

SUPPLEMENT TO APPENDIX C - AMENDMENTS TO THE GUIDELINES MANUAL

This supplement to Appendix C presents the amendments to the guidelines, policy statements, and official commentary effective November 1, 1998.

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

For amendments to the guidelines, policy statements, and official commentary effective November 1, 1997 and earlier, see the main volume of Appendix C.

AMENDMENTS

576. Section 2B1.1(b) is amended by adding at the end the following new subdivision:

"(8) If the offense involved theft of property from a national cemetery, increase by 2 levels."

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by adding at the end the following new paragraph:

"'National cemetery' means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior."

The Commentary to §2B1.1 captioned "Background" is amended by adding at the end the following new paragraph:

" Subsection (b)(8) implements the instruction to the Commission in section 2 of Public Law 105-101."

Section 2B1.3(b) is amended by adding at the end the following new subdivision:

"(4) If property of a national cemetery was damaged or destroyed, increase by 2 levels."

The Commentary to §2B1.3 captioned "Application Notes" is amended in Note 1 by adding at the end the following new paragraph:

"'National cemetery' means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior."

The Commentary to §2B1.3 captioned "Background" is amended by inserting before the first paragraph the following:

" Subsection (b)(4) implements the instruction to the Commission in section 2 of Public Law 105–101."

Section 2K1.4(b) is amended by striking "Characteristic" and inserting "Characteristics"; and by adding at the end the following new subdivision:

"(2) If the base offense level is not determined under (a)(4), and the offense occurred on a national cemetery, increase by 2 levels."

The Commentary to §2K1.4 is amended by adding at the end the following new application note and background commentary:

"4. 'National cemetery' means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

Background: Subsection (b)(2) implements the directive to the Commission in section 2 of Public Law 105–101."

The purpose of this amendment is to provide an increase for property offenses committed against national cemeteries. This amendment implements the directive to the Commission in the Veterans' Cemetery Protection Act of 1997, Pub. L. 105–101, § 2, 111 Stat. 2202, 2202 (1997). This Act directs the Commission to provide a sentence enhancement of not less than two levels for any offense against the property of a national cemetery. In response to the legislation, this amendment adds a two-level enhancement to §§2B1.1 (Theft), 2B1.3 (Property Destruction), and 2K1.4 (Arson). "National cemetery" is defined in the same way as that term is defined in the statute. **The effective date of this amendment is November 1, 1998.**

577. Section 2F1.1(b) is amended by striking subdivision (5) in its entirety as follows:

"(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12."

and inserting:

- "(5) (A) If the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) if a substantial part of a fraudulent scheme was committed from outside the United States; or (C) if the offense otherwise involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12."

Section 2F1.1(b) is amended by adding at the end the following new subdivision:

- "(7) If the offense was committed through mass-marketing, increase by 2 levels."

The Commentary to §2F1.1 captioned "Application Notes" is amended by redesignating Notes 14 through 18, as Notes 15 through 19, respectively; and by inserting after Note 13 the following new Note 14:

- "14. For purposes of subsection (b)(5)(B), 'United States' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(5)(C), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment."

The Commentary to §2F1.1 captioned "Application Notes" is amended by adding at the end the following new note:

- "20. 'Mass-marketing,' as used in subsection (b)(7), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies."

Section 2T1.1(b) is amended by striking subdivision (2) in its entirety as follows:

- "(2) If sophisticated means were used to impede discovery of the existence or

extent of the offense, increase by 2 levels.",

and inserting the following:

"(2) If the offense involved sophisticated concealment, increase by 2 levels."

The Commentary to §2T1.1 captioned "Application Notes" is amended by striking Note 4 in its entirety as follows:

"4. 'Sophisticated means,' as used in subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities."

and inserting the following:

"4. For purposes of subsection (b)(2), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment."

Section 2T1.4(b) is amended by striking subdivision (2) in its entirety as follows:

"(2) If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.",

and inserting the following:

"(2) If the offense involved sophisticated concealment, increase by 2 levels."

The Commentary to §2T1.4 captioned "Application Notes" is amended by striking Note 3 in its entirety as follows:

"3. 'Sophisticated means,' as used in §2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts or transactions through corporate shells or fictitious entities."

and inserting the following:

- "3. For purposes of subsection (b)(2), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment."

Section 2T3.1(b) is amended by striking subdivision (1) in its entirety as follows:

- "(1) If sophisticated means were used to impede discovery of the nature or existence of the offense, increase by 2 levels."

and inserting the following:

- "(1) If the offense involved sophisticated concealment, increase by 2 levels."

The Commentary to §2T3.1 captioned "Application Notes" is amended by adding at the end the following new note:

- "3. For purposes of subsection (b)(1), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment."

This amendment has three purposes: (1) to provide an increase for fraud offenses that use mass-marketing to carry out the fraud; (2) to provide an increase for fraud offenses that involve conduct, such as sophisticated concealment, that makes it difficult for law enforcement authorities to discover the offense or apprehend the offender; and (3) to clarify and conform an existing enhancement that provides an increase for tax offenses that similarly involve sophisticated concealment.

