

APPENDIX C (Volume I) - AMENDMENTS TO THE GUIDELINES MANUAL

This Volume of Appendix C presents the amendments to the guidelines, policy statements, and official commentary promulgated effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997.*

For amendments effective after November 1, 1997, *see* Appendix C, Volume II.

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

AMENDMENTS

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

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

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

- "4. The offense level adjustments from more than one specific offense characteristic within an offense guideline are cumulative (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. E.g., in §2A2.2(b)(3), pertaining to degree of bodily injury, the subsection that best

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"existing practice," and "present practice," where used to denote sentencing practice prior to guidelines, have been replaced by the term "pre-guidelines practice" and conforming tense changes have been made in §2B3.1, comment.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

Effective Date: The effective date of this amendment is November 1, 1990.

In addition, citations to court cases have been updated, as appropriate, in the Manual and this Appendix.

describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subsections (A), (B), and (C)) are not added together."

Reason for Amendment: The purposes of this amendment are to correct a clerical error and to clarify the operation of the guidelines by consolidating the former §1B1.4 (Determining the Offense Level) with this section.

Effective Date: The effective date of this amendment is January 15, 1988.

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

Section 1B1.2(a) is amended by inserting the following additional sentence at the end of the subsection: "Similarly, stipulations to additional offenses are treated as if the defendant had been convicted of separate counts charging those offenses."

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

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

and inserting in lieu thereof:

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

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

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

and inserting in lieu thereof:

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

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purposes of this amendment are to correct a clerical error and

to clarify the operation of the guidelines.

Effective Date: The effective date of this amendment is January 15, 1988.

3. **Amendment:** Chapter One, Part B is amended by deleting §1B1.3 in its entirety as follows:

"§1B1.3. Relevant Conduct

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

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

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

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

Commentary

Application Note:

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

The first three criteria are derived from two sources, Rule 8(a) of the Federal Rules of Criminal Procedure, governing joinder of similar or related

offenses, and Rule 404(b) of the Federal Rules of Evidence, permitting admission of evidence of other crimes to establish motive, intent, plan, and common scheme. These rules provide standards that govern consideration at trial of crimes "of the same or similar character," and utilize concepts and terminology familiar to judges, prosecutors, and defenders. The governing standard should be liberally construed in favor of considering information generally appropriate to sentencing. When other crimes are inadmissible under the Rule 404(b) standard, such crimes may not be "relevant to the offense of conviction" under the criteria that determine this question for purposes of Chapter Two; such crimes would, however, be considered in determining the relevant offender characteristics to the extent authorized by Chapter Three (Adjustments), and Chapter Four (Criminal History and Criminal Livelihood) and Chapter Five, Part H (Specific Offender Characteristics). This construction is consistent with the existing rule that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense . . . for the purpose of imposing an appropriate sentence," 18 U.S.C. § 3577, so long as the information "has sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F. Supp. 751 (D. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983).

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

A replacement guideline with accompanying commentary is inserted as §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)).

Reason for Amendment: The purpose of this amendment is to clarify the guideline. The amended language restates the intent of §1B1.3 as originally promulgated.

Effective Date: The effective date of this amendment is January 15, 1988.

4. **Amendment:** Chapter One, Part B is amended by deleting §1B1.4 in its entirety as follows:

"§1B1.4. Determining the Offense Level

In determining the offense level:

- (a) determine the base offense level from Chapter Two;
- (b) make any applicable adjustments for specific offense characteristics from Chapter Two in the order listed;
- (c) make any applicable adjustments from Chapter Three;
- (d) make any applicable adjustments from Chapter Four, Part B (Career Offenders and Criminal Livelihood).

Commentary

Application Notes:

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

A replacement guideline with accompanying commentary is inserted as §1B1.4 (Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)).

Reason for Amendment: The purposes of this amendment are to remove material made redundant by the reorganization of this Part and to replace it with material that clarifies the operation of the guidelines. The material formerly in this section is now covered by §1B1.1.

Effective Date: The effective date of this amendment is January 15, 1988.

5. **Amendment:** Chapter One, Part B, is amended by inserting an additional guideline with accompanying commentary as §1B1.8 (Use of Certain Information).

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

Effective Date: The effective date of this amendment is June 15, 1988.

6. **Amendment:** Chapter One, Part B, is amended by inserting an additional guideline with accompanying commentary as §1B1.9 (Petty Offenses).

Reason for Amendment: The purpose of this guideline is to delete coverage of petty offenses.

Effective Date: The effective date of this amendment is June 15, 1988.

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

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline in respect to the determination of loss.

Effective Date: The effective date of this amendment is June 15, 1988.

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

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

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

and by renumbering Note 4 as Note 3.

Reason for Amendment: The purpose of this amendment is to correct a clerical error in the guideline. Correction of the error makes the deleted commentary unnecessary.

Effective Date: The effective date of this amendment is January 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is June 15, 1988.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline in respect to the determination of loss.

