

CHAPTER FIVE - DETERMINING THE SENTENCE

Introductory Commentary

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).

Historical Note: Effective November 1, 1987.

PART A - SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE

(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11,12)	VI (13 or more)
Zone A	1	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6
	2	0 - 6	0 - 6	0 - 6	0 - 6	1 - 7
	3	0 - 6	0 - 6	0 - 6	0 - 6	2 - 8
	4	0 - 6	0 - 6	0 - 6	2 - 8	4 - 10
	5	0 - 6	0 - 6	1 - 7	4 - 10	6 - 12
	6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15
	7	0 - 6	2 - 8	4 - 10	8 - 14	12 - 18
	8	0 - 6	4 - 10	6 - 12	10 - 16	15 - 21
	9	4 - 10	6 - 12	8 - 14	12 - 18	18 - 24
Zone B	10	6 - 12	8 - 14	10 - 16	15 - 21	21 - 27
	11	8 - 14	10 - 16	12 - 18	18 - 24	24 - 30
	12	10 - 16	12 - 18	15 - 21	21 - 27	27 - 33
Zone C	13	12 - 18	15 - 21	18 - 24	24 - 30	30 - 37
	14	15 - 21	18 - 24	21 - 27	27 - 33	33 - 41
	15	18 - 24	21 - 27	24 - 30	30 - 37	37 - 46
	16	21 - 27	24 - 30	27 - 33	33 - 41	41 - 51
	17	24 - 30	27 - 33	30 - 37	37 - 46	46 - 57
	18	27 - 33	30 - 37	33 - 41	41 - 51	51 - 63
	19	30 - 37	33 - 41	37 - 46	46 - 57	57 - 71
	20	33 - 41	37 - 46	41 - 51	51 - 63	63 - 78
	21	37 - 46	41 - 51	46 - 57	57 - 71	70 - 87
	22	41 - 51	46 - 57	51 - 63	63 - 78	77 - 96
	23	46 - 57	51 - 63	57 - 71	70 - 87	84 - 105
	24	51 - 63	57 - 71	63 - 78	77 - 96	92 - 115
Zone D	25	57 - 71	63 - 78	70 - 87	84 - 105	100 - 125
	26	63 - 78	70 - 87	78 - 97	92 - 115	110 - 137
	27	70 - 87	78 - 97	87 - 108	100 - 125	120 - 150
	28	78 - 97	87 - 108	97 - 121	110 - 137	130 - 162
	29	87 - 108	97 - 121	108 - 135	121 - 151	140 - 175
	30	97 - 121	108 - 135	121 - 151	135 - 168	151 - 188
	31	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210
	32	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235
	33	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262
	34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293
	35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327
	36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365
37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	
38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	
39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	
40	292 - 365	324 - 405	360 - life	360 - life	360 - life	
41	324 - 405	360 - life	360 - life	360 - life	360 - life	
42	360 - life	360 - life	360 - life	360 - life	360 - life	
43	life	life	life	life	life	

Commentary to Sentencing Table

Application Notes:

1. *The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "Life" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24-30 months of imprisonment.*
2. *In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.*
3. *The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 270); November 1, 1991 (see Appendix C, amendment 418); November 1, 1992 (see Appendix C, amendment 462).

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PART B - PROBATION

Introductory Commentary

The Comprehensive Crime Control Act of 1984 makes probation a sentence in and of itself. 18 U.S.C. § 3561. Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.

Historical Note: Effective November 1, 1987.

§5B1.1. Imposition of a Term of Probation

- (a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:
 - (1) the applicable guideline range is in Zone A of the Sentencing Table; or
 - (2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).
- (b) A sentence of probation may not be imposed in the event:
 - (1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);
 - (2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);
 - (3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

Commentary

Application Notes:

1. *Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:*
 - (a) Where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months). In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

- (b) Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months). In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2-8 months. In such case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totalling at least two months.
2. Where the applicable guideline range is in Zone C or D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is eight months or more), the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).

Background: This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of "split sentences" impossible pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be "achieved by a more direct and logically consistent route" by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a "straight" probationary term is authorized and those where probation is prohibited.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 302); November 1, 1992 (see Appendix C, amendment 462).

§5B1.2. Term of Probation

- (a) When probation is imposed, the term shall be:
- (1) at least one year but not more than five years if the offense level is 6 or greater;
 - (2) no more than three years in any other case.

Commentary

Background: This section governs the length of a term of probation. Subject to statutory restrictions, the guidelines provide that a term of probation may not exceed three years if the offense level is less than 6. If a defendant has an offense level of 6 or greater, the guidelines provide that a term of probation be at least one year but not more than five years. Although some distinction in the length of a term of probation is warranted based on the circumstances of the case, a term of probation may also be used to enforce conditions such as fine or restitution payments, or attendance in a program

of treatment such as drug rehabilitation. Often, it may not be possible to determine the amount of time required for the satisfaction of such payments or programs in advance. This issue has been resolved by setting forth two broad ranges for the duration of a term of probation depending upon the offense level. Within the guidelines set forth in this section, the determination of the length of a term of probation is within the discretion of the sentencing judge.