First, this amendment adds a two-level enhancement in the fraud guideline for offenses that are committed through mass-marketing. The Commission identified mass-marketing as a central component of telemarketing fraud and also determined that there were other fraudulent schemes that relied on mass-marketing to perpetrate the offense (for example, Internet fraud). Accordingly, rather than provide a limited enhancement for telemarketing fraud only, the Commission determined that a generally applicable specific offense characteristic in the fraud guideline would better provide consistent and proportionate sentencing increases for similar types of fraud, while also ensuring increased sentences for persons who engage in mass-marketed telemarketing fraud.

Second, this amendment provides an increase for fraud offenses that involve conduct, such as

sophisticated concealment, that makes it difficult for law enforcement authorities to discover the offense or apprehend the offenders. The new enhancement provides a two-level increase and a "floor" offense level of level 12 in the fraud guideline and replaces the current enhancement for "the use of foreign bank accounts or transactions to conceal the true nature or extent of fraudulent conduct." There are three alternative provisions to the enhancement. The first two prongs address conduct that the Commission has been informed often relates to telemarketing fraud, although the conduct also may occur in connection with fraudulent schemes perpetrated by other means. Specifically, the Commission has been informed that fraudulent telemarketers increasingly are conducting their operations from Canada and other locations outside the United States. Additionally, testimony offered at a Commission hearing on telemarketing fraud indicated that telemarketers often relocate their schemes to other jurisdictions once they know or suspect that enforcement authorities have discovered the scheme. Both types of conduct are specifically covered by the new enhancement. The third prong provides an increase if any offense covered by the fraud guideline otherwise involves sophisticated concealment. This prong addresses cases in which deliberate steps are taken to make the offense, or its extent, difficult to detect.

Third, this amendment provides a two-level enhancement for conduct related to sophisticated concealment of a tax offense. The primary purpose of this amendment is to conform the language of the current enhancement for "sophisticated means" in the tax guidelines to the essentially equivalent language of the new sophisticated concealment enhancement provided in the fraud guideline. Additionally, the amendment resolves a circuit conflict regarding whether the enhancement applies based on the personal conduct of the defendant or the overall offense conduct for which the defendant is accountable. Consistent with the usual relevant conduct rules, application of this new enhancement for sophisticated concealment accordingly is based on the overall offense conduct for which the defendant is accountable. **The effective date of this amendment is November 1, 1998.**

578. Section 2K2.1(a) is amended in subdivision (4) by striking "the defendant" after "20, if"; in subdivision (4)(A) by inserting "the defendant" before "had one"; in subdivision (4)(B) by striking "is a prohibited person, and"; and in subdivision (4)(B) by inserting "; and the defendant (i) is a prohibited person; or (ii) is convicted under 18 U.S.C. § 922(d)" after "§ 921(a)(30)".

Section 2K2.1(a)(6) is amended by inserting "(A)" after "defendant"; and by inserting "; or (B) is convicted under 18 U.S.C. § 922(d)" after "person".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 6 by striking "or" before "(vi)"; and by inserting "; or (vii) has been convicted in any court of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33)" after "§ 922(d)(8)".

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 12 in the first

paragraph by striking "924(j) or (k), or 26 U.S.C. § 5861(g) or (h)" and inserting "924 (l) or (m)"; and in the second paragraph by striking "only" after "if the"; and by inserting "or 26 U.S.C. § 5861(g) or (h)" after "922(k)".

This amendment has three purposes: (1) to change the definition of "prohibited person" in the firearms guideline so that it includes a person convicted of a misdemeanor crime of domestic violence; (2) to provide the same base offense levels for both a prohibited person and a person who is convicted under 18 U.S.C. § 922(d) of transferring a firearm to a prohibited person; and (3) to make several technical and conforming changes to the firearms guideline.

The first part of the amendment amends Application Note 6 of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to include a person convicted of a misdemeanor crime of domestic violence within the scope of "prohibited person" for purposes of that guideline. It also defines "misdemeanor crime of domestic violence" by reference to the new statutory definition of that term in 18 U.S.C. § 921(a).

This part of the amendment addresses section 658 of the Treasury, Postal Service, and General Government Appropriations Act, Pub. L. 104–208, 110 Stat. 3009 (1996) (contained in the Omnibus Consolidated Appropriations Act for Fiscal Year 1997). Section 658 amended 18 U.S.C. § 922(d) to prohibit the sale of a firearm or ammunition to a person who has been convicted in any court of a misdemeanor crime of domestic violence. It also amended 18 U.S.C. § 922(g) to prohibit a person who has been convicted in any court of a misdemeanor crime of domestic violence from transporting or receiving a firearm or ammunition. Section 922(s)(3)(B)(i), which lists the information a person not licensed under 18 U.S.C. § 923 must include in a statement to the handgun importer, manufacturer, or dealer, was amended to require certification that the person to whom the gun is transferred was not convicted in any court of a misdemeanor crime of domestic violence. Section 658 also amended 18 U.S.C. § 921(a) to define "misdemeanor crime of domestic violence".

