §2D1.1 is not to be used where a more reliable estimate of the weight of the mixture or substance containing the controlled substance is available from case-specific information. This amendment also clarifies that for certain controlled substances this table provides an estimate of the weight of the actual controlled substance, not necessarily the weight of the mixture or substance containing the controlled substance, and therefore use of this table in such cases will provide a very conservative estimate. Finally, this amendment deletes listings for several controlled substances that are generally legitimately manufactured and then unlawfully diverted; in such cases, more accurate weight estimates can be obtained from other sources (e.g., from the Drug Enforcement Administration or the manufacturer). **The effective date of this amendment is November 1, 1990.**

319. Section 2D1.2(a)(1) is amended by inserting "applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual" immediately following "§2D1.1".

Section §2D1.2(a) is amended by renumbering subdivisions (2) and (3) as (3) and (4), respectively; and by inserting the following as subdivision (2):

"(2) 1 plus the offense level from §2D1.1 applicable to the total quantity of controlled substances involved in the offense; or".

The Commentary to §2D1.2 is amended by inserting, immediately before "Background", the following:

"Application Note:

1. Where only part of the relevant offense conduct directly involved a protected location or an underage or pregnant individual, subsections (a)(1) and (a)(2) may result in different offense levels. For example, if the defendant, as part of the same course of conduct or common scheme or plan, sold 5 grams of heroin near a protected location and 10 grams of heroin elsewhere, the offense level from subsection (a)(1) would be level 16 (2 plus the offense level for the sale of 5 grams of heroin, the amount sold near the protected location); the offense level from subsection (a)(2) would be level 17 (1 plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense)."

This amendment provides for the determination of the offense level in cases in which only part of the relevant offense conduct involves a protected location or an underage or pregnant individual. **The effective date of this amendment is November 1, 1990.**

320. Section 2D1.6 is amended by deleting "12" and inserting in lieu thereof: "the offense level applicable to the underlying offense."

The Commentary to §2D1.6 is amended by inserting, immediately before "Background", the following:

"Application Note:

1. Where the offense level for the underlying offense is to be determined by reference to §2D1.1, see Application Note 12 of the Commentary to §2D1.1, and Application Notes 1 and 2 of the Commentary to §2D1.4, for guidance in determining the scale of the offense. Note that the Drug Quantity Table in §2D1.1 provides a minimum offense level of 12 where the offense involves heroin (or other Schedule I or II Opiates), cocaine (or other Schedule I or II Stimulants), cocaine base, PCP, Methamphetamine, LSD (or other Schedule I or II Hallucinogens), Fentanyl, or Fentanyl Analogue (§2D1.1(c)(16)); and a minimum offense level of 6 otherwise (§2D1.1(c)(19))."

This amendment is designed to reduce unwarranted disparity by requiring consideration in the guideline of the amount of the controlled substance involved in the offense, thus conforming this guideline section to the structure of §§2D1.1, 2D1.2, 2D1.4, and 2D1.5. The statute to which this guideline applies (21 U.S.C. § 843(b)) prohibits the use of a communications facility to commit, cause, or facilitate a felony controlled substance offense. Frequently, a conviction under this statute is the result of a plea bargain because the statute has a low maximum (four years with no prior felony drug conviction; eight years with a prior felony drug conviction) and no mandatory minimum. The current guideline has a base offense level of 12 and no specific offense characteristics. Therefore, the scale of the underlying drug offense is not reflected in the guideline. This results in a departure from the guideline range frequently being warranted. Without guidance as to whether or how far to depart, the potential for unwarranted disparity is substantial. Under this amendment, the guideline itself will take into account the scale of the underlying offense. **The effective date of this amendment is November 1, 1990.**

321. Section 2D2.1(a)(1) is amended by deleting "or an analogue of these" and inserting in lieu thereof "an analogue of these, or cocaine base".

This amendment specifies the appropriate offense level for possession of cocaine base ("crack") in cases not covered by the enhanced penalties created by section 6371 of the Anti-Drug Abuse Act of 1988. **The effective date of this amendment is November 1, 1990.**

322. Section 2G1.1(c)(1) is amended by deleting "involves" and inserting in lieu thereof "involved".

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 3 by inserting at the end:

"This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of transportation involving an adult, rather than a minor, this characteristic generally will not apply where the alcohol or drug was voluntarily taken."

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 5 by deleting ", distinct offense, even if several persons are transported in a single act" and inserting in lieu thereof:

"victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the

count of conviction or not, each such person shall be treated as if contained in a separate count of conviction".

This amendment clarifies the application of this guideline and corrects a clerical error. The effective date of this amendment is November 1, 1990.

323. Section 2G1.2(c)(1) is amended by deleting "involves" and inserting in lieu thereof "involved".

Section 2G1.2 is amended by inserting the following additional subsection:

"(d) Cross Reference

- (1) If the offense involved the defendant causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production)."

The Commentary to §2G1.2 captioned "Statutory Provisions" is amended by deleting "§ 2423" and inserting in lieu thereof "§§ 2421, 2422, 2423".

The Commentary to §2G1.2 captioned "Application Notes" is amended in Note 1 by deleting ", distinct offense, even if several persons are transported in a single act" and inserting in lieu thereof:

"victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, each such person shall be treated as if contained in a separate count of conviction".

The Commentary to §2G1.2 captioned "Application Notes" is amended in Note 3 by inserting the following at the end:

"This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol."

The Commentary to §2G1.2 captioned "Application Notes" is amended by inserting the following additional notes:

4. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.
5. The cross reference in (d)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct."

This amendment clarifies the application of this guideline and corrects a clerical error. In addition, a cross reference to §2G2.1 is inserted where the offense involves conduct that is more appropriately covered by that guideline to provide an offense level that more appropriately reflects the seriousness of such conduct. The effective date of this amendment is November 1, 1990.

324. Section 2G2.1 is amended in the title by inserting "; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production" immediately following "Printed Material".

Section 2G2.1 is amended by deleting:

"(1) If the minor was under the age of twelve years, increase by 2 levels.";

and inserting in lieu thereof:

"(1) If the offense involved a minor under the age of twelve years, increase by 4 levels; otherwise, if the offense involved a minor under the age of sixteen years, increase by 2 levels.

(2) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(c) Special Instruction

(1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.";

and by deleting "Characteristic" and inserting in lieu thereof "Characteristics".

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by deleting "8 U.S.C. § 1328"; and by inserting "(a), (b), (c)(1)(B)" immediately following "18 U.S.C. § 2251".

The Commentary to §2G2.1 captioned "Application Notes" is amended in Note 1 by inserting at the end:

"Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction."

The Commentary to §2G2.1 captioned "Application Note" is amended by inserting the following additional notes:

"2. Specific offense characteristic (b)(2) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, babysitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.

3. If specific offense characteristic (b)(2) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).";

and in the caption by deleting "Note" and inserting in lieu thereof "Notes".

The Commentary to §2G2.1 captioned "Background" is deleted in its entirety as follows:

"Background: This offense commonly involves the production source of a child pornography enterprise. Because the offense directly involves the exploitation of minors, the base offense level is higher than for the distribution of the sexually explicit material after production. An enhancement is provided when the conduct involves the exploitation of a minor under age twelve to reflect the more serious nature of exploiting young children."

This amendment revises subsection (b)(1) to provide distinctions for the age of the victim consistent with §2G1.2, and adds subsection (b)(2) to provide an increase for defendants who abuse a position of trust in exploiting minor children. A special instruction is added to conform the operation of the multiple count rule in this guideline with §§2G1.1 and 2G1.2. A revision to the statutory provisions removes 8 U.S.C. § 1328; such offenses are now brought under this guideline by the cross reference appearing in §2G1.2. In addition, the reference in the statutory provisions to 18 U.S.C. § 2251 is made specific to the appropriate subsections. **The effective date of this amendment is November 1, 1990.**

325. Section 2G2.2 is amended by inserting the following at the end:

- " (3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
- (c) Cross Reference
 - (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) if the resulting offense level is greater than that determined above."

The Commentary to §2G2.2 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions"; and by inserting "§ 1460, 2251(c)(1)(A)," immediately before "2252".

The Commentary to §2G2.2 captioned "Application Note" is amended by inserting the following additional notes:

- "2. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.
- 3. The cross reference in (c)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.
- 4. If the defendant sexually abused a minor at any time, whether or not such sexual abuse occurred during the course of the offense, an upward departure is warranted. In determining the extent of such a departure, the court should take into consideration the offense levels provided in §§2A3.1, 2A3.2, and 2A3.4 most commensurate with the defendant's conduct.";

and in the caption by deleting "Note" and inserting in lieu thereof "Notes".

This amendment provides a specific offense characteristic for materials involving depictions of sadistic or masochistic conduct or other violence, and a cross reference for offenses more

appropriately treated under §2G2.1. It also provides Commentary recommending consideration of an upward departure in cases in which the defendant has sexually abused a minor at any time, whether or not such sexual abuse occurred during the course of the instant offense. In addition, it inserts a statutory provision indicating the applicability of this guideline to violations of 18 U.S.C. § 2251(c)(1)(A). **The effective date of this amendment is November 1, 1990.**

326. Section 2G3.1(b)(2) is amended by deleting "sodomasochistic" and inserting in lieu thereof "sadistic or masochistic".

Section 2G3.1(c) is amended by deleting:

- "(1) If the offense involved a criminal enterprise, apply the appropriate guideline from Chapter Two, Part E (Offenses Involving Criminal Enterprises and Racketeering) if the resulting offense level is greater than that determined above.",

and inserting in lieu thereof:

- "(1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply §2G2.2 (Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor)."

This amendment inserts a cross reference to §2G2.2 for offenses involving materials which, in fact, depict children to ensure that the penalties for such offenses adequately reflect their seriousness. The current cross reference at subsection (c)(1) is deleted. In addition, the amendment conforms the terminology of specific offense characteristic (b)(2) to that used in other offense guidelines. **The effective date of this amendment is November 1, 1990.**

327. Section 2H1.1 is amended in the title by inserting "Conspiracy to Interfere with Civil Rights;" immediately before "Going".

Section 2H1.2 is amended by deleting the guideline and accompanying commentary in its entirety as follows:

"§2H1.2. Conspiracy to Interfere with Civil Rights

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

- (1) 13; or
(2) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

- (1) If the defendant was a public official at the time of the offense, increase by 4 levels.

Commentary

Statutory Provision: 18 U.S.C. § 241.

Application Notes:

1. '2 plus the offense level applicable to any underlying offense' is defined in the Commentary to §2H1.1.
2. Where the adjustment in §2H1.2(b)(1) is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This section applies to conspiracies to interfere with civil rights. The maximum term of imprisonment authorized by statute is ten years; except where death results, the maximum term of imprisonment authorized by statute is life imprisonment. The base offense level for this guideline assumes threatening or otherwise serious conduct."

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 in the paragraph beginning "Offense guidelines that expressly cover conspiracies" by deleting "§2H1.2 (Conspiracy to Interfere with Civil Rights)" and inserting in lieu thereof "§2H1.1 (Conspiracy to Interfere With Civil Rights; Going in Disguise to Deprive of Rights)".