Historical Note: Effective November 1, 1987.

§5B1.3. Conditions of Probation

- (a) If a term of probation is imposed, the court shall impose a condition that the defendant shall not commit another federal, state, or local crime during the term of probation. 18 U.S.C. § 3563(a)(1). The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3).
- (b) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing and (2) involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing. 18 U.S.C. § 3563(b). Recommended conditions are set forth in §5B1.4.
- (c) If a term of probation is imposed for a felony, the court shall impose at least one of the following as a condition of probation: a fine, an order of restitution, or community service, 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). 18 U.S.C. § 3563(a)(2).
- (d) Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. 18 U.S.C. § 3563(b)(11). Intermittent confinement shall be credited toward the guideline term of imprisonment at §5C1.1 as provided in the schedule at §5C1.1(e).

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).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 273, 274, and 302).

§5B1.4. Recommended Conditions of Probation and Supervised Release (Policy Statement)

- (a) The following "standard" conditions (1-13) are generally recommended for both probation and supervised release:

- (1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
- (2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- (3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- (4) the defendant shall support his dependents and meet other family responsibilities;
- (5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- (6) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- (7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- (8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
- (9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- (10) the defendant shall permit a probation officer to visit him at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- (11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- (12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- (13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

- (b) The following "special" conditions of probation and supervised release (14-24) are either recommended or required by law under the circumstances described, or may be appropriate in a particular case:

(14) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense, it is recommended that the court impose a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(15) Restitution

If the court imposes an order of restitution, it is recommended that the court impose a condition requiring the defendant to make payment of restitution or adhere to a court ordered installment schedule for payment of restitution. See §5E1.1 (Restitution).

(16) Fines

If the court imposes a fine, it is recommended that the court impose a condition requiring the defendant to pay the fine or adhere to a court ordered installment schedule for payment of the fine.

(17) Debt Obligations

If an installment schedule of payment of restitution or fines is imposed, it is recommended that the court impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(18) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine, it is recommended that the court impose a condition requiring the defendant to provide the probation officer access to any requested financial information.

(19) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation or supervised release. See §5F1.1 (Community Confinement).

(20) Home Detention

Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(21) Community Service

Community service may be imposed as a condition of probation or supervised release. See §5F1.3 (Community Service).

(22) Occupational Restrictions

Occupational restrictions may be imposed as a condition of probation or supervised release. See §5F1.5 (Occupational Restrictions).

(23) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol, it is recommended that the court impose a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(24) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment, it is recommended that the court impose a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(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.

Commentary

Application Note:

1. *Home detention, as defined by §5F1.3, may only be used as a substitute for imprisonment. See §5C1.1 (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.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 271, 272, and 302).

PART C - IMPRISONMENT

§5C1.1. Imposition of a Term of Imprisonment

- (a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.
- (b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.
- (c) If the applicable guideline range is in Zone B of the Sentencing Table, 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 subsection (e), provided that at least one month is satisfied by imprisonment; or
 - (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).
- (d) If the applicable guideline range is in Zone C of the Sentencing Table, 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 subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.
- (e) Schedule of Substitute Punishments:
 - (1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);
 - (2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;
 - (3) One day of home detention for one day of imprisonment.
- (f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Commentary

Application Notes:

1. Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33-41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.
2. Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.
3. Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (*i.e.*, the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than six months), the court has three options:

It may impose a sentence of imprisonment.

It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4-10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4-10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4-10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4. *Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is eight, nine, or ten months), the court has two options:*

It may impose a sentence of imprisonment.

Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 8-14 months, a sentence of four months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 8-14 months, both a sentence of four months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of five months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

5. *Subsection (e) sets forth a schedule of imprisonment substitutes.*
6. *There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.*
7. *The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above. Generally, such defendants have failed to reform despite the use of such alternatives.*
8. *Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is twelve months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection(e).*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 51); November 1, 1989 (see Appendix C, amendments 271, 275, and 302); November 1, 1992 (see Appendix C, amendment 462).

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PART D - SUPERVISED RELEASE

§5D1.1. Imposition of a Term of Supervised Release

- (a) The court shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute.
- (b) The court may order a term of supervised release to follow imprisonment in any other case.