Violations of 18 U.S.C. § 922(d) and (g) are covered by §2K2.1. The new provisions at § 922(d) (sale of a firearm to a "prohibited person") and § 922(g) (transporting, possession, and receipt of a firearm by a "prohibited person") affect Application Note 6 of §2K2.1, which defines "prohibited person". This part of the amendment conforms Application Note 6 of §2K2.1 to the new statutory provisions.

The second part of this amendment increases the base offense level for a defendant who is convicted under 18 U.S.C. § 922(d), which prohibits the transfer of a firearm to a prohibited person. Specifically, this part amends the two alternative base offense levels that pertain to prohibited persons in the firearms guideline in order to make those offense levels applicable to the person who transfers the firearm to the prohibited person. A person who is convicted under 18 U.S.C. § 922(d) has been shown beyond a reasonable doubt either to have known, or to have had reasonable cause to believe, that the transferee was a prohibited person.

The third part of this amendment makes two technical and conforming changes in Application Note 12 of §2K2.1. First, the amendment corrects statutory references to 18 U.S.C. § 924(j) and (k), which were added as a result of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, 108 Stat. 1796 (1994). In the Economic Espionage Act of 1996, Pub. L. 104–294, 110 Stat. 3488 (1996), Congress again amended 18 U.S.C. § 924 and redesignated the provisions as subsections (l) and (m). The amendment conforms Application Note 12 to that redesignation. Second, the amendment corrects the misplacement of the reference to 26 U.S.C. § 5861(g) and (h). **The effective date of this amendment is November 1, 1998.**

579. The Commentary to §2J1.6 captioned "Application Notes" is amended in Note 3 in the first paragraph by striking "3D1.2" and inserting "3D1.1"; and by striking the second paragraph in its entirety as follows:

"Otherwise, in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under §3D1.2(c). Note that although 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, it does require that any sentence of imprisonment on a failure to appear count be imposed consecutively to any other sentence of imprisonment. Therefore, in such cases, the combined sentence must be constructed to provide a 'total punishment' that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, where the combined applicable guideline range for both counts is 30-37 months and the court determines a 'total punishment' of 36 months is appropriate, a sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy these requirements."

and inserting the following as the new second paragraph:

"In the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense, and the failure to appear count and the count or counts for the underlying offense are grouped together under §3D1.2(c). (Note that 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a 'total punishment' that satisfies the

requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30-37 months and the court determines that a ‘total punishment’ of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months’ sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. § 3146(b)(2).)”).

The Commentary to §2J1.6 captioned "Application Notes" is amended by redesignating Note 4 as Note 5; and by inserting the following as new Note 4:

"4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (e.g., perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under §3C1.1 (Obstruction of Justice) is made because of the operation of the rules set out in Application Note 3."

The Commentary to §2P1.2 captioned "Application Notes" is amended in Note 2 by striking "as amended," after "18 U.S.C. § 1791(c),"; and by inserting "by the inmate" after "served".

The Commentary to §2P1.2 captioned "Application Notes" is amended in Note 2 by inserting before the first paragraph the following:

"In a case in which the defendant is convicted of the underlying offense and an offense involving providing or possessing a controlled substance in prison, group the offenses together under §3D1.2(c). (Note that 18 U.S.C. § 1791(b) does not require a sentence of imprisonment, although if a sentence of imprisonment is imposed on a count involving providing or possessing a controlled substance in prison, section 1791(c) requires that the sentence be imposed to run consecutively to any other sentence of imprisonment for the controlled substance. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a ‘total punishment’ that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 1791(c). For example, if the combined applicable guideline range for both counts is 30-37 months and the court determines a ‘total punishment’ of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months’ sentence for the providing or possessing a controlled substance in prison count would satisfy these requirements."

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 6 by striking "Where" and inserting "If"; and by striking "where" both places it appears and inserting "if".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 7 in the first sentence by striking "Where" and inserting "If"; by striking "both of the" and inserting "both of an"; by inserting "(e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally))" after "obstruction offense" the first place it appears; and by striking "the underlying" the first place it appears and inserting "an underlying".

Section 3D1.1(b) is amended by striking the first sentence in its entirety as follows:

"Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§3D1.2-3D1.5.",

and inserting the following:

"Exclude from the application of §§3D1.2-3D1.5 any count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment."

The Commentary to §3D1.1 captioned "Application Note" is amended by striking Note 1 in its entirety as follows:

"1. Counts for which a statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Convictions on such counts are not used in the determination of a combined offense level under this Part, but may affect the offense level for other counts. A conviction for 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence) provides a common example. In the case of a conviction under 18 U.S.C. § 924(c), the specific offense characteristic for weapon use in the primary offense is to be disregarded to avoid double counting. See Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). Example: The defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together, and the offense level for the bank robbery count is computed without application of an enhancement for weapon possession or use. The mandatory five-year sentence on the weapon-use count runs consecutively, as required by law. See §5G1.2(a).",

and inserting the following:

"1. Subsection (b) applies if a statute (A) specifies a term of imprisonment to be

imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory term of five years to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However, a count covered by subsection (b) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. See §5G1.2(a).