This amendment consolidates two guidelines and raises the minimum base offense level from level 13 to level 15 for cases currently covered under §2H1.2 to better reflect the seriousness of this offense. **The effective date of this amendment is November 1, 1990.**

328. The Commentary to §2H1.5 captioned "Statutory Provisions" is amended by deleting "Provisions" and inserting in lieu thereof "Provision"; and by deleting "; 42 U.S.C. § 3631".

The Commentary to §2H1.5 captioned "Application Notes" is amended by deleting Note 3 as follows:

- "3. In the case of a violation of 42 U.S.C. § 3631, apply this guideline where the offense did not involve the threat or use of force. If the offense involved the threat or use of force, apply §2H1.3."

This amendment deletes references to a statute to which this guideline does not apply. **The effective date of this amendment is November 1, 1990.**

329. Section 2J1.6 is amended by deleting:

- "(a) Base Offense Level: 6
- (b) Specific Offense Characteristics
 - (1) If the underlying offense is punishable by death or imprisonment for a term of fifteen years or more, increase by 9 levels.
 - (2) If the underlying offense is punishable by a term of imprisonment of five or more years, but less than fifteen years, increase by 6 levels.
 - (3) If the underlying offense is a felony punishable by a maximum term of less than five years, increase by 3 levels."

and inserting in lieu thereof:

- "(a) Base Offense Level:
 - (1) 11, if the offense constituted a failure to report for service of sentence; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the base offense level is determined under subsection (a)(1), and the defendant --

- (A) voluntarily surrendered within 96 hours of the time he was originally scheduled to report, decrease by 5 levels; or
- (B) was ordered to report to a community corrections center, community treatment center, 'halfway house,' or similar facility, and subdivision (A) above does not apply, decrease by 2 levels;

Provided, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more.

(2) If the base offense level is determined under subsection (a)(2), and the underlying offense is --

- (A) punishable by death or imprisonment for a term of fifteen years or more, increase by 9 levels; or
- (B) punishable by a term of imprisonment of five years or more, but less than fifteen years, increase by 6 levels; or
- (C) a felony punishable by a term of imprisonment of less than five years, increase by 3 levels."

The Commentary to §2J1.6 captioned "Background" is amended by deleting "The offense level for this offense" and inserting in lieu thereof "Where the base offense level is determined under subsection (a)(2), the offense level".

This amendment provides greater differentiation in the guideline offense levels for the various types of conduct covered by this guideline. **The effective date of this amendment is November 1, 1990.**

330. Section 2K1.4, is amended by deleting the guideline and accompanying commentary in its entirety as follows:

"§2K1.4. Arson; Property Damage By Use of Explosives

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristics

If more than one applies, use the greatest:

- (1) If the defendant knowingly created a substantial risk of death or serious bodily injury, increase by 18 levels.
- (2) If the defendant recklessly endangered the safety of another, increase by 14 levels.
- (3) If the offense involved destruction or attempted destruction of a residence, increase by 12 levels.

- (4) If the defendant used fire or an explosive to commit another offense that is a felony under federal law, or carried explosives during the commission of any offense that is a felony under federal law (*i.e.*, the defendant is convicted under 18 U.S.C. § 844(h)), increase by 7 levels.
- (5) If the defendant endangered the safety of another person, increase by 4 levels.
- (6) If a destructive device was used, increase by 2 levels.

(c) Cross References

- (1) If the defendant caused death, or intended to cause bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.
- (2) Apply §2B1.3 (Property Damage or Destruction) if the resulting offense level is greater than that determined above.

(d) Note

- (1) The specific offense characteristic in subsection (b)(4) applies only in the case of an offense committed prior to November 18, 1988.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32, 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 2275.

Application Notes:

1. 'Destructive device' means any article described in 18 U.S.C. § 921(a)(4) (for example, explosive, incendiary, or poison gas bombs, grenades, mines, and similar devices and certain rockets, missiles, and large bore weapons).
2. If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Background: Review of presentence reports indicates that many arson cases involve 'malicious mischief,' *i.e.*, minor property damage under circumstances that do not present an appreciable danger. A low base offense level is provided for these cases. However, aggravating factors are provided for instances where a defendant knowingly or recklessly endangered others, destroyed or attempted to destroy a residence, used a destructive device, or otherwise endangered others. As amended by Section 6474(b) of the Anti-Drug Abuse Act of 1988 (effective November 18, 1988), 18 U.S.C. § 844(h) sets forth a mandatory sentencing enhancement of five years for the first offense and ten years for subsequent offenses if the defendant was convicted of using fire or an explosive to commit a felony or of carrying an explosive during the commission of a felony. See §2K1.7."

and inserting in lieu thereof:

"§2K1.4. Arson; Property Damage by Use of Explosives

(a) **Base Offense Level (Apply the Greatest):**

- (1) 24, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling;
- (2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than a dwelling; or (C) endangered a dwelling, or a structure other than a dwelling;
- (3) 2 plus the offense level from §2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or
- (4) 2 plus the offense level from §2B1.3 (Property Damage or Destruction).

(b) **Specific Offense Characteristic**

- (1) If the offense was committed to conceal another offense, increase by 2 levels.

(c) **Cross Reference**

- (1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 2275.

Application Notes:

1. If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).
2. Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense."

This amendment restructures this guideline to provide more appropriate offense levels for the conduct covered. The Commission has determined that the offense levels provided in the current guideline do not adequately reflect the seriousness of the offenses that are covered under this section. The effective date of this amendment is November 1, 1990.

331. Section 2K1.6(a) is amended by deleting "greater" and inserting in lieu thereof "greatest"; and by inserting the following additional subdivision:

"(3) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide)."

Section 2K1.6(a)(2) is amended by deleting the period at the end and inserting in lieu thereof "; or".

This amendment adds an additional alternative base offense level to cover the situation in which the commission of this offense results in death. **The effective date of this amendment is November 1, 1990.**

332. Section 2K1.7 is amended by inserting "(a)" immediately before "If"; and by inserting the following additional subsection:

"(b) Special Instruction for Fines

(1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section."

The Commentary to §2K1.7 captioned "Application Notes" is amended by inserting the following additional notes:

"3. Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the use of fire or explosives is not to be applied in respect to the guideline for the underlying offense.

4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 844(h). This is required because the offense level for the underlying offense may be reduced in that any specific offense characteristic for use of fire or explosives would not be applied (see Application Note 3). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571."

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4 in the third sentence by inserting "required" immediately before "because"; and by inserting ", although a fine is authorized under 18 U.S.C. § 3571" immediately before the period at the end of the last sentence.

This amendment conforms §2K1.7 to §2K2.4, which includes specific instructions concerning treatment of fines and double counting. Both sections are based upon similarly written statutes that provide for a fixed mandatory, consecutive sentence of imprisonment. In addition, Application Note 4 of the Commentary to §2K2.4 is revised and expanded for greater clarity. **The effective date of this amendment is November 1, 1990.**

333. Section 2K2.1(a)(1) is amended by deleting "16" and inserting in lieu thereof "18".

Section 2K2.1(b)(1) is amended by inserting ", other than a firearm covered in 26 U.S.C. § 5845(a)," immediately following "ammunition".

Section 2K2.2(a)(1) is amended by deleting "16" and inserting in lieu thereof "18".

This amendment provides that the reduction in offense level under subsection (b)(1) for possession of a weapon for sporting purposes or collection may not be applied in the case of any weapon described in 26 U.S.C. § 5845(a). In addition, the amendment increases the base offense level in subsection (a)(1) of §§2K2.1 and 2K2.2 from 16 to 18 to better reflect the seriousness of the conduct covered. **The effective date of this amendment is November 1, 1990.**

334. Chapter Two, Part K, Subpart 3 is amended by inserting the following additional guideline and accompanying commentary:

"§2K3.2. Feloniously Mailing Injurious Articles

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

- (1) If the offense was committed with intent (A) to kill or injure any person, or (B) to injure the mails or other property, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the intended offense; or
- (2) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide).

Commentary

Statutory Provision: 18 U.S.C. § 1716 (felony provisions only).

Background: This guideline applies only to the felony provisions of 18 U.S.C. § 1716. The Commission has not promulgated a guideline for the misdemeanor provisions of this statute."

This amendment adds an additional guideline covering the felony provisions of 18 U.S.C. § 1716. **The effective date of this amendment is November 1, 1990.**

335. Section 2L1.1(b)(1) is amended by deleting "and without knowledge that the alien was excludable under 8 U.S.C. §§ 1182(a)(27), (28), (29)," immediately before "decrease".

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

- "7. 8 U.S.C. §§ 1182(a)(27), (a)(28), and (a)(29) concern certain aliens who are excludable because they are subversives.",

and inserting in lieu thereof:

- "7. Where the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, an upward departure may be warranted."

The Commentary to §2L1.1 captioned "Background" is amended in the second sentence by deleting "and did not know the alien was excludable as a subversive" immediately following "profit".

This amendment deletes a portion of specific offense characteristic (b)(1) that is unclear in application, and in any event rarely occurs, and replaces it with an application note

indicating that an upward departure may be warranted in the circumstances specified. **The effective date of this amendment is November 1, 1990.**

336. Section 2M4.1(b)(1) is amended by deleting "while" and inserting in lieu thereof "at a time when"; and by deleting "into the armed services, other than in time of war or armed conflict" and inserting in lieu thereof "for compulsory military service".

The Commentary to §2M4.1 captioned "Application Notes" is amended by deleting:

- "1. 'While persons were being inducted into the armed services' means at a time of compulsory military service under the Selective Service laws.
2. The Commission has not considered the appropriate sanction for this offense when persons are being inducted during time of war or armed conflict.",

and inserting in lieu thereof:

- "1. Subsection (b)(1) does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. If the offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict, an upward departure may be warranted.";

and in the caption by deleting "Notes" and inserting in lieu thereof "Note".

This amendment clarifies this guideline and deletes language that produced the anomalous result of a lower offense level for failure to register and evasion of military service in time of war or armed conflict than during a peacetime draft. In addition, the amendment makes a technical correction to the language of the guideline that enables the elimination of current Application Note 1. **The effective date of this amendment is November 1, 1990.**

337. Section 2M5.2 is amended by deleting:

- "(a) Base Offense Level (Apply the greater):
 - (1) 22, if sophisticated weaponry was involved; or
 - (2) 14.",

and inserting in lieu thereof:

- "(a) Base Offense Level:
 - (1) 22, except as provided in subdivision (2) below;
 - (2) 14, if the offense involved only non-fully-automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten."

The Commentary to §2M5.2 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions", and by deleting "§ 2778" and inserting in lieu thereof "§§ 2778, 2780".

The Commentary to §2M5.2 captioned "Application Notes" is amended in Note 1 by inserting, immediately before "In the case of a violation", the following:

"Under 22 U.S.C. § 2778, the President is authorized, through a licensing system

administered by the Department of State, to control exports of defense articles and defense services that he deems critical to a security or foreign policy interest of the United States. The items subject to control constitute the United States Munitions List, which is set out in 22 C.F.R. Part 121.1. Included in this list are such things as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, vessels of war, explosives, military and space electronics, and certain firearms.