Commentary

Application Notes:

1. *Subsection 5D1.1(a) requires imposition of supervised release following any sentence of imprisonment for a term of more than one year or if required by a specific statute. While there may be cases within this category that do not require post release supervision, these cases are the exception and may be handled by a departure from this guideline.*
2. *Under §5D1.1(b), the court may impose a term of supervised release in cases involving imprisonment for a term of one year or less. The court may consider the need for a term of supervised release to facilitate the reintegration of the defendant into the community; to enforce a fine, restitution order, or other condition; or to fulfill any other purpose authorized by statute.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 302).

§5D1.2. Term of Supervised Release

- (a) If a defendant is convicted under a statute that requires a term of supervised release, the term shall be at least three years but not more than five years, or the minimum period required by statute, whichever is greater.
- (b) Otherwise, when a term of supervised release is ordered, the length of the term shall be:
 - (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.

Commentary

Background: This section specifies the length of a term of supervised release that is to be imposed. Subsection (a) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release. Subsection (b) applies to all other statutes.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 52); November 1, 1989 (see Appendix C, amendment 302).

§5D1.3. Conditions of Supervised Release

- (a) If a term of supervised release is imposed, the court shall impose a condition that the defendant not commit another federal, state, or local crime. 18 U.S.C. § 3583(d). The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3).
- (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).
- (c) Recommended conditions of supervised release are set forth in §5B1.4.

Commentary

Background: This section applies to conditions of supervised release. The conditions generally recommended for supervised release are those recommended for probation. See §5B1.4. 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).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 276, 277, and 302).

PART E - RESTITUTION, FINES, ASSESSMENTS, FORFEITURES

§5E1.1. Restitution

- (a) The court shall --
- (1) enter a restitution order if such order is authorized under 18 U.S.C. §§ 3663-3664; or
 - (2) if a restitution order would be authorized under 18 U.S.C. §§ 3663-3664, except for the fact that the offense of conviction is not an offense set forth in Title 18, United States Code, or 49 U.S.C. § 1472(h), (i), (j), or (n), impose a term of probation or supervised release with a condition requiring restitution.
- (b) *Provided*, that the provisions of subsection (a) do not apply when full restitution has been made, or to the extent the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process.
- (c) If a defendant is ordered to make restitution and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.
- (d) 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).

Commentary

Background: Section 3553(a)(7) of Title 18 requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Section 3556 of Title 18 authorizes the court to impose restitution in accordance with 18 U.S.C. §§ 3663 and 3664, which authorize restitution for violations of Title 18 and of designated subdivisions of 49 U.S.C. § 1472. For other offenses, restitution may be imposed as a condition of probation or supervised release. See 18 U.S.C. § 3563(b)(3) as amended by Section 7110 of Pub. L. No. 100-690 (1988).

Subsection (a)(1) of this guideline requires the court to order restitution for offenses under Title 18, United States Code, or 49 U.S.C. § 1472(h), (i), (j), or (n), unless full restitution has already been made or "the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution . . . outweighs the need to provide restitution to any victims." 18 U.S.C. § 3663(d). If the court does not order restitution, or orders only partial restitution, it must state its reasons for doing so. 18 U.S.C. § 3553(c).

In determining whether to impose an order of restitution, and the amount of restitution, the court shall consider the amount of loss the victim suffered as a result of the offense, the financial resources of the defendant, the financial needs of the defendant and his dependents, and other factors the court deems appropriate. 18 U.S.C. § 3664(a).

Pursuant to Rule 32(c)(2)(D), Federal Rules of Criminal Procedure, the probation officer's presentence investigation report must contain a victim impact statement. That report must contain information about the financial impact on the victim and the defendant's financial condition. The sentencing judge may base findings on the presentence report or other testimony or evidence supported by a preponderance of the evidence. 18 U.S.C. § 3664(d).

A court's authority to deny restitution is limited. Even "in those unusual cases where the precise amount owed is difficult to determine, section 3579(d) authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim." S. Rep. No. 532, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2537.

Unless the court orders otherwise, restitution must be made immediately. 18 U.S.C. § 3663(f)(3). The court may permit the defendant to make restitution within a specified period or in specified installments, provided that the last installment is paid not later than the expiration of probation, five years after the end of the defendant's term of imprisonment, or in any other case five years after the date of sentencing. 18 U.S.C. § 3663(f)(1) and (2). The restitution order should specify the manner in which, and the persons to whom, payment is to be made.

Subsection (a)(2) provides for restitution as a condition of probation or supervised release for offenses not set forth in Title 18, United States Code, or 49 U.S.C. § 1472(h), (i), (j), or (n).

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 53); November 1, 1989 (see Appendix C, amendments 278, 279, and 302); November 1, 1991 (see Appendix C, amendment 383).

§5E1.2. Fines for Individual Defendants

- (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.
- (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. 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.
- (c) (1) The minimum of the fine range is the amount shown in column A of the table below.
- (2) Except as specified in (4) below, the maximum of the fine range is the amount shown in column B of the table below.