Unless specifically instructed, subsection (b) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (i.e., the statute does not otherwise require a term of imprisonment to be imposed). See, e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 924(a)(4) (regarding penalty for 18 U.S.C. § 922(q) (possession or discharge of a firearm in a school zone)); 18 U.S.C. § 1791(c) (penalty for providing or possessing a controlled substance in prison). Accordingly, the multiple count rules set out under this Part do apply to a count of conviction under this type of statute."

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 1 in the third sentence by striking "mandates imposition of a consecutive sentence" and inserting "(A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment"; and by inserting "; id., comment. (n.1)" after "§3D1.1(b)".

Section 5G1.2(a) is amended by striking "mandates a consecutive sentence" and inserting "(1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment"; and by inserting "by that statute" after "determined".

The Commentary to §5G1.2 is amended in the last paragraph by striking the first three sentences as follows:

"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."

and inserting the following:

"Subsection (a) applies if a statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory term of five years to run consecutively to any other term of imprisonment). The term of years to be imposed consecutively is determined by the statute of conviction, and is independent of a guideline sentence on any other count."

The Commentary to §5G1.2 is amended in the last paragraph in the fourth sentence by inserting "e.g.," after "See"; and by adding at the end the following new sentence:

"Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence."

The purpose of this amendment is to clarify how several guideline provisions, including those on grouping multiple counts of conviction, work together to ensure an incremental, consecutive penalty for a failure to appear count. This amendment addresses a circuit conflict regarding whether the guideline procedure of grouping the failure to appear count of conviction with the count of conviction for the underlying offense violates the statutory mandate of imposing a consecutive sentence. Compare United States v. Agoro, 996 F.2d 1288 (1st Cir. 1993) (grouping rules apply), and United States v. Flores, No. 93-3771, 1994 WL 163766 (6th Cir. May 2, 1994) (unpublished) (same), with United States v. Packer, 70 F.3d 357 (5th Cir. 1995) (grouping rules defeat statutory purposes of 18 U.S.C. § 3146), cert. denied, 117 S. Ct. 75 (1996). The amendment maintains the current grouping rules for failure to appear and obstruction of justice, but addresses internal inconsistencies among different guidelines and explains how the guideline provisions work together to ensure an incremental, consecutive penalty for the failure to appear count. Specifically, the amendment (1) more clearly distinguishes between statutes that require imposition of a consecutive term of imprisonment only if imprisonment is imposed (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1791(b), (c) (Penalty for providing or possessing contraband in prison)), and statutes that require both a minimum term of imprisonment and a consecutive sentence (e.g., 18 U.S.C. § 924(c) (Use of a firearm in relation to crime of violence or drug trafficking offense)); (2) states that the method outlined for determining a sentence for failure to appear and similar statutes ensures an incremental, consecutive punishment; (3) adds an upward departure provision if offense conduct involves multiple obstructive acts; (4) makes conforming changes in §2P1.2 (Providing or Possessing Contraband in Prison) because the relevant statute, 18 U.S.C. § 1791, is similar to 18 U.S.C. § 3146; and (5) makes conforming

changes in §§3C1.1, 3D1.1, 3D1.2, and 5G1.2. **The effective date of this amendment is November 1, 1998.**

580. The Commentary to §3B1.3 captioned "Application Notes" is amended in the first paragraph of Note 1 in the third sentence by striking "enhancement" and inserting "adjustment"; by inserting "public or private" after "position of"; in the fourth sentence by striking "would apply" and inserting "applies"; and in the last sentence by striking "would" and inserting "does."

The Commentary to §3B1.3 captioned "Application Notes" is amended by redesignating Note 2 as Note 3; and by inserting the following as new Note 2:

- "2. This adjustment also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not. For example, the adjustment applies in the case of a defendant who (A) perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker; or (B) perpetrates a fraud by representing falsely to a patient or employer that the defendant is a licensed physician. In making the misrepresentation, the defendant assumes a position of trust, relative to the victim, that provides the defendant with the same opportunity to commit a difficult-to-detect crime that the defendant would have had if the position were held legitimately."

The Commentary to §3B1.3 captioned "Background" is amended by inserting after the first sentence the following:

- "The adjustment also applies to persons who provide sufficient indicia to the victim that they legitimately hold a position of public or private trust when, in fact, they do not."