The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted."

The Commentary to §2M5.2 captioned "Application Notes" is amended in the first sentence of Note 2 by inserting "or foreign policy" immediately before "interest".

This amendment revises this guideline to better distinguish the more and less serious forms of offense conduct covered. **The effective date of this amendment is November 1, 1990.**

338. Section 2N1.1 is amended by inserting the following additional subsection:

"(b) Cross Reference

- (1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above."

This amendment adds a cross reference to ensure that in the case of an offense involving extortion, the offense level will not be lower than that under §2B3.2. **The effective date of this amendment is November 1, 1990.**

339. Section 2N1.2 is amended by deleting:

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

- (1) 16;
- (2) If the offense involved extortion, apply §2B3.2."

and inserting in lieu thereof:

"(a) Base Offense Level: 16

(b) Cross Reference

- (1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage)."

The Commentary to §2N1.2 captioned "Application Notes" is amended by deleting Note 1 as follows:

- "1. If the offense involved extortion, apply the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) rather than the guideline from this section.";

by renumbering Note 2 as Note 1; and in the caption by deleting "Notes" and inserting in lieu thereof "Note".

This amendment conforms the structure of this guideline to that used in other guidelines. No substantive change results. The effective date of this amendment is November 1, 1990.

340. The Commentary to §2N2.1 captioned "Statutory Provisions" is amended by inserting "(a)(1), (a)(2), (b)" immediately after "333".

The Commentary to §2N2.1 captioned "Application Notes" is amended by inserting the following additional note:

- "4. The Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving anabolic steroids)."

This amendment provides that §2N2.1 does not apply to convictions under 21 U.S.C. § 333(e). The effective date of this amendment is November 1, 1990.

341. Section 2P1.1(b)(2) is amended by inserting the following at the end:

"*Provided*, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more."

Section 2P1.1(b) is amended by renumbering subdivision (3) as (4); and by inserting the following as subdivision (3):

- "(3) If the defendant escaped from the non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility, and subsection (b)(2) is not applicable, decrease the offense level under subsection (a)(1) by 4 levels or the offense level under subsection (a)(2) by 2 levels. *Provided*, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more."

The Commentary to §2P1.1 captioned "Application Notes" is amended in Note 3 by deleting "§2P1.1(b)(3)" and inserting in lieu thereof "subsection (b)(4)".

The Commentary to §2P1.1 captioned "Application Notes" is amended by inserting the following additional note:

- "5. Criminal history points under Chapter Four, Part A (Criminal History) are to be determined independently of the application of this guideline. For example, in the case of a defendant serving a one-year sentence of imprisonment at the time of the escape, criminal history points from §4A1.1(b) (for the sentence being served at the time of the escape), §4A1.1(d) (custody status), and §4A1.1(e) (recency) would be applicable."

This amendment provides greater differentiation in the guideline offense levels for the various types of conduct covered by this guideline. In addition, it clarifies that, where the instant offense is escape, criminal history points from §4A1.1(d) or (e), or both, may be applicable and that the addition of such points does not constitute unintended double counting. The effective date of this amendment is November 1, 1990.

342. The Introductory Commentary to Chapter Two, Part S, is deleted in its entirety as follows:

"Introductory Commentary

Money laundering activities are essential to the operation of organized crime.

Congress recently enacted new statutes prohibiting these activities and increased the maximum penalties.

The guidelines provide substantially increased punishments for these offenses. In fiscal year 1985, the time served by defendants convicted of felonies involving monetary transaction reporting under 31 U.S.C. §§ 5313, 5316, and 5322 averaged about ten months, and only a few defendants served as much as four to five years. However, courts have been imposing higher sentences as they come to appreciate the seriousness of this activity, and sentences as long as thirty-five years have been reported. Specifically, Congress made all reporting violations felonies in 1984, and enacted the Money Laundering Control Act of 1986 (18 U.S.C. §§ 1956, 1957), which creates new offenses and provides higher maximum sentences when knowledge, facilitation or concealment of serious criminal activity is proved."

This amendment deletes the introductory commentary to this part as outdated, inconsistent with the commentaries to other sections, and better covered in the individual commentaries to the offenses contained in the part. **The effective date of this amendment is November 1, 1990.**

343. The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 5 by deleting:

"'racketeering activity' as defined in 18 U.S.C. § 1961. If §2T1.1(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

The Commentary to §2T1.2 captioned "Application Notes" is amended in Note 1 by deleting:

"'racketeering activity' as defined in 18 U.S.C. § 1961. If §2T1.2(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

The Commentary to §2T1.3 captioned "Application Notes" is amended in Note 1 by deleting:

"'racketeering activity' as defined in 18 U.S.C. § 1961. If §2T1.3(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

The Commentary to §2T1.4 captioned "Application Notes" is amended in Note 1 by deleting the last sentence as follows:

"If this subsection applies, do not apply §4B1.3 (Criminal Livelihood) which is substantially duplicative."

This amendment deletes the portion of these application notes concerning application of §4B1.3 (Criminal Livelihood) because this commentary conflicts with the principle expressed in Application Note 5 of the Commentary to §1B1.1 (when two guideline provisions are equally applicable, the one producing the greater offense level controls). In addition, this amendment broadens the definition of "criminal activity" to cover any criminal violation of federal, state, or local law. **The effective date of this amendment is November 1, 1990.**

344. The Introductory Commentary to Chapter Three, Part A is amended by deleting the second sentence as follows: "They are to be treated as specific offense characteristics."

The Commentary to §3A1.1 (Vulnerable Victim) captioned "Application Notes" is amended in Note 2 by inserting the following at the end:

"For example, where the offense guideline provides an enhancement for the age of the victim, this guideline should not be applied unless the victim was unusually vulnerable for reasons unrelated to age."

This amendment clarifies the application of §3A1.1, and eliminates an unnecessary and confusing sentence in the introductory commentary to this part. **The effective date of this amendment is November 1, 1990.**

345. The Introductory Commentary to Chapter Three, Part B, is amended by beginning a new paragraph with the second sentence; and by inserting, immediately after the first sentence, the following:

"The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), *i.e.*, all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction. However, where the defendant has received mitigation by virtue of being convicted of an offense significantly less serious than his actual criminal conduct, *e.g.*, the defendant is convicted of unlawful possession of a controlled substance but his actual conduct involved drug trafficking, a further reduction in the offense level under §3B1.2 (Mitigating Role) ordinarily is not warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense."

This amendment clarifies the conduct that is relevant to the determination of Chapter Three, Part B, and clarifies the operation of §3B1.2 in certain cases. **The effective date of this amendment is November 1, 1990.**

346. Section 3B1.3 is amended in the second sentence by deleting "in addition to that provided for in §3B1.1, nor may it be employed" immediately following "may not be employed"; and by inserting the following additional sentence at the end:

"If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role)."

This amendment provides that the enhancement for abuse of a position of trust may apply in addition to an enhancement for an aggravating role under §3B1.1. **The effective date of this amendment is November 1, 1990.**

347. Section 3C1.1 is amended in the title by deleting "Willfully Obstructing or Impeding Proceedings" and inserting in lieu thereof "Obstructing or Impeding the Administration of Justice".

Section 3C1.1 is amended by deleting "impeded or obstructed, or attempted to impede or obstruct" and inserting in lieu thereof "obstructed or impeded, or attempted to obstruct or impede,"; and by deleting "or prosecution" and inserting in lieu thereof ", prosecution, or sentencing".

The Commentary to §3C1.1 is amended by deleting the introductory paragraph immediately before "Application Notes" as follows:

" This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to willfully interfere with the disposition of criminal charges, in respect to the instant offense."

The Commentary to §3C1.1 captioned "Application Notes" is amended by deleting Notes 1-4 as follows:

- "1. The following conduct, while not exclusive, may provide a basis for applying this adjustment:
 - (a) destroying or concealing material evidence, or attempting to do so;
 - (b) directing or procuring another person to destroy or conceal material evidence, or attempting to do so;
 - (c) testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record during a preliminary or grand jury proceeding, trial, sentencing proceeding, or any other judicial proceeding;
 - (d) threatening, intimidating, or otherwise unlawfully attempting to influence a co-defendant, witness, or juror, directly or indirectly;
 - (e) furnishing material falsehoods to a probation officer in the course of a presentence or other investigation for the court.
2. In applying this provision, suspect testimony and statements should be evaluated in a light most favorable to the defendant.
3. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt is not a basis for application of this provision.
4. Where the defendant is convicted for an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury), §2J1.8 (Bribery of Witness), or §2J1.9 (Payment to Witness), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely-Related Counts). The offense level for that Group of Closely-Related Counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater."

and inserting in lieu thereof:

- "1. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not

a basis for application of this provision. In applying this provision, the defendant's testimony and statements should be evaluated in a light most favorable to the defendant.

2. Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 3 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application Note 4 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 3 and 4 should assist the court in determining whether application of this enhancement is warranted in a particular case.
3. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:
 - (a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;
 - (b) committing, suborning, or attempting to suborn perjury;
 - (c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;
 - (d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (*e.g.*, shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;
 - (e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;
 - (f) providing materially false information to a judge or magistrate;
 - (g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;
 - (h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;
 - (i) conduct prohibited by 18 U.S.C. §§ 1501-1516.
4. The following is a non-exhaustive list of examples of the types of conduct that, absent a separate count of conviction for such conduct, do not warrant

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

application of this enhancement, but ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range:

- (a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;
 - (b) making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies;
 - (c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;
 - (d) avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight)).
5. 'Material' evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.
6. Where the defendant is convicted for an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of Perjury), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.8 (Bribery of Witness), or §2J1.9 (Payment to Witness), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely-Related Counts). The offense level for that group of closely-related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater."

Chapter Three, Part C, is amended by inserting the following additional guideline and accompanying commentary:

"§3C1.2. Reckless Endangerment During Flight

If the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer, increase by 2 levels.

Commentary

Application Notes:

1. Do not apply this enhancement where the offense guideline in Chapter Two, or another adjustment in Chapter Three, results in an equivalent or greater increase in offense level solely on the basis of the same conduct.
2. 'Reckless' is defined in the Commentary to §2A1.4 (Involuntary Manslaughter). For the purposes of this guideline, 'reckless' means that the conduct was at least reckless and includes any higher level of culpability. However, where a higher degree of culpability was involved, an upward departure above the 2-level increase provided in this section may be warranted.

3. 'Another person' includes any person, except a participant in the offense who willingly participated in the flight."

This amendment clarifies the operation of §3C1.1 and inserts an additional guideline to address reckless endangerment during flight. The Commission believes that reckless endangerment during flight is sufficiently different from other forms of obstructive conduct to warrant a separate enhancement. **The effective date of this amendment is November 1, 1990.**

348. Section 3D1.1 is amended by inserting "(a)" immediately before "When"; by deleting "(a)", "(b)", and "(c)", and inserting in lieu thereof "(1)", "(2)", and "(3)" respectively; and by inserting the following additional subsection:

"(b) Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§3D1.2-3D1.5. Sentences for such counts are governed by the provisions of §5G1.2(a)."