Effective Date: The effective date of this amendment is June 15, 1988.

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

Reason for Amendment: The purpose of the amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline in respect to the determination of loss.

Effective Date: The effective date of this amendment is June 15, 1988.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline in respect to the determination of loss.

Effective Date: The effective date of this amendment is June 15, 1988.

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

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 3 by deleting

"property" and inserting in lieu thereof "loss".

Reason for Amendment: The purpose of this amendment is to clarify the guideline in respect to the determination of loss.

Effective Date: The effective date of this amendment is June 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is June 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is January 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is January 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to correct a typographical error.

Effective Date: The effective date of this amendment is January 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is January 15, 1988.

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

"11. If it is uncertain whether the quantity of drugs involved falls into one category in the table or an adjacent category, the court may use the intermediate level for

sentencing purposes. For example, sale of 700-999 grams of heroin is at level 30, while sale of 400-699 grams is at level 28. If the exact quantity is uncertain, but near 700 grams, use of level 29 would be permissible."

Reason for Amendment: The purpose of this amendment is to delete an erroneous reference to interpolation, which cannot apply as the guideline is written.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

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

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to correct clerical errors in the guideline and commentary.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is January 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to correct a typographical error.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is June 15, 1988.

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is June 15, 1988.

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

The Commentary to §2E5.2 captioned "Application Notes" is amended in Note 1 by inserting immediately following the first sentence: "Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)."

Reason for Amendment: The purpose of this amendment is to clarify the guideline in respect to the determination of loss.

Effective Date: The effective date of this amendment is June 15, 1988.

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

The Commentary to §2E5.4 captioned "Application Notes" is amended in Note 1 by inserting immediately following the first sentence: "Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)."

Reason for Amendment: The purpose of this amendment is to clarify the guideline in respect to the determination of loss.

Effective Date: The effective date of this amendment is June 15, 1988.

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

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

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 7 by inserting

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

Reason for Amendment: The purposes of this amendment are to clarify the guideline in respect to the determination of loss and to delete an inadvertently included infraction.

Effective Date: The effective date of this amendment is June 15, 1988,

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

Reason for Amendment: The purpose of this amendment is to provide an alternative measure to be used in determining whether the material involved an extremely young minor for cases in which the actual age of the minor is unknown.

Effective Date: The effective date of this amendment is June 15, 1988.

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

- "1. By statute, a term of imprisonment imposed for this offense runs consecutively to any other term of imprisonment. 18 U.S.C. § 3147.
2. This guideline assumes that the sentence imposed for the offense committed while on release, which may have been imposed by a state court, is reasonably consistent with that which the guidelines would provide for a similar federal offense. If this is not the case, a departure may be warranted. See Chapter Five, Part K (Departures).
3. If the defendant was convicted in state court for the offense committed while on release, the term of imprisonment referred to in subdivision (b) is the maximum term of imprisonment authorized under state law.",

and inserting in lieu thereof:

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

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

Reason for Amendment: The purposes of this amendment are to clarify the commentary and to delete erroneous references.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

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

Reason for Amendment: The purpose of this amendment is to correct a clerical error. Correction of this error makes the deleted commentary unnecessary.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to make the guideline conform to the typical case.

Effective Date: The effective date of this amendment is January 15, 1988.

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

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 2 by deleting "bringing illegal aliens into the United States" and inserting in lieu thereof "smuggling,

transporting, or harboring an unlawful alien, or a related offense".

Reason for Amendment: The purpose of this amendment is to correct a clerical error in the guideline and conform the commentary to the corrected guideline.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the factors considered by the Commission in promulgating the guideline.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

"(b) Specific Offense Characteristic

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

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

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to delete coverage of a petty offense.

Effective Date: The effective date of this amendment is January 15, 1988.

39. **Amendment:** The Commentary to §2L2.2 captioned "Application Notes" is amended in Note 1

by deleting "an enhancement equivalent to that at §2L1.2(b)(1)," and inserting in lieu thereof "a result equivalent to §2L1.2."

Reason for Amendment: The purpose of this amendment is to make the commentary consistent with §2L1.2, as amended.

Effective Date: The effective date of this amendment is January 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to make the commentary consistent with §2L1.2, as amended.

Effective Date: The effective date of this amendment is January 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is January 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to correct a typographical error.

Effective Date: The effective date of this amendment is January 15, 1988.

- 43. Amendment:** Chapter Two, Part X is amended by deleting §2X5.1 in its entirety as follows:

"§2X5.1. Other Offenses (Policy Statement)

For offenses for which no specific guideline has been promulgated:

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

Commentary

Background: This policy statement addresses cases in which a defendant has been convicted of an offense for which no specific guideline has been written. For a felony

or a class A misdemeanor (see 18 U.S.C. §§ 3559(a) and 3581(b)), the court is directed to apply the most analogous guideline. If no sufficiently analogous guideline exists, the court is directed to sentence without reference to a specific guideline or guideline range, as provided in 18 U.S.C. § 3553(b).