The purpose of this amendment is to establish that the two-level increase for abuse of a position of trust applies to a defendant who is an imposter, as well as to a person who legitimately holds and abuses a position of trust. This amendment resolves a circuit conflict on that issue. Compare United States v. Gill, 99 F.3d 484 (1st Cir. 1996) (adjustment applied to defendant who posed as licensed psychologist), and United States v. Queen, 4 F.3d 925 (10th Cir. 1993) (adjustment applied to defendant who posed as financial broker), cert. denied, 510 U.S. 1182 (1994), with United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994) (defendant who poses as physician does not occupy a position of trust). The amendment adopts the majority appellate view and provides that the abuse of position of trust adjustment applies to an imposter who pretends to hold a position of trust when in fact he does not. The Commission has determined that, particularly from the perspective of the crime victim, an imposter who falsely assumes and takes advantage of a position of trust is as culpable and

deserving of increased punishment as is a defendant who abuses an actual position of trust.
The effective date of this amendment is November 1, 1998

581. Section 3C1.1 is amended by inserting "(A)" after "If"; by inserting "the course of" after "during"; and by inserting "of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense" after "instant offense".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 2 by striking "enhancement" each place it appears, and inserting "adjustment"; in the second sentence by striking "Note 3" and inserting "Note 4"; in the third sentence by striking "Note 4" and inserting "Note 5"; and in the fourth sentence by striking "Notes 3 and 4" and inserting "Notes 4 and 5".

The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 in the first paragraph by striking "Note 7" and inserting "Note 8".

The Commentary to §3C1.1 captioned "Application Notes" is amended by redesignating Notes 1 through 8, as Notes 2 through 9, respectively; and by inserting the following as new Note 1:

- "1. This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant."

The purpose of this amendment is to clarify what the term "instant offense" means in the obstruction of justice guideline, §3C1.1. This amendment resolves a circuit conflict on the issue of whether the adjustment applies to obstructions that occur in cases closely related to the defendant's case or only those specifically related to the offense of which the defendant convicted. Compare United States v. Powell, 113 F.3d 464 (3d Cir.) (adjustment applies if defendant attempts to impede the prosecution of a co-defendant who is charged with the same offense for which defendant was convicted), cert. denied, 118 S. Ct. 454 (1997), United States v. Walker, 119 F.3d 403 (6th Cir.) (same), cert. denied, 118 S. Ct. 643 (1997), United States v. Acuna, 9 F.3d 1442 (9th Cir. 1993) (adjustment applies if defendant attempts to obstruct justice in a case closely related to his own), and United States v. Bernaugh, 969 F.2d 858 (10th Cir. 1992) (adjustment applies when defendant testifies falsely at his own hearing about co-defendants' roles in the offense), with United States v. Perdomo, 927 F.2d 111 (2d Cir. 1991) (cannot apply adjustment based on obstructive conduct outside the scope of charged offense), and United States v. Partee, 31 F.3d 529 (7th Cir. 1994) (same). The amendment, which adopts the majority view, instructs that the obstruction must relate either to the defendant's offense of conviction (including any relevant conduct) or to a closely related case.

The amendment also clarifies the temporal element of the obstruction guideline (*i.e.*, that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant's offense of conviction). **The effective date of this amendment is November 1, 1998.**

582. The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 (redesignated as Note 5 by Amendment 581) in the first sentence of the first paragraph by striking "enhancement" and inserting "adjustment"; and by inserting "or affect the determination of whether other guideline adjustments apply (*e.g.*, §3E1.1 (Acceptance of Responsibility))" after "guideline range"; in the second sentence by striking "enhancement" and inserting "adjustment"; in subdivision (d) by striking the period at the end and inserting a semicolon; and by adding at the end the following new subdivision:

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

The purpose of this amendment is to establish that lying to a probation officer about drug use while released on bail does not warrant an obstruction of justice adjustment under §3C1.1. This amendment resolves a circuit conflict on that issue. Compare *United States v. Belletiere*, 971 F.2d 961 (3d Cir. 1992) (lying about drug use is not obstructive conduct that impedes government's investigation of instant offense), and *United States v. Thompson*, 944 F.2d 1331 (7th Cir. 1991) (same), cert. denied, 502 U.S. 1097 (1992), with *United States v. Garcia*, 20 F.3d 670 (6th Cir. 1994) (falsely denying drug use, while not outcome-determinative, is relevant), cert. denied, 513 U.S. 1159 (1995). The amendment, which adopts the majority view, excludes from application of §3C1.1 a defendant's denial of drug use while on pre-trial release, although the amendment provides that such conduct may be relevant in determining the application of other guidelines, such as §3E1.1 (Acceptance of Responsibility). **The effective date of this amendment is November 1, 1998.**

583. Section 5K2.13 is amended by striking the text in its entirety as follows:

"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."

and inserting:

"A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note:

1. For purposes of this policy statement—

'Significantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful."