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

"Certain offenses, e.g., 18 U.S.C. § 924(c) (use of a deadly or dangerous weapon in relation to a crime of violence or drug trafficking) by law carry mandatory consecutive sentences. Such offenses are exempted from the operation of these rules. See §3D1.2.",

and inserting in lieu thereof:

"Counts for which a statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Convictions on such counts are not used in the determination of a combined offense level under this Part, but may affect the offense level for other counts. A conviction for 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence) provides a common example. In the case of a conviction under 18 U.S.C. § 924(c), the specific offense characteristic for weapon use in the primary offense is to be disregarded to avoid double counting. See Commentary to §2K2.4. Example: The defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together, and the offense level for the bank robbery count is computed without application of an enhancement for weapon possession or use. The mandatory five-year sentence on the weapon-use count runs consecutively, as required by law. See §5G1.2(a)."

Section 3D1.2 is amended by deleting the second sentence as follows:

"A count for which the statute mandates imposition of a consecutive sentence is excluded from such Groups for purposes of §§3D1.2-3D1.5."

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

- "1. Counts for which the statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Convictions under such counts are excluded from the determination of the combined offense level. Convictions for 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence) provide a common example. Note that such a conviction usually does affect the offense level for other counts, however, in that in the event of such a conviction the specific offense characteristic for weapon use in the primary offense is to be disregarded. See Commentary to §2K2.4.

Example: The defendant is convicted of one count of bank robbery in which he took \$5,000 and discharged a weapon causing permanent bodily injury (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together, but the offense level for the bank robbery count is 28 (18 + 4 + 6) rather than 31. The mandatory five year sentence on the weapon-use count runs consecutively, as required by law."

This amendment consolidates the provisions dealing with statutorily required consecutive sentences in §3D1.1 for greater clarity. **The effective date of this amendment is November 1, 1990.**

349. Section 3D1.2(b) is amended by deleting, immediately following "common scheme or plan", the following:

" , including, but not limited to:

- (1) A count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation. 28 U.S.C. § 994(1)(2).
- (2) A count charging an attempt to commit an offense and a count charging the commission of the offense. 18 U.S.C. § 3584(a).
- (3) A count charging an offense based on a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition. 28 U.S.C. § 994(v)".

Section 3D1.2(d) is amended by deleting "Counts are grouped together if" and inserting in lieu thereof "When".

Section 3D1.2(d) is amended by deleting "specifically included" and inserting in lieu thereof "to be grouped".

Section 3D1.2(d) is amended in the second paragraph by inserting in the appropriate place: "§2K2.2;".

Section 3D1.2(d) is amended in the third paragraph by inserting "Chapter Two," immediately before "Part A".

The Commentary to §3D1.2 captioned "Application Notes" is amended by inserting the following as Note 1:

- "1. Subsections (a)-(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. See §3D1.1(b)."

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 3 by inserting the following as the second paragraph:

"When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a)."

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 4 in the first

sentence of the first paragraph by deleting "states the principle" and inserting in lieu thereof "provides".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 4 by inserting the following sentence as the second sentence of the first paragraph:

"This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).";

and by inserting the following as the second paragraph:

"When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 6 by deleting the third sentence of the first paragraph as follows:

"The same general type of offense" is to be construed broadly, and would include, for example, larceny, embezzlement, forgery, and fraud.";

and by inserting the following as the second paragraph:

"Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; see §3D1.3(b). The 'same general type' of offense is to be construed broadly, and would include, for example, larceny, embezzlement, forgery, and fraud.".

This amendment clarifies the operation of §3D1.2(b), makes editorial improvements in §3D1.2(d), makes the listing of offenses in §3D1.2(d) more comprehensive, clarifies the interaction of §§ 3D1.2(d) and 3D1.3(b), and clarifies the Commentary of §3D1.2 by making explicit that offenses such as multiple robberies do not fit within the parameters of §3D1.2(b). The effective date of this amendment is November 1, 1990.

350. Section 3D1.4 is amended in the fourth line of the Unit table by inserting "2 1/2-" immediately before "3" the first time "3" appears; and in the fifth line of the Unit table by deleting "4 or" and inserting in lieu thereof "3 1/2-".

Section 3D1.4 is amended by deleting:

"(d) Except when the total number of Units is 1 1/2, round up to the next large whole number.".

The Commentary to §3D1.4 captioned "Background" is amended in the first paragraph by deleting the fifth sentence as follows:

"When this approach produces a fraction in the total Units, other than 1 1/2, it is rounded up to the nearest whole number.".

The "Illustrations of the Operation of the Multiple-Count Rules" following §3D1.5 are amended in example 1 in the third sentence by deleting "18" and "4-" and inserting in lieu thereof "20" and "2-" respectively; and in the sixth sentence by deleting "(rounded up to 3)" immediately following "2 1/2 Units".

The "Illustrations of the Operation of the Multiple-Count Rules" following §3D1.5 are amended in example 3 in the sixth sentence by deleting "Obstruction" and inserting in lieu thereof "Obstructing or Impeding the Administration of Justice".

This amendment simplifies the operation of §3D1.4. In addition, the amendment conforms the illustrations of the operation of the multiple-count rules. **The effective date of this amendment is November 1, 1990.**

351. The Commentary to §3E1.1 captioned "Application Notes" is amended by deleting:

- "2. Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).
3. A guilty plea may provide some evidence of the defendant's acceptance of responsibility. However, it does not, by itself, entitle a defendant to a reduced sentence under this section."

and inserting in lieu thereof:

- "2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.
3. Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility for the purposes of this section. However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility."

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 4 in the first sentence by deleting "Willfully Obstructing or Impeding Proceedings" and inserting in lieu thereof "Obstructing or Impeding the Administration of Justice".

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 5 in the second sentence by deleting "and should not be disturbed unless it is without foundation" immediately following "review".

The Commentary to §3E1.1 captioned "Background" is amended in the first paragraph in the second sentence by inserting "and related conduct" immediately before "by taking"; and in the third sentence by deleting "lesser sentence" and inserting in lieu thereof "lower offense level", and by deleting "sincere remorse" and inserting in lieu thereof "acceptance of responsibility".

The Commentary to §3E1.1 captioned "Background" is amended by deleting the second

paragraph as follows:

" The availability of a reduction under §3E1.1 is not controlled by whether the conviction was by trial or plea of guilty. Although a guilty plea may show some evidence of acceptance of responsibility, it does not automatically entitle the defendant to a sentencing adjustment."

This amendment clarifies the operation of this guideline and conforms the title of a reference to another guideline. The effective date of this amendment is November 1, 1990.

352. Section 4A1.2(a)(3) is amended by inserting "or execution" immediately following "imposition".

Section 4A1.2(c)(1) is amended by inserting in the appropriate place by alphabetical order:

"Careless or reckless driving",
"Insufficient funds check".

Section 4A1.2(c)(1) is amended by inserting "(excluding local ordinance violations that are also criminal offenses under state law)" immediately following "Local ordinance violations".

Section 4A1.2(c)(2) is amended by inserting "(e.g., speeding)" immediately following "minor traffic infractions".

The Commentary to §4A1.2 captioned "Application Notes" is amended by inserting the following additional notes:

- "12. Local ordinance violations. A number of local jurisdictions have enacted ordinances covering certain offenses (e.g., larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (e.g., a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(1) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.
13. Insufficient funds check. 'Insufficient funds check,' as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account."

This amendment clarifies that, for the purpose of computing criminal history points, there is no difference between the suspension of the "imposition" and "execution" of a prior sentence. This amendment also makes the provisions of §4A1.2(c)(1) more comprehensive in respect to certain vehicular offenses and clarifies the application of §4A1.2(c)(1) in respect to certain offenses prosecuted in municipal courts. In addition, this amendment expands the coverage of §4A1.2(c)(1) to include a misdemeanor or petty offense conviction for an insufficient funds check. The effective date of this amendment is November 1, 1990.

353. The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 by deleting:

"Any other sentence resulting in a valid conviction is to be counted in the criminal history score. Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score. Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score. Nonetheless, any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 if it provides reliable evidence of past criminal activity."

and inserting in lieu thereof:

"Also, sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted. Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Adequacy of Criminal History Category)."

The Commentary to §4A1.2 captioned "Application Notes" is amended in the caption of Note 6 by deleting "Invalid" and inserting in lieu thereof "Reversed, Vacated, or Invalidated".

The Commentary to §4A1.2 is amended by inserting at the end:

Background: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction."

This amendment clarifies the circumstances under which prior sentences are excluded from the criminal history score. In particular, the amendment clarifies the Commission's intent regarding the counting of uncounseled misdemeanor convictions for which counsel constitutionally is not required because the defendant was not imprisoned. Lack of clarity regarding whether these prior sentences are to be counted may result not only in considerable disparity in guideline application, but also in the criminal history score not adequately reflecting the defendant's failure to learn from the application of previous sanctions and his potential for recidivism. This amendment expressly states the Commission's position that such convictions are to be counted for the purposes of criminal history under Chapter Four, Part A. **The effective date of this amendment is November 1, 1990.**

354. The Commentary to §4B1.3 captioned "Application Notes" is amended in Note 2 by deleting "(currently 2,000x the hourly minimum wage under federal law is \$6,700)" immediately following "then existing hourly minimum wage under federal law".

This amendment deletes a reference to the federal minimum wage that is now outdated. **The effective date of this amendment is November 1, 1990.**

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

"§4B1.4. Armed Career Criminal

- (a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.
- (b) The offense level for an armed career criminal is the greatest of:
 - (1) the offense level applicable from Chapters Two and Three; or
 - (2) the offense level from §4B1.1 (Career Offender) if applicable; or
 - (3) (A) 34, if the defendant used or possessed the

firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in §4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(B) 33, otherwise.*

*If §3E1.1 (Acceptance of Responsibility) applies, reduce by 2 levels.

- (c) The criminal history category for an armed career criminal is the greatest of:
- (1) the criminal history category from Chapter Four, Part A (Criminal History), or §4B1.1 (Career Offender) if applicable; or
 - (2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in §4B1.2(1), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or
 - (3) Category IV.

Commentary

Application Note:

1. This guideline applies in the case of a defendant subject to an enhanced sentence under 18 U.S.C. § 924(e). Under 18 U.S.C. § 924(e)(1), a defendant is subject to an enhanced sentence if the instant offense of conviction is a violation of 18 U.S.C. § 922(g) and the defendant has at least three prior convictions for a 'violent felony' or 'serious drug offense,' or both, committed on occasions different from one another. The terms 'violent felony' and 'serious drug offense' are defined in 18 U.S.C. § 924(e)(2). It is to be noted that the definitions of 'violent felony' and 'serious drug offense' in 18 U.S.C. § 924(e)(2) are not identical to the definitions of 'crime of violence' and 'controlled substance offense' used in §4B1.1 (Career Offender), nor are the time periods for the counting of prior sentences under §4A1.2 (Definitions and Instructions for Computing Criminal History) applicable to the determination of whether a defendant is subject to an enhanced sentence under 18 U.S.C. § 924(e).