(3)

Fine Table

<u>Offense Level</u>	<u>A Minimum</u>	<u>B Maximum</u>
3 and below	\$100	\$5,000
4-5	\$250	\$5,000
6-7	\$500	\$5,000

8-9	\$1,000	\$10,000
10-11	\$2,000	\$20,000
12-13	\$3,000	\$30,000
14-15	\$4,000	\$40,000
16-17	\$5,000	\$50,000
18-19	\$6,000	\$60,000
20-22	\$7,500	\$75,000
23-25	\$10,000	\$100,000
26-28	\$12,500	\$125,000
29-31	\$15,000	\$150,000
32-34	\$17,500	\$175,000
35-37	\$20,000	\$200,000
38 and above	\$25,000	\$250,000.

- (4) Subsection (c)(2), limiting the maximum fine, does not apply if the defendant is convicted under a statute authorizing (A) a maximum fine greater than \$250,000, or (B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized by the statute.
- (d) In determining the amount of the fine, the court shall consider:
- (1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;
 - (2) any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;
 - (3) the burden that the fine places on the defendant and his dependents relative to alternative punishments;
 - (4) any restitution or reparation that the defendant has made or is obligated to make;
 - (5) any collateral consequences of conviction, including civil obligations arising from the defendant's conduct;
 - (6) whether the defendant previously has been fined for a similar offense; and
 - (7) any other pertinent equitable considerations.
- (e) The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.
- (f) If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider

alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances.

- (g) If the defendant establishes that payment of the fine in a lump sum would have an unduly severe impact on him or his dependents, the court should establish an installment schedule for payment of the fine. The length of the installment schedule generally should not exceed twelve months, and shall not exceed the maximum term of probation authorized for the offense. The defendant should be required to pay a substantial installment at the time of sentencing. If the court authorizes a defendant sentenced to probation or supervised release to pay a fine on an installment schedule, the court shall require as a condition of probation or supervised release that the defendant pay the fine according to the schedule. The court also may impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit unless he is in compliance with the payment schedule.
- (h) If the defendant knowingly fails to pay a delinquent fine, the court shall resentence him in accordance with 18 U.S.C. § 3614.
- (i) Notwithstanding of the provisions of subsection (c) of this section, but subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered.

Commentary

Application Notes:

1. *A fine may be the sole sanction if the guidelines do not require a term of imprisonment. If, however, the fine is not paid in full at the time of sentencing, it is recommended that the court sentence the defendant to a term of probation, with payment of the fine as a condition of probation. If a fine is imposed in addition to a term of imprisonment, it is recommended that the court impose a term of supervised release following imprisonment as a means of enforcing payment of the fine.*
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. *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.*

4. *The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.*

Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (e.g., by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted.

5. *Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others: 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to \$8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to \$4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of \$500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C. § 1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. § 1319(c), which authorizes a fine of up to \$50,000 per day for violations of the Water Pollution Control Act; 42 U.S.C. § 6928(d), which authorizes a fine of up to \$50,000 per day for violations of the Resource Conservation Act; and 42 U.S.C. § 7413(c), which authorizes a fine of up to \$25,000 per day for violations of the Clean Air Act.*
6. *The existence of income or assets that the defendant failed to disclose may justify a larger fine than that which otherwise would be warranted under §5E1.2. The court may base its conclusion as to this factor on information revealing significant unexplained expenditures by the defendant or unexplained possession of assets that do not comport with the defendant's reported income. If the court concludes that the defendant willfully misrepresented all or part of his income or assets, it may increase the offense level and resulting sentence in accordance with Chapter Three, Part C (Obstruction).*
7. *Subsection (i) provides for an additional fine sufficient to pay the costs of any imprisonment, probation, or supervised release ordered, subject to the defendant's ability to pay as prescribed in subsection (f). In making a determination as to the amount of any fine to be imposed under this provision, the court may be guided by reports published by the Bureau of Prisons and the Administrative Office of the United States Courts concerning average costs.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 54); November 1, 1989 (see Appendix C, amendments 280, 281, and 302); November 1, 1990 (see Appendix C, amendment 356); November 1, 1991 (see Appendix C, amendment 384).

§5E1.3. Special Assessments

A special assessment must be imposed on a convicted defendant in the amount prescribed by statute.

Commentary

Background: *The Victims of Crime Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires the courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation. Monies deposited in the fund are awarded to the states by the Attorney General for victim assistance and compensation programs. 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.*

With respect to offenses committed prior to November 18, 1988, the court is required to impose assessments in the following amounts:

- \$25, if the defendant is an individual convicted of a misdemeanor;*
- \$50, if the defendant is an individual convicted of a felony;*
- \$100, if the defendant is an organization convicted of a misdemeanor; and*
- \$200, if the defendant is an organization convicted of a felony. 18 U.S.C. § 3013.*

The Act does not authorize the court to waive imposition of the assessment.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 282 and 302).