The purpose of this amendment is to allow (except under certain circumstances) a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity. This amendment addresses a circuit conflict regarding whether the diminished capacity departure is precluded if the defendant committed a "crime of violence" as that term is defined in the career offender guideline. Compare United States v. Poff, 926 F.2d 588 (7th Cir.) (en banc) (definition of "non-violent offense" necessarily excludes a crime of violence), cert. denied, 502 U.S. 827 (1991), United States v. Maddalena, 893 F.2d 815 (6th Cir. 1989) (same), United States v. Mayotte, 76 F.3d 887 (8th Cir. 1996) (same), United States v. Borrayo, 898 F.2d 91 (9th Cir. 1989) (same), and United States v. Dailey, 24 F.3d 1323 (11th Cir. 1994) (same), with United States v. Chatman, 986 F.2d 1446 (D.C. Cir. 1993) (court must consider all the facts and circumstances to determine whether offense was non-violent; terms are not mutually exclusive), United States v. Weddle, 30 F.3d 532 (4th Cir. 1994) (same), and United States v. Askari, 140 F.3d 536 (3d Cir. 1998) (en banc) ("non-violent offenses" are those that do not involve a reasonable perception that force against persons may be used in committing the offense), abrogating United States v. Rosen, 896 F.2d 789 (3d Cir. 1990) (non-violent offense means the opposite of crime of violence). The amendment replaces the current policy statement with a new provision that essentially represents a compromise approach to the circuit conflict. The new policy statement allows a diminished capacity departure if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity, except under the following three circumstances: (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other

intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. The amendment also adds an application note that defines "significantly reduced mental capacity" in accord with the decision in United States v. McBroom, 124 F.3d 533 (3d Cir. 1997). The McBroom court concluded that "significantly reduced mental capacity" included both cognitive impairments (i.e., an inability to understand the wrongfulness of the conduct or to exercise the power of reason) and volitional impairments (i.e., an inability to control behavior that the person knows is wrongful). The application note specifically includes both types of impairments in the definition of "significantly reduced mental capacity". **The effective date of this amendment is November 1, 1998.**

584. Section 5B1.3(d) is amended by adding at the end the following new subdivision:

"(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge."

Section 5D1.3(d) is amended by adding at the end the following new subdivision:

"(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge."

Section 5D1.3(e)(5) is amended by striking "to provide just punishment for the offense,".

Section 5B1.3(c) is amended by inserting "(Policy Statement)" before "The following".

Section 5B1.3(d) is amended by inserting "(Policy Statement)" before "The following".

Section 5B1.3(e) is amended in the title by adding "(Policy Statement)" at the end.

Section 5D1.3(c) is amended by inserting "(Policy Statement)" before "The following".

Section 5D1.3(d) is amended by inserting "(Policy Statement)" before "The following".

Section 5D1.3(e) is amended in the title by adding "(Policy Statement)" at the end.

The purpose of this amendment is to make several technical and conforming changes to the guidelines relating to conditions of probation and supervised release. The amendment has three parts. First, the amendment adds to §§5B1.3 and 5D1.3 a condition of probation and supervised release regarding deportation, in response to section 374 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L 104–208, 110 Stat. 3009 (1996). That section amended 18 U.S.C. § 3563(b) to add a new discretionary condition of probation with respect to deportation. Second, this amendment deletes the reference in the supervised release guideline to "just punishment" as a reason for the imposition of curfew as a condition of supervised release. The need to provide "just punishment" is not included in 18 U.S.C. § 3583(c) as a permissible factor to be considered in imposing a term of supervised release. Third, this amendment amends the guidelines pertaining to conditions of probation and supervised release to indicate that discretionary (as opposed to mandatory) conditions are advisory policy statements of the Commission, not binding guidelines. **The effective date of this amendment is November 1, 1998.**

585. Section 5K2.0 is amended in the first paragraph in the first sentence by inserting a comma after "3553(b)"; by striking "guideline" and inserting "guidelines"; in the second sentence by striking "guidelines" and inserting "guideline range"; in the third sentence by striking "controlling" after "The"; by striking "can only be made by the courts" and inserting "rests with the sentencing court on a case-specific basis"; in the last sentence by inserting "determining" after "consideration in"; by striking "guidelines" the second place it appears and inserting "guideline range"; by striking "guideline level" and inserting "weight"; by inserting "under the guidelines" after "factor"; and by inserting before the period at the end "or excessive".

Section 5K2.0 is amended in the last paragraph by striking "An" and inserting "Finally, an"; by striking "not ordinarily relevant" and inserting ", in the Commission's view, 'not ordinarily relevant'"; and by striking "in a way that is important to the statutory purposes of sentencing".

The Commentary to §5K2.0 is amended by inserting before the first paragraph the following:

" The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. Koon v. United States, 116 S. Ct. 2035 (1996). Furthermore, '[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment

of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District Courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.' Id. at 2046-47."

The purpose of this amendment is to reference specifically in the general departure policy statement the United States Supreme Court's decision in United States v. Koon, 116 S. Ct. 2035 (1996). This amendment (1) incorporates the principal holding and key analytical points from the Koon decision into the general departure policy statement, §5K2.0; (2) deletes language inconsistent with the holding of Koon; and (3) makes minor, non-substantive changes that improve the precision of the language of §5K2.0. **The effective date of this amendment is November 1, 1998.**

586. Section 2B3.2(b) is amended in subdivision (2) by striking "(b)(6)" and inserting "(b)(7)".

The Commentary to §2K1.3 captioned "Application Note" is amended in Note 2 by striking " subsections (1) and (2)" and inserting " subsection (a), subsection (b)".