It is also to be noted that the procedural steps relative to the imposition of an enhanced sentence under 18 U.S.C. § 924(e) are not set forth by statute and may vary to some extent from jurisdiction to jurisdiction.

Background: This section implements 18 U.S.C. § 924(e), which requires a minimum sentence of imprisonment of fifteen years for a defendant who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense. If the offense level determined under this section is greater than the offense level otherwise applicable, the offense level determined under this section shall be applied. A minimum criminal history category (Category IV) is provided, reflecting that each defendant to whom this section applies will have at least three prior convictions for serious offenses. In some cases, the criminal history category may not adequately reflect the

defendant's criminal history; see §4A1.3 (Adequacy of Criminal History Category).".

This amendment adds a new section to address cases subject to a sentence enhancement under 18 U.S.C. § 924(e). **The effective date of this amendment is November 1, 1990.**

356. Section 5E1.2 is amended by deleting:

"(a) Except as provided in subsection (f) below, the court shall impose a fine in all cases.",

and inserting in lieu thereof:

"(a) The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine."

Section 5E1.2(d)(2) is amended by deleting "the ability of the defendant" and inserting in lieu thereof "any evidence presented as to the defendant's ability".

The Commentary to §5E1.2 captioned "Application Notes" is amended in Note 3 by deleting the fourth sentence as follows:

"In many cases, circumstances will make it unnecessary to consider these standards other than in the most general terms.";

and by inserting the following additional paragraphs at the end:

"Where it is readily ascertainable that the defendant cannot, and is not likely to become able to, pay a fine greater than the maximum fine set forth in Column B of the Fine Table in subsection (c)(3), calculation of the alternative maximum fines under subsections (c)(2)(B) (twice the gross pecuniary loss caused by the offense) and (c)(2)(C) (three times the gross pecuniary gain to all participants in the offense) is unnecessary. In such cases, a statement that 'the alternative maximums of the fine table were not calculated because it is readily ascertainable that the defendant cannot, and is not likely to become able to, pay a fine greater than the maximum set forth in the fine table' is recommended in lieu of such calculations.

The determination of the fine guideline range may be dispensed with entirely upon a court determination of present and future inability to pay any fine. The inability of a defendant to post bail bond (having otherwise been determined eligible for release) and the fact that a defendant is represented by (or was determined eligible for) assigned counsel are significant indicators of present inability to pay any fine. In conjunction with other factors, they may also indicate that the defendant is not likely to become able to pay any fine."

This amendment clarifies the operation of this guideline. **The effective date of this amendment is November 1, 1990.**

357. The Introductory Commentary to Chapter Five, Part H is amended by inserting the following additional paragraph at the end:

" In addition, 28 U.S.C. § 994(c) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment."

This amendment clarifies the relationship of 28 U.S.C. § 994(e) to certain of the policy statements contained in this part. The effective date of this amendment is November 1, 1990.

358. Chapter Five, Part K, Subpart 2, is amended in the title by deleting "GENERAL PROVISIONS:" and inserting in lieu thereof "OTHER GROUNDS FOR DEPARTURE".

Section 5K2.0 is amended in the first sentence of the first paragraph by inserting a comma immediately following "degree", and by inserting "that should result in a sentence different from that described" immediately following "the guidelines"; in the third sentence of the first paragraph by deleting "court at the time of sentencing" and inserting in lieu thereof "courts"; in the fourth sentence of the first paragraph by deleting "the present section" and inserting in lieu thereof "this subpart", by deleting "fully" immediately before "take", by inserting "fully" immediately following "account", and by deleting "precise" and inserting in lieu thereof "the"; in the sixth sentence of the first paragraph by deleting "judge" and inserting in lieu thereof "court"; and in the seventh sentence of the first paragraph by deleting "listed elsewhere in the guidelines (e.g., as an adjustment or specific offense characteristic)" and inserting in lieu thereof "taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment)".

Section 5K2.0 is amended in the first sentence of the second paragraph by inserting ", for example," immediately following "Where", by deleting "guidelines, specific offense characteristics," and inserting in lieu thereof "offense guideline", by deleting "part" and inserting in lieu thereof "subpart", by deleting "guideline" and inserting in lieu thereof "applicable guideline range", and by deleting "of conviction" immediately following "the offense"; in the second sentence of the second paragraph by deleting "offense of conviction" and inserting in lieu thereof "applicable offense guideline"; in the third sentence of the second paragraph by deleting "offense of conviction is theft" and inserting in lieu thereof "theft offense guideline is applicable", by deleting "when" immediately before "the theft", and by inserting "range" immediately before "more readily"; and in the fourth sentence of the second paragraph by deleting "offense of conviction is robbery" and inserting in lieu thereof "robbery offense guideline is applicable", and by deleting "sentence" immediately before "adjustment".

Section 5K2.0 is amended by deleting the fourth paragraph as follows:

"Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in §1B1.3."

This amendment makes various editorial and clarifying changes. In addition, the last paragraph is deleted as unclear and overly restrictive. The effective date of this amendment is November 1, 1990.

359. Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

"7 U.S.C. § 1361	2Q1.2",
"18 U.S.C. § 34	2A1.1, 2A1.2, 2A1.3, 2A1.4",
"18 U.S.C. § 35(b)	2A6.1",
"18 U.S.C. § 219	2C1.3",
"18 U.S.C. § 281	2C1.3",
"18 U.S.C. § 332	2B1.1, 2F1.1",
"18 U.S.C. § 335	2F1.1",
"18 U.S.C. § 608	2H2.1",
"18 U.S.C. § 647	2B1.1",

"18 U.S.C. § 650	2B1.1",
"18 U.S.C. § 665(b)	2B3.3, 2C1.1",
"18 U.S.C. § 667	2B1.1, 2B1.2",
"18 U.S.C. § 712	2F1.1",
"18 U.S.C. § 753	2P1.1",
"18 U.S.C. § 915	2F1.1",
"18 U.S.C. § 917	2F1.1",
"18 U.S.C. § 970(a)	2B1.3, 2K1.4",
"18 U.S.C. § 1015	2F1.1, 2J1.3, 2L2.1, 2L2.2",
"18 U.S.C. § 1023	2B1.1, 2F1.1",
"18 U.S.C. § 1024	2B1.2",
"18 U.S.C. § 1031	2F1.1",
"18 U.S.C. § 1091	2H1.3",
"18 U.S.C. § 1115	2A1.4",
"18 U.S.C. § 1167	2B1.1",
"18 U.S.C. § 1168	2B1.1",
"18 U.S.C. § 1201(c), (d)	2X1.1",
"18 U.S.C. § 1364	2K1.4",
"18 U.S.C. § 1422	2C1.2, 2F1.1",
"18 U.S.C. § 1541	2L2.3",
"18 U.S.C. § 1716	2K3.2",
(felony provisions only)	
"18 U.S.C. § 1860	2R1.1",
"18 U.S.C. § 1861	2F1.1",
"18 U.S.C. § 1864	2Q1.6",
"18 U.S.C. § 1991	2A2.1, 2X1.1",
"18 U.S.C. § 1992	2A1.1, 2B1.3, 2K1.4, 2X1.1",
"18 U.S.C. § 2072	2F1.1",
"18 U.S.C. § 2118(d)	2X1.1",
"18 U.S.C. § 2197	2B5.2, 2F1.1",
"18 U.S.C. § 2232	2J1.2",
"18 U.S.C. § 2233	2B1.1, 2B3.1",
"18 U.S.C. § 2272	2F1.1",
"18 U.S.C. § 2276	2B1.3, 2B2.2",
"18 U.S.C. § 2331(a)	2A1.1, 2A1.2, 2A1.3, 2A1.4",
"18 U.S.C. § 2331(b)	2A2.1",
"18 U.S.C. § 2331(c)	2A2.2",
"22 U.S.C. § 2780	2M5.2",
"42 U.S.C. § 300i-1	2Q1.4, 2Q1.5",
"42 U.S.C. § 1973j(c)	2X1.1".

Appendix A is amended:

in the line beginning "8 U.S.C. § 1328" by deleting ", 2G2.1, 2G2.2";

in the line beginning "16 U.S.C. § 1029" by deleting ", 2Q2.2";

in the line beginning "16 U.S.C. § 1030" by deleting ", 2Q2.2";

in the line beginning "16 U.S.C. § 1857(2)" by deleting ", 2Q2.2" and inserting in lieu thereof "2Q2.1";

in the line beginning "16 U.S.C. § 1859" by deleting "2Q2.2" and inserting in lieu thereof "2Q2.1";

and in the line beginning "16 U.S.C. § 3373(d)" by deleting "2Q2.2" and inserting in lieu thereof "2Q2.1";

by deleting:

18 U.S.C. § 32(a)(1)-(4) 2K1.4, 2B1.3
18 U.S.C. § 32(b) 2A1.1-2A2.3, 2A4.1, 2A5.1-2A5.2,
2K1.4, 2B1.3",

and inserting in lieu thereof:

"18 U.S.C. § 32(a),(b) 2A1.1-2A2.3, 2A4.1, 2A5.1, 2A5.2, 2B1.3, 2K1.4";

in the line beginning "18 U.S.C. § 33" by inserting "2A2.1, 2A2.2," immediately before "2B1.3";

in the line beginning "18 U.S.C. § 112(a)" by inserting "2A2.1," immediately before "2A2.2," and by inserting ", 2A4.1, 2B1.3, 2K1.4" immediately following "2A2.3";

in the line beginning "18 U.S.C. § 152" by deleting "2F1.1," and by inserting ", 2F1.1, 2J1.3" immediately following "2B4.1";

in the line beginning "18 U.S.C. § 201(b)(1)" by deleting ", 2J1.3, 2J1.8, 2J1.9";

in the line beginning "18 U.S.C. § 241" by deleting "2H1.2,";

in the line beginning "18 U.S.C. § 351(d)" by deleting ", 2A2.1" and inserting in lieu thereof "2A1.5";

in the line beginning "18 U.S.C. § 371" by deleting "2A2.1" and inserting in lieu thereof "2A1.5";

in the line beginning "18 U.S.C. § 373" by deleting "2A2.1" and inserting in lieu thereof "2A1.5";

in the line beginning "18 U.S.C. § 474" by inserting ", 2B5.2" immediately following "2B5.1";

in the line beginning "18 U.S.C. § 476" by inserting ", 2B5.2" immediately following "2B5.1";

in the line beginning "18 U.S.C. § 477" by inserting ", 2B5.2" immediately following "2B5.1";

in the line beginning "18 U.S.C. § 496" by deleting "2T3.1" and inserting in lieu thereof "2F1.1, 2T3.1";

in the line beginning "18 U.S.C. § 545" by deleting "2Q2.2" and inserting in lieu thereof "2Q2.1";

in the line beginning "18 U.S.C. § 549" by inserting "2B1.1," immediately before "2T3.1", and by inserting ", 2T3.2" immediately following "2T3.1";

in the line beginning "18 U.S.C. § 551" by inserting "2J1.2," immediately before "2T3.1";

in the line beginning "18 U.S.C. § 642" by inserting ", 2B5.2" immediately following "2B5.1"; by deleting:

"18 U.S.C. § 666(a) 2B1.1, 2C1.1, 2C1.2, 2F1.1",

and inserting in lieu thereof:

"18 U.S.C. § 666(a)(1)(A) 2B1.1, 2F1.1
18 U.S.C. § 666(a)(1)(B) 2C1.1, 2C1.2
18 U.S.C. § 666(a)(1)(C) 2C1.1, 2C1.2";

in the line beginning "18 U.S.C. § 755" by deleting ", 2X2.1";

in the line beginning "18 U.S.C. § 756" by deleting ", 2X2.1";

in the line beginning "18 U.S.C. § 757" by deleting "2X2.1" and inserting in lieu thereof "2X3.1";

in the line beginning "18 U.S.C. § 793(d), (e)" by inserting "2M3.2," immediately before "2M3.3";

in the line beginning "18 U.S.C. § 842(a)" by deleting ",(h),(i)" by inserting in lieu thereof "-(i)";

in the line beginning "18 U.S.C. § 844(f)" by inserting ", 2X1.1" immediately following "2K1.4";

by deleting:

"18 U.S.C. § 922(a)(1)-(5)	2K2.3
18 U.S.C. § 922(a)(6)	2K2.1
18 U.S.C. § 922(b)(1)-(3)	2K2.3
18 U.S.C. § 922(d)	2K2.3
18 U.S.C. § 922(g)	2K2.1
18 U.S.C. § 922(h)	2K2.1
18 U.S.C. § 922(i)	2B1.2, 2K2.3
18 U.S.C. § 922(j)	2B1.2, 2K2.3
18 U.S.C. § 922(k)	2K2.3
18 U.S.C. § 922(l)	2K2.3
18 U.S.C. § 922(n)	2K2.1
18 U.S.C. § 923	2K2.3
18 U.S.C. § 924(c)	2K2.4",

and inserting in lieu thereof:

"18 U.S.C. § 922(a)(1)	2K2.1,2K2.2
18 U.S.C. § 922(a)(2)	2K2.2
18 U.S.C. § 922(a)(3)	2K2.1
18 U.S.C. § 922(a)(4)	2K2.1
18 U.S.C. § 922(a)(5)	2K2.2
18 U.S.C. § 922(a)(6)	2K2.1
18 U.S.C. § 922(b)-(d)	2K2.2
18 U.S.C. § 922(e)	2K2. 1, 2K2.2
18 U.S.C. § 922(f)	2K2.1, 2K2.2
18 U.S.C. § 922(g)	2K2.1
18 U.S.C. § 922(h)	2K2.1
18 U.S.C. § 922(i)-(l)	2K2.1, 2K2.2
18 U.S.C. § 922(m)	2K2.2
18 U.S.C. § 922(n)	2K2.1
18 U.S.C. § 922(o)	2K2.1, 2K2.2
18 U.S.C. § 923(a)	2K2.2
18 U.S.C. § 924(a)(1)(A)	2K2.2
18 U.S.C. § 924(a)(1)(C)	2K2.1, 2K2.2
18 U.S.C. § 924(a)(3)(A)	2K2.2
18 U.S.C. § 924(b)	2K2.3
18 U.S.C. § 924(c)	2K2.4
18 U.S.C. § 924(f)	2K2.3
18 U.S.C. § 924(g)	2K2.3";

in the line beginning "18 U.S.C. § 1012" by inserting "2C1.3," immediately before "2F1.1";

in the line beginning "18 U.S.C. § 1028" by inserting ", 2L2.4 " immediately following "2L2.3";
in the line beginning "18 U.S.C. § 1113" by inserting ", 2A2.2" immediately following "2A2.1";
in the line beginning "18 U.S.C. § 1117" by deleting "2A2.1" and inserting in lieu thereof "2A1.5";

in the line beginning "18 U.S.C. § 1362" by inserting ", 2K1.4" immediately following "2B1.3";

in the line beginning "18 U.S.C. § "1363" by inserting ", 2K1.4" immediately following "2B1.3";

in the line beginning "18 U.S.C. § 1426" by inserting ", 2L2.2" immediately following "2L2.1";

in the line beginning "18 U.S.C. § 1460" by inserting "2G2.2," immediately before "2G3.1";

in the line beginning "18 U.S.C. § 1512(a)" by inserting "2A1.3," immediately following "2A1.2,";

in the line beginning "18 U.S.C. § 1512(b) by inserting "2A1.2," immediately before "2A2.2";

in the line beginning "18 U.S.C. § 1704" by inserting ", 2F1.1" immediately following "2B5.2";

in the line beginning "18 U.S.C. § 1751(c)" by inserting ", 2X1.1" immediately following "2A4.1";

in the line beginning "18 U.S.C. § 1751(d)" by deleting "2A2.1" and inserting in lieu thereof "2A1.5", and by inserting ", 2X1.1" immediately following "2A4.1";

in the line beginning "18 U.S.C. § 1909" by inserting "2C1.3," immediately before "2C1.4";

in the line beginning "18 U.S.C. § 1951" by deleting "2B3.1, 2B3.2, 2C1.1,";

in the line beginning "18 U.S.C. § 1952A" by deleting "2A2.1,";

in the line beginning "18 U.S.C. § 1958" by deleting "2A2.1,";

by deleting:

"18 U.S.C. § 2251 2G2.1",

and inserting in lieu thereof:

"18 U.S.C. § 2251(a), (b) 2G2.1
18 U.S.C. § 2251(c)(1)(A) 2G2.2
18 U.S.C. § 2251(c)(1)(B) 2G2.1";

in the line beginning "18 U.S.C. § 2271" by deleting "2F1.1,";

in the line beginning "18 U.S.C. § 2421" by inserting ", 2G1.2" immediately following "2G1.1";

in the line beginning "18 U.S.C. § 2422" by inserting ", 2G1.2" immediately following "2G1.1";

by deleting "18 U.S.C. § 4082(d) 2P1.1";

by deleting:

"21 U.S.C. § 333 2N2.1",

and inserting in lieu thereof:

"21 U.S.C. § 333(a)(1)	2N2.1
21 U.S.C. § 333(a)(2)	2F1.1, 2N2.1
21 U.S.C. § 333(b)	2N2.1";

by deleting:

"26 U.S.C. § 5861(a)	2K2.3
26 U.S.C. § 5861(b)-(l)	2K2.2",

and inserting in lieu thereof:

"26 U.S.C. § 5861(a)	2K2.2
26 U.S.C. § 5861(b)	2K2.1
26 U.S.C. § 5861(c)	2K2.1
26 U.S.C. § 5861(d)	2K2.1
26 U.S.C. § 5861(e)	2K2.2
26 U.S.C. § 5861(f)	2K2.2
26 U.S.C. § 5861(g)	2K2.2
26 U.S.C. § 5861(h)	2K2.1
26 U.S.C. § 5861(i)	2K2.1
26 U.S.C. § 5861(j)	2K2.1, 2K2.2
26 U.S.C. § 5861(k)	2K2.1
26 U.S.C. § 5861(l)	2K2.2";

in the line beginning "26 U.S.C. § 5871" by deleting "2K2.2, 2K2.3" and inserting in lieu thereof "2K2.1, 2K2.2";

by deleting:

"33 U.S.C. § 1319	2Q1.1, 2Q1.2, 2Q1.3",
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and inserting in lieu thereof:

"33 U.S.C. § 1319(c)(1), (c)(2), (c)(4)	2Q1.2, 2Q1.3
33 U.S.C. § 1319(c)(3)	2Q1.1";

and in the line beginning "42 U.S.C. § 3631" by deleting ", 2H1.5".

The Commentary to §2D3.4 captioned "Statutory Provisions" is amended by deleting "Provision" and inserting in lieu thereof "Provisions"; and by deleting "§ 842" and inserting in lieu thereof "§§ 954, 961".

The Commentary to §2M6.2 is amended by inserting between "Commentary" and "Background" the following:

"Statutory Provision: 42 U.S.C. § 2273".

The Commentary to §2T2.2 captioned "Statutory Provisions" is amended by deleting "5601-5605, 5607, 5608" and inserting in lieu thereof "5601, 5603-5605"; and by deleting "5691," immediately before "5762".

The Commentary to §2X2.1 captioned "Statutory Provisions" is amended by deleting "Provisions" and inserting in lieu thereof "Provision"; and by deleting "§§ 2, 755-757" and inserting in lieu thereof "§ 2".

This amendment makes the statutory index more comprehensive, conforms it to amended guidelines, and corrects erroneous references. In addition, this amendment conforms the statutory provisions of §§ 2D3.4, 2T2.2, 2X2.1 to the statutory index, and inserts additional Commentary in §2M6.2 referencing a statutory provision contained in Appendix A (Statutory Index) to conform the format of this guideline to the format of other offense guidelines. **The effective date of this amendment is November 1, 1990.**

360. Section 1B1.10(d) is amended by deleting "and 269" and inserting in lieu thereof "269, 329, and 341".

This amendment implements the directive in 28 U.S.C. § 994(u) in respect to the guideline amendments effective November 1, 1990. **The effective date of this amendment is November 1, 1990.**

361. The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional subdivision at the end:

"(k) 'Destructive device' means any article described in 18 U.S.C. § 921(a)(4) (including an explosive, incendiary, or poison gas - (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the proceeding clauses).".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by deleting "and 'firearm'" and inserting in lieu thereof ", 'firearm,' and 'destructive device'", and by deleting the last sentence as follows: "'Destructive device' is defined in the Commentary to §2K1.4 (Arson: Property Damage by Use of Explosives).".

The Commentary to §2B1.2 captioned "Application Notes" is amended in Note 1 by deleting "and 'firearm'" and inserting in lieu thereof ", 'firearm,' and 'destructive device'", and by deleting the last sentence as follows: "'Destructive device' is defined in the Commentary to §2K1.4 (Arson: Property Damage by Use of Explosives).".

The Commentary to §2B2.1 captioned "Application Notes" is amended in Note 1 by inserting "'destructive device,'" immediately before "and 'dangerous weapon'", and by deleting the last sentence as follows: "'Destructive device' is defined in the Commentary to §2K1.4 (Arson: Property Damage by Use of Explosives).".

The Commentary to §2B2.2 captioned "Application Notes" is amended in Note 1 by deleting "and 'firearm'" and inserting in lieu thereof ", 'firearm,' 'destructive device,' and 'dangerous weapon'", and by deleting the last sentence as follows: "'Destructive device' is defined in the Commentary to §2K1.4 (Arson: Property Damage by Use of Explosives).".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 1 by inserting "'destructive device,'" immediately before "'dangerous weapon,'".