§5E1.4. Forfeiture

Forfeiture is to be imposed upon a convicted defendant as provided by statute.

Commentary

Background: *Forfeiture provisions exist in various statutes. For example, 18 U.S.C. § 3554 requires the court imposing a sentence under 18 U.S.C. § 1962 (proscribing the use of the proceeds of racketeering activities in the operation of an enterprise engaged in interstate commerce) or Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (proscribing the manufacture and distribution of controlled substances) to order the forfeiture of property in accordance with 18 U.S.C. § 1963 and 21 U.S.C. § 853, respectively. Those provisions require the automatic forfeiture of certain property upon conviction of their respective underlying offenses.*

In addition, the provisions of 18 U.S.C. §§ 3681-3682 authorizes the court, in certain circumstances, to order the forfeiture of a violent criminal's proceeds from the depiction of his crime in a book, movie, or other medium. Those sections authorize the deposit of proceeds in an escrow account in the Crime Victims Fund of the United States Treasury. The money is to remain available in the account for five years to satisfy claims brought against the defendant by the victim(s) of his offenses. At the end of the five-year period, the court may require that any proceeds remaining in the account be released from escrow and paid into the Fund. 18 U.S.C. § 3681(c)(2).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 302).

§5E1.5. Costs of Prosecution (Policy Statement)

Costs of prosecution shall be imposed on a defendant as required by statute.

Commentary

Background: Various statutes require the court to impose the costs of prosecution: 7 U.S.C. § 13 (larceny or embezzlement in connection with commodity exchanges); 21 U.S.C. § 844 (simple possession of controlled substances) (unless the court finds that the defendant lacks the ability to pay); 26 U.S.C. § 7201 (attempt to defeat or evade income tax); 26 U.S.C. § 7202 (willful failure to collect or pay tax); 26 U.S.C. § 7203 (willful failure to file income tax return, supply information, or pay tax); 26 U.S.C. 7206 (fraud and false statements); 26 U.S.C. § 7210 (failure to obey summons); 26 U.S.C. § 7213 (unauthorized disclosure of information); 26 U.S.C. § 7215 (offenses with respect to collected taxes); 26 U.S.C. § 7216 (disclosure or use of information by preparers of returns); 26 U.S.C. § 7232 (failure to register or false statement by gasoline manufacturer or producer); 42 U.S.C. § 1302c-9 (improper FOIA disclosure); 43 U.S.C. § 942-6 (rights of way for Alaskan wagon roads).

Historical Note: Effective November 1, 1992 (see Appendix C, amendment 463).

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PART F - SENTENCING OPTIONS

§5F1.1. Community Confinement

Community confinement may be imposed as a condition of probation or supervised release.

Commentary

Application Notes:

1. "Community confinement" means residence in a community treatment center, halfway house, restitution center, mental health facility, alcohol or drug rehabilitation center, or other community facility; and participation in gainful employment, employment search efforts, community service, vocational training, treatment, educational programs, or similar facility-approved programs during non-residential hours.
2. Community confinement generally should not be imposed for a period in excess of six months. A longer period may be imposed to accomplish the objectives of a specific rehabilitative program, such as drug rehabilitation. The sentencing judge may impose other discretionary conditions of probation or supervised release appropriate to effectuate community confinement.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 302).

§5F1.2. Home Detention

Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment.

Commentary

Application Notes:

1. "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.
2. 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.

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.*

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.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 271 and 302).

§5F1.3. Community Service

Community service may be ordered as a condition of probation or supervised release.

Commentary

Application Note:

1. *Community service generally should not be imposed in excess of 400 hours. Longer terms of community service impose heavy administrative burdens relating to the selection of suitable placements and the monitoring of attendance.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 283 and 302); November 1, 1991 (see Appendix C, amendment 419).

§5F1.4. Order of Notice to Victims

The court may order the defendant to pay the cost of giving notice to victims pursuant to 18 U.S.C. § 3555. This cost may be set off against any fine imposed if the court determines that the imposition of both sanctions would be excessive.

Commentary

Background: In cases where a defendant has been convicted of an offense involving fraud or "other intentionally deceptive practices," the court may order the defendant to "give reasonable notice and explanation of the conviction, in such form as the court may approve" to the victims of the offense. 18 U.S.C. § 3555. The court may order the notice to be given by mail, by advertising in specific

areas or through specific media, or by other appropriate means. In determining whether a notice is appropriate, the court must consider the generally applicable sentencing factors listed in 18 U.S.C. § 3553(a) and the cost involved in giving the notice as it relates to the loss caused by the crime. The court may not require the defendant to pay more than \$20,000 to give notice.