The Commentary to §2K2.1 captioned "Application Notes " is amended in Note 5 in the first sentence by striking " subsections (1) and (2)" and inserting "subsection (a), subsection (b)".

The Commentary to §6A1.3 is amended in the third paragraph by striking "117 U.S." after "Watts," both places it appears and inserting "117 S. Ct."

This amendment corrects technical errors in §§2B3.1, 2K2.1, and 6A1.3. **The effective date of this amendment is November 1, 1998.**

587. Section 2F1.1(b), as amended by amendment 577, is further amended by striking subdivision (3) and all that follows through the end of the subsection as follows:

- "(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.
- (4) If the offense involved (A) the conscious or reckless risk of serious bodily injury, or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

- (5) (A) If the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) if a substantial part of a fraudulent scheme was committed from outside the United States; or (C) if the offense otherwise involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

- (6) If the offense --
 - (A) substantially jeopardized the safety and soundness of a financial institution; or
 - (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

- (7) If the offense was committed through mass-marketing, increase by 2 levels.";

and inserting the following:

- "(3) If the offense was committed through mass-marketing, increase by 2 levels.

- (4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

- (5) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

- (6) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

- (7) If the offense --
 - (A) substantially jeopardized the safety and soundness of a financial

institution; or

- (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24."

The Commentary to §2F1.1 captioned "Application Notes ", as amended by amendment 577, is further amended by striking Application Note 14 and all that follows through the end of the Application Notes as follows:

- "14. For purposes of subsection (b)(5)(B), 'United States' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(5)(C), 'sophisticated concealment' means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment."

15. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.
16. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with

another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

17. 'The defendant derived more than \$1,000,000 in gross receipts from the offense,' as used in subsection (b)(7)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).
18. If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise.'
19. If subsection (b)(7)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved 'more than minimal planning.'
20. 'Mass-marketing,' as used in subsection (b)(7), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies."

and inserting the following:

- "15. For purposes of subsection (b)(5)(B), 'United States' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(5)(C), 'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.

The enhancement for sophisticated means under subsection (b)(5)(C) requires conduct that is significantly more complex or intricate than the conduct that may form the basis for an enhancement for more than minimal

planning under subsection (b)(2)(A).

If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

16. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.
17. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.
18. 'The defendant derived more than \$1,000,000 in gross receipts from the offense,' as used in subsection (b)(7)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. 'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).
19. If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise.'
20. If subsection (b)(7)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved 'more than minimal planning.'"

The Commentary to §2F1.1 captioned "Application Notes ", as amended by amendment 577, is further amended by redesignating Notes 3 through 13 as Notes 4 through 14, respectively; and by inserting after Note 2 the following new Note 3:

- "3. 'Mass-marketing,' as used in subsection (b)(3), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies."

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 1 by striking "§2F1.1(b)(3)" and inserting "§2F1.1(b)(4)"; in redesignated Note 5 (formerly Note 4), by striking "(b)(3)(A)" and inserting "(b)(4)(A)"; and in redesignated Note 6 (formerly Note 5), by striking "(b)(3)(B)" and inserting "(b)(4)(B)".

The Commentary to §2F1.1 captioned " Background " is amended by inserting after the fifth paragraph the following new paragraph:

" Subsection (b)(5) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184."

Section 3A1.1 is amended by striking subsection (b) in its entirety as follows:

- "(b) If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels."

and inserting:

- "(b) (1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.
- (2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels."

The Commentary to §3A1.1 captioned "Application Notes " is amended in Note 2 in the first paragraph by striking "'victim' includes any person" before "who is" and inserting "'vulnerable victim' means a person (A)"; and by inserting after "(Relevant Conduct)" the following:

"; and (B) who is unusually vulnerable due to age, physical or mental condition, or

who is otherwise particularly susceptible to the criminal conduct ".

The Commentary to §3A1.1 captioned "Application Notes" is amended in Note 2 in the second paragraph by striking "where" each place it appears and inserting "in which".

The Commentary to §3A1.1 captioned "Application Notes" is amended in Note 2 in the third paragraph by striking "offense guideline specifically incorporates this factor" and inserting "factor that makes the person a vulnerable victim is incorporated in the offense guideline".

The Commentary to §3A1.1 captioned "Background" is amended by adding at the end the following additional paragraph:

" Subsection (b)(2) implements, in a broader form, the instruction to the Commission in section 6(c)(3) of Public Law 105-184."

The Commentary to §2B5.1 captioned "Application Notes" is amended in Note 1 by inserting "United States " before "Virgin Islands ".