This amendment inserts the definition of a destructive device, formerly in the Commentary to §2K1.4, in the Commentary to §1B1.1, with minor revisions to the examples of the articles prohibited by 18 U.S.C. § 921(a)(4) to better reflect the statutory provision. This amendment also conforms the commentary of various offense guidelines to reference the definitions set forth in Application Note 1 of the Commentary to §1B1.1. **The effective date of this amendment is November 1, 1990.**

362. Chapter Seven is deleted in its entirety as follows:

**"CHAPTER SEVEN - VIOLATIONS OF PROBATION AND
SUPERVISED RELEASE**

§7A1.1. Reporting of Violations of Probation and Supervised Release (Policy Statement)

- (a) The Probation Officer shall promptly report to the court any alleged violation of a condition of probation or supervised release that constitutes new criminal conduct, other than conduct that would constitute a petty offense.
- (b) The Probation Officer shall promptly report to the court any other alleged violation of a condition of probation or supervised release, unless the officer determines: (1) that such violation is minor, not part of a continuing pattern of violation, and not indicative of a serious adjustment problem; and (2) that non-reporting will not present an undue risk to the public or be inconsistent with any directive of the court relative to the reporting of violations.

Commentary

This policy statement addresses the reporting of violations of probation and supervised release. It is the Commission's intent that significant violations be promptly reported to the court. At the same time, the Commission realizes that it would neither be practical nor desirable to require such reporting for every minor violation.

§7A1.2. Revocation of Probation (Policy Statement)

- (a) Upon a finding of a violation of probation involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke probation.
- (b) Upon a finding of a violation of probation involving conduct other than conduct under subsection (a), the court may: (1) revoke probation; or (2) extend the term of probation and/or modify the conditions of probation.

Commentary

This policy statement expresses a presumption that probation is to be revoked in the case of new criminal conduct other than a petty offense. For lesser violations, the policy statements provide that the court may revoke probation, extend the term of supervision, or modify the conditions of supervision.

§7A1.3. Revocation of Supervised Release (Policy Statement)

- (a) Upon a finding of a violation of supervised release involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke supervised release.
- (b) Upon a finding of a violation of supervised release involving conduct other than conduct under subsection (a), the court may: (1) revoke supervised release; or (2) extend the term of supervised release and/or modify the conditions of supervised release.

Commentary

This policy statement expresses a presumption that supervised release is to be revoked in the case of new criminal conduct other than a petty offense. For lesser violations, the policy statements provide that the court may revoke supervised release, extend the term of supervision, or modify the conditions of supervision.

§7A1.4. No Credit for Time Under Supervision (Policy Statement)

- (a) Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.
- (b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.

Commentary

This policy statement provides that time served on probation or supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation."

and the following inserted in lieu thereof:

"CHAPTER SEVEN - VIOLATIONS OF PROBATION AND SUPERVISED RELEASE

PART A - INTRODUCTION TO CHAPTER SEVEN

1. Authority

Under 28 U.S.C. § 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. At this time, the Commission has chosen to promulgate policy statements only. These policy statements will provide guidance while allowing for the identification of any substantive or procedural issues that require further review. The Commission views these policy statements as evolutionary and will review relevant data and materials concerning revocation determinations under these policy statements. Revocation guidelines will be issued after federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment on these policy statements.

2. Background

(a) Probation.

Prior to the implementation of the federal sentencing guidelines, a court could stay the imposition or execution of sentence and place a defendant on probation. When a court found that a defendant violated a condition of probation, the court could continue probation, with or without extending the term or modifying the conditions, or revoke probation and either impose the term of imprisonment previously stayed, or, where no term of imprisonment had originally been imposed, impose any term of imprisonment that was available at the initial sentencing.

The statutory authority to 'suspend' the imposition or execution of sentence in order to impose a term of probation was abolished upon implementation of the sentencing guidelines. Instead, the Sentencing Reform Act recognized probation as a sentence in itself. 18 U.S.C. § 3561. Under current law, if the court finds that a

defendant violated a condition of probation, the court may continue probation, with or without extending the term or modifying the conditions, or revoke probation and impose any other sentence that initially could have been imposed. 18 U.S.C. § 3565. For certain violations, revocation is required by statute.

(b) Supervised Release.

Supervised release, a new form of post-imprisonment supervision created by the Sentencing Reform Act, accompanied implementation of the guidelines. A term of supervised release may be imposed by the court as a part of the sentence of imprisonment at the time of initial sentencing. 18 U.S.C. § 3583(a). Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court. Accordingly, supervised release is more analogous to the additional 'special parole term' previously authorized for certain drug offenses.

With the exception of intermittent confinement, which is available only for a sentence of probation, the conditions of supervised release authorized by statute are the same as those for a sentence of probation. When the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release, with or without extending the term or modifying the conditions, or revoke supervised release and impose a term of imprisonment. The periods of imprisonment authorized by statute for a violation of the conditions of supervised release generally are more limited, however, than those available for a violation of the conditions of probation. 18 U.S.C. § 3583(e)(3).

3. Resolution of Major Issues

(a) Guidelines versus Policy Statements.

At the outset, the Commission faced a choice between promulgating guidelines or issuing advisory policy statements for the revocation of probation and supervised release. After considered debate and input from judges, probation officers, and prosecuting and defense attorneys, the Commission decided, for a variety of reasons, initially to issue policy statements. Not only was the policy statement option expressly authorized by statute, but this approach provided greater flexibility to both the Commission and the courts. Unlike guidelines, policy statements are not subject to the May 1 statutory deadline for submission to Congress, and the Commission believed that it would benefit from the additional time to consider complex issues relating to revocation guidelines provided by the policy statement option.

Moreover, the Commission anticipates that, because of its greater flexibility, the policy statement option will provide better opportunities for evaluation by the courts and the Commission. This flexibility is important, given that supervised release as a method of post-incarceration supervision and transformation of probation from a suspension of sentence to a sentence in itself represent recent changes in federal sentencing practices. After an adequate period of evaluation, the Commission intends to promulgate revocation guidelines.

(b) Choice Between Theories.

The Commission debated two different approaches to sanctioning violations of probation and supervised release.

The first option considered a violation resulting from a defendant's failure to follow the court-imposed conditions of probation or supervised release as a 'breach of trust.' While the nature of the conduct leading to the revocation would be considered in measuring the extent of the breach of trust, imposition of an appropriate punishment for any new criminal conduct would not be the primary goal of a

revocation sentence. Instead, the sentence imposed upon revocation would be intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision, leaving the punishment for any new criminal conduct to the court responsible for imposing the sentence for that offense.

The second option considered by the Commission sought to sanction violators for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct. Under this approach, offense guidelines in Chapters Two and Three of the Guidelines Manual would be applied to any criminal conduct that formed the basis of the violation, after which the criminal history in Chapter Four of the Guidelines Manual would be recalculated to determine the appropriate revocation sentence. This option would also address a violation not constituting a criminal offense.

After lengthy consideration, the Commission adopted an approach that is consistent with the theory of the first option; *i.e.*, at revocation the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator.

The Commission adopted this approach for a variety of reasons. First, although the Commission found desirable several aspects of the second option that provided for a detailed revocation guideline system similar to that applied at the initial sentencing, extensive testing proved it to be impractical. In particular, with regard to new criminal conduct that constituted a violation of state or local law, working groups expert in the functioning of federal criminal law noted that it would be difficult in many instances for the court or the parties to obtain the information necessary to apply properly the guidelines to this new conduct. The potential unavailability of information and witnesses necessary for a determination of specific offense characteristics or other guideline adjustments could create questions about the accuracy of factual findings concerning the existence of those factors.

In addition, the Commission rejected the second option because that option was inconsistent with its views that the court with jurisdiction over the criminal conduct leading to revocation is the more appropriate body to impose punishment for that new criminal conduct, and that, as a breach of trust inherent in the conditions of supervision, the sanction for the violation of trust should be in addition, or consecutive, to any sentence imposed for the new conduct. In contrast, the second option would have the revocation court substantially duplicate the sanctioning role of the court with jurisdiction over a defendant's new criminal conduct and would provide for the punishment imposed upon revocation to run concurrently with, and thus generally be subsumed in, any sentence imposed for that new criminal conduct.

Further, the sanctions available to the courts upon revocation are, in many cases, more significantly restrained by statute. Specifically, the term of imprisonment that may be imposed upon revocation of supervised release is limited by statute to not more than five years for persons convicted of Class A felonies, except for certain Title 21 drug offenses; not more than three years for Class B felonies; not more than two years for Class C or D felonies; and not more than one year for Class E felonies. 18 U.S.C. § 3583(e)(3).

Given the relatively narrow ranges of incarceration available in many cases, combined with the potential difficulty in obtaining information necessary to determine specific offense characteristics, the Commission felt that it was undesirable at this time to develop guidelines that attempt to distinguish, in detail, the wide variety of behavior that can lead to revocation. Indeed, with the relatively low ceilings set by statute, revocation policy statements that attempted to delineate with great particularity the gradations of conduct leading to revocation would frequently result in a sentence at the statutory maximum penalty.

Accordingly, the Commission determined that revocation policy statements that provided for three broad grades of violations would permit proportionally longer terms for more serious violations and thereby would address adequately concerns about proportionality, without creating the problems inherent in the second option.

4. The Basic Approach

The revocation policy statements categorize violations of probation and supervised release in three broad classifications ranging from serious new felonious criminal conduct to less serious criminal conduct and technical violations. The grade of the violation, together with the violator's criminal history category calculated at the time of the initial sentencing, fix the applicable sentencing range.

The Commission has elected to develop a single set of policy statements for revocation of both probation and supervised release. In reviewing the relevant literature, the Commission determined that the purpose of supervision for probation and supervised release should focus on the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct. Although there was considerable debate as to whether the sanction imposed upon revocation of probation should be different from that imposed upon revocation of supervised release, the Commission has initially concluded that a single set of policy statements is appropriate.

5. A Concluding Note

The Commission views these policy statements for revocation of probation and supervised release as the first step in an evolutionary process. The Commission expects to issue revocation guidelines after judges, probation officers, and practitioners have had an opportunity to apply and comment on the policy statements.

In developing these policy statements, the Commission assembled two outside working groups of experienced probation officers representing every circuit in the nation, officials from the Probation Division of the Administrative Office of the U.S. Courts, the General Counsel's office at the Administrative Office of the U.S. Courts, and the U.S. Parole Commission. In addition, a number of federal judges, members of the Criminal Law and Probation Administration Committee of the Judicial Conference, and representatives from the Department of Justice and federal and community defenders provided considerable input into this effort.

PART B - PROBATION AND SUPERVISED RELEASE VIOLATIONS

Introductory Commentary

The policy statements in this chapter seek to prescribe penalties only for the violation of the judicial order imposing supervision. Where a defendant is convicted of a criminal charge that also is a basis of the violation, these policy statements do not purport to provide the appropriate sanction for the criminal charge itself. The Commission has concluded that the determination of the appropriate sentence on any new criminal conviction should be a separate determination for the court having jurisdiction over such conviction.

Because these policy statements focus on the violation of the court-ordered supervision, this chapter, to the extent permitted by law, treats violations of the conditions of probation and supervised release as functionally equivalent.

Under 18 U.S.C. § 3584, the court, upon consideration of the factors set forth in 18 U.S.C. § 3553(a), including applicable guidelines and policy statements issued

by the Sentencing Commission, may order a term of imprisonment to be served consecutively or concurrently to an undischarged term of imprisonment. It is the policy of the Commission that the sanction imposed upon revocation is to be served consecutively to any other term of imprisonment imposed for any criminal conduct that is the basis of the revocation.