If an order of notice to victims is under consideration, the court must notify the government and the defendant. 18 U.S.C. § 3553(d). Upon motion of either party, or on its own motion, the court must: (1) permit the parties to submit affidavits and memoranda relevant to the imposition of such an order; (2) provide counsel for both parties the opportunity to address orally, in open court, the appropriateness of such an order; and (3) if it issues such an order, state its reasons for doing so. The court may also order any additional procedures that will not unduly complicate or prolong the sentencing process.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 284 and 302).

§5F1.5. Occupational Restrictions

- (a) The court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that:
 - (1) a reasonably direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction; and
 - (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.
- (b) If the court decides to impose a condition of probation or supervised release restricting a defendant's engagement in a specified occupation, business, or profession, the court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public.

Commentary

Background: *The Comprehensive Crime Control Act authorizes the imposition of occupational restrictions as a condition of probation, 18 U.S.C. § 3563(b)(6), or supervised release, 18 U.S.C. § 3583(d). Pursuant to section 3563(b)(6), a court may require a defendant to:*

[R]efrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances.

Section 3583(d) incorporates this section by reference. The Senate Judiciary Committee Report on the Comprehensive Crime Control Act explains that the provision was "intended to be used to preclude the continuation or repetition of illegal activities while avoiding a bar from employment that

exceeds that needed to achieve that result." S. Rep. No. 225, 98th Cong., 1st Sess. 96-97. The condition "should only be used as reasonably necessary to protect the public. It should not be used as a means of punishing the convicted person." *Id.* at 96. Section 5F1.5 accordingly limits the use of the condition and, if imposed, limits its scope, to the minimum reasonably necessary to protect the public.

The appellate review provisions permit a defendant to challenge the imposition of a probation condition under 18 U.S.C. § 3563(b)(6) if "the sentence includes . . . a more limiting condition of probation or supervised release under section 3563(b)(6) . . . than the maximum established in the guideline." 18 U.S.C. § 3742(a)(3)(A). The government may appeal if the sentence includes a "less limiting" condition of probation than the minimum established in the guideline. 18 U.S.C. § 3742(b)(3)(A).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 285 and 302); November 1, 1991 (see Appendix C, amendment 428).

§5F1.6. Denial of Federal Benefits to Drug Traffickers and Possessors

The court, pursuant to 21 U.S.C. § 862, 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. § 862(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. § 862 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. § 862(a)(1) (for distribution offenses) and (b)(1) (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. § 862(a)(1)(C) (unless suspended by the court under 21 U.S.C. § 862(c)).

Subsection (b)(2) of 21 U.S.C. § 862 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. § 862 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. § 862 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."

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 305); November 1, 1992 (see Appendix C, amendment 464).

§5F1.7. Shock Incarceration Program (Policy Statement)

The court, pursuant to 18 U.S.C. §§ 3582(a) and 3621(b)(4), may recommend that a defendant who meets the criteria set forth in 18 U.S.C. § 4046 participate in a shock incarceration program.

Commentary

Section 4046 of Title 18, United States Code, provides --

- "(a) the Bureau of Prisons may place in a shock incarceration program any person who is sentenced to a term of more than 12, but not more than 30 months, if such person consents to that placement.*
- (b) For such initial portion of the term of imprisonment as the Bureau of Prisons may determine, not to exceed six months, an inmate in the shock incarceration program shall be required to -*
 - (1) adhere to a highly regimented schedule that provides the strict discipline, physical training, hard labor, drill, and ceremony characteristic of military basic training; and*
 - (2) participate in appropriate job training and educational programs (including literacy programs) and drug, alcohol, and other counseling programs.*
- (c) An inmate who in the judgment of the Director of the Bureau of Prisons has successfully completed the required period of shock incarceration shall remain in the custody of the Bureau for such period (not to exceed the remainder of the prison term otherwise required by law to be served by that inmate), and under such conditions, as the Bureau deems appropriate. 18 U.S.C. § 4046."*

The Bureau of Prisons has issued an operations memorandum (174-90 (5390), November 20, 1990) that outlines eligibility criteria and procedures for the implementation of this program (which the Bureau of Prisons has titled "intensive confinement program"). Under these procedures, the Bureau will not place a defendant in an intensive confinement program unless the sentencing court has approved, either at the time of sentencing or upon consultation after the Bureau has determined that the defendant is otherwise eligible. In return for the successful completion of the "intensive confinement" portion of the program, the defendant is eligible to serve the remainder of his term of

imprisonment in a graduated release program comprised of community corrections center and home confinement phases.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 424).

PART G - IMPLEMENTING THE TOTAL SENTENCE OF IMPRISONMENT

§5G1.1. Sentencing on a Single Count of Conviction

- (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).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 286).