This amendment implements, in a broader form, the directives to the Commission in section 6 of the Telemarketing Fraud Prevention Act of 1998, Pub. L. 105-184 ("the Act").

The Act directs the Commission to provide for "substantially increased penalties" for telemarketing frauds. It also more specifically requires that the guidelines provide "an additional appropriate sentencing enhancement, if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States," and "an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to [telemarketing fraud victims over age 55], are affected by a fraudulent scheme or schemes."

This amendment responds to the directives by building upon the amendments to the fraud guideline, §2F1.1, that were submitted to Congress on May 1, 1998. (See amendment 577, supra.) Those amendments added a specific offense characteristic for "mass-marketing," which is defined to include telemarketing, and a specific offense characteristic for sophisticated concealment.

This amendment broadens the "sophisticated concealment" enhancement to cover "sophisticated means" of executing or concealing a fraud offense. In addition, the amendment increases the enhancement under the vulnerable victim guideline, §3A1.1, for offenses that impact a large number of vulnerable victims.

This amendment also makes a conforming amendment to §2B5.1 in the definition of "United States".

In designing enhancements that may apply more broadly than the Act's above-stated directives minimally require, the Commission acts consistently with other directives in the Act (e.g.,

section 6(c)(4) (requiring the Commission to ensure that its implementing amendments are reasonably consistent with other relevant directives to the Commission and other parts of the sentencing guidelines)) and with its basic mandate in sections 991 and 994 of title 28, United States Code (e.g., 28 U.S.C. § 991(b)(1)(B)) (requiring sentencing policies that avoid unwarranted disparities among similarly situated defendants)). **The effective date of this amendment is November 1, 1998.**

588. The Commentary to §2C1.4 captioned "Background" is amended by striking the last sentence as follows:

" Both offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year."

The Commentary to §2J1.1 captioned "Application Notes" is amended in Note 2 in the third sentence by inserting "(a)(1) and to any offense under 18 U.S.C. § 228(a)(2) and (3)" after "228"; and in the fourth sentence by inserting "(a)(1)" after "228".

This is a two-part amendment. First, this amendment amends the commentary in the contempt guideline, §2J1.1, pertaining to offenses under 18 U.S.C. § 228 involving the willful failure to pay court-ordered child support. The commentary notes that the contempt guideline applies to second and subsequent offenses under 18 U.S.C. § 228 because a first offense is a Class B misdemeanor not covered by the guidelines.

However, in the Deadbeat Parents Punishment Act of 1998, Pub. L. 105–187, Congress amended 18 U.S.C. § 228 to add two new violations of that section (found at 18 U.S.C. § 228(a)(2) and (3)) and to make even the first offense under those new violations a felony that would be subject to the guidelines. Accordingly, the commentary in the contempt guideline is amended to reflect that it is only the first offense under a violation of 18 U.S.C. § 228(a)(1) that is not covered by the guideline.

Second, this amendment updates and corrects the background commentary of §2C1.4, the guideline that covers offenses involving unlawful compensation for federal employees and bank officials. Currently the background commentary states that 18 U.S.C. § 209 (involving the unlawful supplementation of the salary of various federal employees) and 18 U.S.C. §1909 (prohibiting bank examiners from performing any service for compensation for banks or bank officials) both are misdemeanors for which the maximum term of imprisonment is one year. In fact, however, as a result of enacted legislation, the maximum term of imprisonment for violations of 18 U.S.C. § 209 is now five years if the conduct is willful. The amendment deletes the sentence of the commentary that describes the maximum term of imprisonment for these offenses. **The effective date of this amendment is November 1, 1998.**

589. Appendix A (Statutory Index) is amended in the line referenced to "18 U.S.C. § 924(i)" by striking " 2A1.1, 2A1.2" and inserting "2K2.1";

by striking:

"18 U.S.C. § 924(j)-(n) 2K2.1",

and inserting:

"18 U.S.C. § 924(j)(1) 2A1.1, 2A1.2",

"18 U.S.C. § 924(j)(2) 2A1.3, 2A1.4",

"18 U.S.C. § 924(k)-(o) 2K2.1";

and by inserting, after the line referenced to "18 U.S.C. § 2252" the following new line:

"18 U.S.C. § 2252A 2G2.2, 2G2.4".

This amendment updates the Statutory Index by adding a reference to a recently created offense (pertaining to the use of a computer to commit certain child pornography offenses) and by correcting the references to a number of firearms offenses in response to congressional redesignations of those offenses.

Specifically, Congress recently enacted 18 U.S.C. § 2252A, which makes it unlawful to traffic in, receive, or possess child pornography, including by computer. The amendment references this offense to §2G2.2 (trafficking in child pornography) and §2G2.4 (possession of child pornography).

In addition, in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, and the Economic Espionage Act of 1996, Pub. L. 104-294, Congress redesignated a number of firearms provisions in 18 U.S.C. § 924. The amendment changes the references in the Statutory Index to a number of these offenses in response to the congressional redesignations. **The effective date of this amendment is November 1, 1998.**