This chapter is applicable in the case of a defendant under supervision for a felony or Class A misdemeanor. Consistent with §1B1.9 (Class B or C Misdemeanors and Infractions), this chapter does not apply in the case of a defendant under supervision for a Class B or C misdemeanor or an infraction.

§7B1.1. Classification of Violations (Policy Statement)

- (a) There are three grades of probation and supervised release violations:
 - (1) Grade A Violations -- conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;
 - (2) Grade B Violations -- conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;
 - (3) Grade C Violations -- conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision.
- (b) Where there is more than one violation of the conditions of supervision, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

Commentary

Application Notes:

1. Under 18 U.S.C. §§ 3563(a)(1) and 3583(d), a mandatory condition of probation and supervised release is that the defendant not commit another federal, state, or local crime. A violation of this condition may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct. The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct.
2. 'Crime of violence' has the same meaning as set forth in §4B1.2(1), and includes any offense under federal or state law punishable by imprisonment for a term exceeding one year that --
 - (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

- (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

A crime of violence includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth in the violation charged involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another. A crime of violence also includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

- 3. 'Controlled substance offense' includes any offense under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with the intent to manufacture, import, export, distribute, or dispense. A controlled substance offense also includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.
- 4. A 'firearm or destructive device of a type described in 26 U.S.C. § 5845(a)' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or a weapon made from a rifle, with a barrel or barrels of less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain large bore weapons.
- 5. Where the defendant is under supervision in connection with a felony conviction, or has a prior felony conviction, possession of a firearm (other than a firearm of a type described in 26 U.S.C. § 5845(a)) will generally constitute a Grade B violation, because 18 U.S.C. § 922(g) prohibits a convicted felon from possessing a firearm. The term 'generally' is used in the preceding sentence, however, because there are certain limited exceptions to the applicability of 18 U.S.C. § 922(g). Sec. e.g., 18 U.S.C. § 925(c).

§7B1.2. Reporting of Violations of Probation and Supervised Release (Policy Statement)

- (a) The probation officer shall promptly report to the court any alleged Grade A or B violation.
- (b) The probation officer shall promptly report to the court any alleged Grade C violation unless the officer determines: (1) that such violation is minor, and not part of a continuing pattern of violations; and (2) that non-reporting will not present an undue risk to an individual or the public or be inconsistent with any directive of the court relative to the reporting of violations.

Commentary

Application Note:

- 1. Under subsection (b), a Grade C violation must be promptly reported to the court unless the probation officer makes an affirmative determination that the alleged violation meets the criteria for non-reporting. For example, an isolated failure to file a monthly report or a minor traffic infraction generally would not

require reporting.

§7B1.3. Revocation of Probation or Supervised Release (Policy Statement)

- (a)
 - (1) Upon a finding of a Grade A or B violation, the court shall revoke probation or supervised release.
 - (2) Upon a finding of a Grade C violation, the court may (A) revoke probation or supervised release; or (B) extend the term of probation or supervised release and/or modify the conditions of supervision.
- (b) In the case of a revocation of probation or supervised release, the applicable range of imprisonment is that set forth in §7B1.4 (Term of Imprisonment).
- (c) In the case of a Grade B or C violation---
 - (1) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is at least one month but not more than six months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e) for any portion of the minimum term; and
 - (2) Where the minimum term of imprisonment determined under §7B1.4 (Term of Imprisonment) is more than six months but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.
 - (3) In the case of a revocation based, at least in part, on a violation of a condition specifically pertaining to community confinement, intermittent confinement, or home detention, use of the same or a less restrictive sanction is not recommended.
- (d) Any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under §7B1.4 (Term of Imprisonment), and any such unserved period of community confinement, home detention, or intermittent confinement may be converted to an equivalent period of imprisonment.
- (e) Where the court revokes probation or supervised release and imposes a term of imprisonment, it shall increase the term of imprisonment determined under subsections (b), (c), and (d) above by the amount of time in official detention that will be credited toward service of the term of imprisonment under 18

U.S.C. § 3585(b), other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding.

- (f) Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.
- (g)
 - (1) Where probation is revoked and a term of imprisonment is imposed, the provisions of §§5D1.1-1.3 shall apply to the imposition of a term of supervised release.
 - (2) Where supervised release is revoked and the term of imprisonment imposed is less than the maximum term of imprisonment imposable upon revocation, the defendant may, to the extent permitted by law, be ordered to recommence supervised release upon release from imprisonment.

Commentary

Application Notes:

1. Revocation of probation or supervised release generally is the appropriate disposition in the case of a Grade C violation by a defendant who, having been continued on supervision after a finding of violation, again violates the conditions of his supervision.
2. The provisions for the revocation, as well as early termination and extension, of a term of supervised release are found in 18 U.S.C. § 3583(e). This statute, however, neither expressly authorizes nor precludes a court from ordering that a term of supervised release recommence after revocation. Under §7B1.3(f)(2), the court may order, to the extent permitted by law, the commencement of a supervised release term following revocation.
3. Subsection (c) provides for the use of certain alternatives to imprisonment upon revocation. It is to be noted, however, that a court may decide that not every alternative is authorized by statute in every circumstance. For example, in United States v. Behnezhad, No. 89-10529 (9th Cir. July 3, 1990), the Ninth Circuit held that where a term of supervised release was revoked there was no statutory authority to impose a further term of supervised release. Under this decision, in the case of a revocation of a term of supervised release, an alternative that is contingent upon imposition of a further term of supervised release (e.g., a period of imprisonment followed by a period of community confinement or detention as a condition of supervised release) cannot be implemented. The Commission has transmitted to the Congress a proposal for a statutory amendment to address this issue.
4. Subsection (e) is designed to ensure that the revocation penalty is not decreased by credit for time in official detention other than time in official detention resulting from the federal probation or supervised release violation warrant or proceeding. Example: A defendant, who was in pre-trial detention for three months, is placed on probation, and subsequently violates that probation. The court finds the violation to be a Grade C violation, determines that the applicable range of imprisonment is 4-10 months, and determines that revocation of probation and imposition of a term of imprisonment of four

months is appropriate. Under subsection (e), a sentence of seven months imprisonment would be required because the Bureau of Prisons, under 18 U.S.C. § 3585(b), will allow the defendant three months' credit toward the term of imprisonment imposed upon revocation.

5. Subsection (f) provides that any term of imprisonment imposed upon the revocation of probation or supervised release shall run consecutively to any sentence of imprisonment being served by the defendant. Similarly, it is the Commission's recommendation that any sentence of imprisonment for a criminal offense that is imposed after revocation of probation or supervised release be run consecutively to any term of imprisonment imposed upon revocation.
6. Intermittent confinement is authorized only as a condition of probation during the first year of the term of probation. 18 U.S.C. § 3563(b)(11). Intermittent confinement is not authorized as a condition of supervised release. 18 U.S.C. § 3583(d).

§7B1.4. Term of Imprisonment (Policy Statement)

- (a) The range of imprisonment applicable upon revocation is set forth in the following table:

Revocation Table
(in months of imprisonment)

Criminal History Category*

<u>Grade of Violation</u>	<u>I</u>	<u>II</u>	<u>III</u>	<u>IV</u>	<u>V</u>	<u>VI</u>
Grade C	3-9	4-10	5-11	6-12	7-13	8-14
Grade B	4-10	6-12	8-14	12-18	18-24	21-27
Grade A	(1) Except as provided in subdivision (2) below: 12-18 15-21 18-24 24-30 30-37 33-41					
	(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony: 24-30 27-33 30-37 37-46 46-57 51-63.					

*The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision.

- (b) *Provided*, that ---
 - (1) Where the statutorily authorized maximum term of imprisonment that is imposable upon revocation is less than the minimum of the applicable range, the statutorily authorized maximum term shall be substituted for the applicable range; and
 - (2) Where the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment

required by statute shall be substituted for the applicable range.

- (3) In any other case, the sentence upon revocation may be imposed at any point within the applicable range, provided that the sentence --
 - (A) is not greater than the maximum term of imprisonment authorized by statute; and
 - (B) is not less than any minimum term of imprisonment required by statute.

Commentary

Application Notes:

1. The criminal history category to be used in determining the applicable range of imprisonment in the Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Revocation Table have been designed to take into account that the defendant violated supervision. In the rare case in which no criminal history category was determined when the defendant originally was sentenced to the term of supervision being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of supervision. (See the criminal history provisions of §§4A1.1-4B1.4.)
2. Departure from the applicable range of imprisonment in the Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in §4A1.3 (Adequacy of Criminal History Category) in originally imposing the sentence that resulted in supervision. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in supervision, has been sentenced for an offense that is not the basis of the violation proceeding.
3. In the case of a Grade C violation that is associated with a high risk of new felonious conduct (e.g., a defendant, under supervision for conviction of criminal sexual abuse, violates the condition that he not associate with children by loitering near a schoolyard), an upward departure may be warranted.
4. Where the original sentence was the result of a downward departure (e.g., as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.
5. Under 18 U.S.C. § 3565(a), upon a finding that a defendant violated a condition of probation by being in possession of a controlled substance, the court is required 'to revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.' Under 18 U.S.C. § 3583(g), upon a finding that a defendant violated a condition of supervised release by being in possession of a controlled substance, the court is required 'to terminate supervised release and sentence the defendant to serve in prison not less than one-third of the term of supervised release.' The Commission leaves to the court the determination of whether evidence of drug usage established solely by laboratory analysis constitutes 'possession of a controlled substance' as set forth in 18 U.S.C. §§ 3565(a) and 3583(g).

6. Under 18 U.S.C. § 3565(b), upon a finding that a defendant violated a condition of probation by the actual possession of a firearm, the court is required 'to revoke the sentence of probation and impose any other sentence that was available ... at the time of initial sentencing.'

§7B1.5. No Credit for Time Under Supervision (Policy Statement)

- (a) Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.
- (b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.
- (c) *Provided*, that in the case of a person serving a period of supervised release on a foreign sentence under the provisions of 18 U.S.C. § 4106A, credit shall be given for time on supervision prior to revocation, except that no credit shall be given for any time in escape or absconder status.

Commentary

Application Note:

1. Subsection (c) implements 18 U.S.C. § 4106A(b)(1)(C), which provides that the combined periods of imprisonment and supervised release in transfer treaty cases shall not exceed the term of imprisonment imposed by the foreign court.

Background: This section provides that time served on probation or supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation. Other aspects of the defendant's conduct, such as compliance with supervision conditions and adjustment while under supervision, appropriately may be considered by the court in the determination of the sentence to be imposed within the applicable revocation range."

This amendment replaces Chapter Seven with a set of more detailed policy statements applicable to violations of probation and supervised release. Under 28 U.S.C. § 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. At this time, the Commission has chosen to promulgate policy statements only. These policy statements will provide guidance while allowing for the identification of any substantive or procedural issues that require further review. The Commission views these policy statements as evolutionary and will review relevant data and materials concerning revocation determinations under these policy statements. Revocation guidelines will be issued after federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment on these policy statements. The effective date of this amendment is November 1, 1990.