§5G1.2. Sentencing on Multiple Counts of Conviction

- (a) The sentence to be imposed on a count for which the statute mandates a consecutive sentence shall be determined and imposed independently.
- (b) Except as otherwise required by law (see §5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.
- (c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

- (d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law.

Commentary

This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences ("total punishment") is determined by the adjusted combined offense level. To the extent possible, the total punishment is to be imposed on each count. Sentences on all counts run concurrently, except as required to achieve the total sentence, or as required by law.

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.

Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence. If no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment.

Counts for which a statute mandates a consecutive sentence, such as counts charging the use of a firearm in a violent crime (18 U.S.C. § 924(c)) are treated separately. The sentence imposed on such a count is the sentence indicated for the particular offense of conviction. That sentence then runs consecutively to the sentences imposed on the other counts. See Commentary to §§2K2.4 and 3D1.2 regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 287 and 288).

§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

- (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- (b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

- (c) (Policy Statement) In any other case, the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense.

Commentary

Application Notes:

1. Under subsection (a), the court shall impose a consecutive sentence where the instant offense (or any part thereof) was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.
2. Subsection (b) (which may apply only if subsection (a) does not apply), addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under §1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur, for example, where a defendant is prosecuted in both federal and state court, or in two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course of conduct.

When a sentence is imposed pursuant to subsection (b), the court should adjust for any term of imprisonment already served as a result of the conduct taken into account in determining the sentence for the instant offense. Example: The defendant has been convicted of a federal offense charging the sale of 40 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine that is part of the same course of conduct for which the defendant has been convicted and sentenced in state court (the defendant received a nine-month sentence of imprisonment, of which he has served six months at the time of sentencing on the instant federal offense). The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 55 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six months on the related state charge, a sentence of seven months, imposed to run concurrently with the remainder of the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guidelines because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody.

3. Where the defendant is subject to an undischarged term of imprisonment in circumstances other than those set forth in subsections (a) or (b), subsection (c) applies and the court shall impose a consecutive sentence to the extent necessary to fashion a sentence resulting in a reasonable incremental punishment for the multiple offenses. In some circumstances, such incremental punishment can be achieved by the imposition of a sentence that is concurrent with the remainder of the unexpired term of imprisonment. In such cases, a consecutive sentence is not required. To the extent practicable, the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence of imprisonment 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. It is recognized that this determination frequently will require an approximation. 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. Where the offense resulting in the undischarged term of imprisonment is a federal offense for which a guideline determination has previously been made, the task will be somewhat more straightforward, although even in such cases a precise determination may not be possible.

It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process. Additionally, this methodology does not, itself, require the court to depart from the guideline range established for the instant federal offense. Rather, this methodology is meant to assist the court in determining the appropriate sentence (e.g., the appropriate point within the applicable guideline range, whether to order the sentence to run concurrently or consecutively to the undischarged term of imprisonment, or whether a departure is warranted). Generally, the court may achieve an appropriate sentence through its determination of an appropriate point within the applicable guideline range for the instant federal offense, combined with its determination of whether that sentence will run concurrently or consecutively to the undischarged term of imprisonment.

Illustrations of the Application of Subsection (c):

- (A) *The guideline range applicable to the instant federal offense is 24-30 months. The court determines that a total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is an indeterminate sentence of imprisonment with a 60-month maximum. At the time of sentencing on the instant federal offense, the defendant has served ten months on the undischarged term of imprisonment. In this case, a sentence of 26 months' imprisonment to be served concurrently with the remainder of the undischarged term of imprisonment would (1) be within the guideline range for the instant federal offense, and (2) achieve an appropriate total punishment (36 months).*
- (B) *The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is a six-month determinate sentence. At the time of sentencing on the instant federal offense, the defendant has served three months on the undischarged term of imprisonment. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would (1) be within the guideline range for the instant federal offense, and (2) achieve an appropriate total punishment (36 months).*
- (C) *The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 60 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is a 12-month determinate sentence. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would be the greatest sentence imposable without departure for the instant federal offense.*
- (D) *The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is an indeterminate sentence with a 60-month maximum. At the time of sentencing on the instant federal offense, the*

defendant has served 22 months on the undischarged term of imprisonment. In this case, a sentence of 24 months to be served concurrently with the remainder of the undischarged term of imprisonment would be the lowest sentence imposable without departure for the instant federal offense.

Background: *This guideline provides direction to the court when a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment. See 18 U.S.C. § 3584. Except in the cases in which subsection (a) applies, this guideline is intended to result in an appropriate incremental punishment for the instant offense that most nearly approximates the sentence that would have been imposed had all the sentences been imposed at the same time.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 289); November 1, 1991 (see Appendix C, amendment 385); November 1, 1992 (see Appendix C, amendment 465).

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PART H - SPECIFIC OFFENDER CHARACTERISTICS

Introductory Commentary

The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range and, in certain cases, to the determination of a sentence within the applicable guideline range. Under 28 U.S.C. § 994(d), the Commission is directed to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined to be relevant by the Commission.

The Commission has determined that certain factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release).

In addition, 28 U.S.C. § 994(e) 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.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 357); November 1, 1991 (see Appendix C, amendment 386).

§5H1.1. Age (Policy Statement)

Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse).

The guidelines are not applicable to a person sentenced as a juvenile delinquent under the provisions of 18 U.S.C. § 5037.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386).

§5H1.2. Education and Vocational Skills (Policy Statement)

Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. See §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386).

§5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program (see recommended condition (24) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386).

§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse (Policy Statement)

Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse is not a reason for imposing a sentence below the guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see recommended condition (23) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

Similarly, where a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (see recommended condition (23) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386).

§5H1.5. Employment Record (Policy Statement)

Employment record is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Employment record may be relevant in determining the conditions of probation or supervised release (e.g., the appropriate hours of home detention).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386).

§5H1.6. Family Ties and Responsibilities, and Community Ties (Policy Statement)

Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 386).

§5H1.7. Role in the Offense (Policy Statement)

A defendant's role in the offense is relevant in determining the appropriate sentence. See Chapter Three, Part B (Role in the Offense).

Historical Note: Effective November 1, 1987.

§5H1.8. Criminal History (Policy Statement)

A defendant's criminal history is relevant in determining the appropriate sentence. See Chapter Four (Criminal History and Criminal Livelihood).

Historical Note: Effective November 1, 1987.

§5H1.9. Dependence upon Criminal Activity for a Livelihood (Policy Statement)

The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. See Chapter Four, Part B (Career Offenders and Criminal Livelihood).

Historical Note: Effective November 1, 1987.

§5H1.10. Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)

These factors are not relevant in the determination of a sentence.

Historical Note: Effective November 1, 1987.

§5H1.11. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)

Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 386).

§5H1.12. Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range.

Historical Note: Effective November 1, 1992 (see Appendix C, amendment 466).

PART J - RELIEF FROM DISABILITY

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 55).

§5J1.1. 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.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 56).

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PART K - DEPARTURES

1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

- (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
 - (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
 - (3) the nature and extent of the defendant's assistance;
 - (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
 - (5) the timeliness of the defendant's assistance.

Commentary

Application Notes:

1. *Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.*
2. *The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.*
3. *Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.*

Background: *A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge*

must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 290).

§5K1.2. Refusal to Assist (Policy Statement)

A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 291).

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2. OTHER GROUNDS FOR DEPARTURE

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 358).

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

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists 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." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range

more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 57); November 1, 1990 (see Appendix C, amendment 358).

§5K2.1. Death (Policy Statement)

If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

Historical Note: Effective November 1, 1987.

§5K2.2. Physical Injury (Policy Statement)

If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in §5K2.1.

Historical Note: Effective November 1, 1987.

§5K2.3. Extreme Psychological Injury (Policy Statement)

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

Historical Note: Effective November 1, 1987.

§5K2.4. Abduction or Unlawful Restraint (Policy Statement)

If a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime, the court may increase the sentence above the authorized guideline range.

Historical Note: Effective November 1, 1987.

§5K2.5. Property Damage or Loss (Policy Statement)

If the offense caused property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

Historical Note: Effective November 1, 1987.

§5K2.6. Weapons and Dangerous Instrumentalities (Policy Statement)

If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

Historical Note: Effective November 1, 1987.

§5K2.7. Disruption of Governmental Function (Policy Statement)

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

Historical Note: Effective November 1, 1987.

§5K2.8. Extreme Conduct (Policy Statement)

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

Historical Note: Effective November 1, 1987.

§5K2.9. Criminal Purpose (Policy Statement)

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.

Historical Note: Effective November 1, 1987.

§5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

- (a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;
- (b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;
- (c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;
- (d) the danger actually presented to the defendant by the victim; and

- (e) any other relevant conduct by the victim that substantially contributed to the danger presented.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

Historical Note: Effective November 1, 1987.

§5K2.11. Lesser Harms (Policy Statement)

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

Historical Note: Effective November 1, 1987.

§5K2.12. Coercion and Duress (Policy Statement)

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence.

Historical Note: Effective November 1, 1987.

§5K2.13. Diminished Capacity (Policy Statement)

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

Historical Note: Effective November 1, 1987.

§5K2.14. Public Welfare (Policy Statement)

If national security, public health, or safety was significantly endangered, the court may increase the sentence above the guideline range to reflect the nature and circumstances of the offense.

Historical Note: Effective November 1, 1987.

§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.

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 292).

§5K2.16. Voluntary Disclosure of Offense (Policy Statement)

If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted. For example, a downward departure under this section might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 420).