For a class B or C misdemeanor or an infraction (see 18 U.S.C. §§ 3559(a) and 3581(b)) that is not covered by a specific guideline, the court is directed to sentence without reference to a specific guideline or guideline range, as provided in 18 U.S.C. § 3553(b). An inquiry as to whether there is a sufficiently analogous guideline that might be applied is not required. The Commission makes this distinction in treatment because for many lesser offenses (e.g., traffic infractions), generally handled under assimilative offense provisions by magistrates, there will be no sufficiently analogous guideline, and a case-by-case determination in respect to this issue for the high volume of cases processed each year would be unduly burdensome and would not significantly reduce disparity."

A replacement guideline with accompanying commentary is inserted as §2X5.1 (Other Offenses).

Reason for Amendment: The purposes of this amendment are to make the section a binding guideline (as the Commission originally intended with respect to felonies and Class A misdemeanors) rather than a policy statement, to delete language relating to petty offenses, and to conform and clarify the commentary.

Effective Date: The effective date of this amendment is June 15, 1988.

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

also applies where the guidelines deal with offenses that are continuing, e.g., §§2L1.3 and 2Q1.3(b)(1)(A).",

and inserting in lieu thereof:

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

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

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

Specifically excluded from the operation of this subsection are:

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

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is June 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is January 15, 1988.

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

Reason for Amendment: The purposes of this amendment are to correct a clerical error and to clarify the guideline.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

and inserting in lieu thereof:

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

The Commentary to §4B1.1 captioned "Background" is amended by deleting the last paragraph as follows:

"The guideline levels for career offenders were established by using the statutory maximum for the offense of conviction to determine the class of felony provided in 18 U.S.C. § 3559. Then the maximum authorized sentence of imprisonment for each

class of felony was determined as provided by 18 U.S.C. § 3581. A guideline range for each class of felony was then chosen so that the maximum of the guideline range was at or near the maximum provided in 18 U.S.C. § 3581."

Reason for Amendment: The purpose of this amendment is to correct the guideline so that the table relating offense statutory maxima to offense levels is consistent with the current authorized statutory maximum terms.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

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

and inserting in lieu thereof:

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

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

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

Reason for Amendment: The purposes of this amendment are to correct a clerical error and to clarify the guideline.

Effective Date: The effective date of this amendment is January 15, 1988.

- 50. Amendment:** Section 4B1.3 is amended by deleting:

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

and inserting in lieu thereof:

", unless §3E1.1 (Acceptance of Responsibility) applies, in which event his offense level

shall be not less than 11."

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

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

Reason for Amendment: The purpose of this amendment is to provide that the adjustment from §3E1.1 (Acceptance of Responsibility) applies to cases under §4B1.3 (Criminal Livelihood).

Effective Date: The effective date of this amendment is June 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to permit implementation of the longer terms of supervised release authorized by the Sentencing Act of 1987.

Effective Date: The effective date of this amendment is January 15, 1988.

53. **Amendment:** Section 5E4.1(a) is amended by inserting immediately before the period at the

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is January 15, 1988.

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

- "(b) The generally applicable minimum and maximum fine for each offense level is shown in the Fine Table in subsection (c) below. Unless a statute expressly authorizes a greater amount, no fine may exceed \$250,000 for a felony or a misdemeanor resulting in the loss of human life; \$25,000 for any other misdemeanor; or \$1,000 for an infraction. 18 U.S.C. § 3571(b)(1).
- (c) (1) The minimum fine range is the greater of:
 - (A) the amount shown in column A of the table below; or
 - (B) any monetary gain to the defendant, less any restitution made or ordered.
- (2) Except as specified in (4) below, the maximum fine is the greater of:
 - (A) the amount shown in column B of the table below;
 - (B) twice the estimated loss caused by the offense; or
 - (C) three times the estimated gain to the defendant.",

and inserting in lieu thereof:

- "(b) Except as provided in subsections (f) and (i) below, or otherwise required by statute, the fine imposed shall be within the range specified in subsection (c) below.
- (c) (1) The minimum of the fine range is the greater of:
 - (A) the amount shown in column A of the table below; or
 - (B) the pecuniary gain to the defendant, less restitution made or ordered.
- (2) Except as specified in (4) below, the maximum of the fine range is the greater of:
 - (A) the amount shown in column B of the table below;
 - (B) twice the gross pecuniary loss caused by the offense; or
 - (C) three times the gross pecuniary gain to all participants in the

offense."

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

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

and inserting in lieu thereof:

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

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

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purposes of this amendment are to make the guideline consistent with 18 U.S.C. § 3571, as amended, to clarify the commentary, and to correct clerical errors in the guideline and commentary.

Effective Date: The effective date of this amendment is January 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to eliminate the possible inference that this part covers only employment for compensation.

Effective Date: The effective date of this amendment is June 15, 1988.

- 56. Amendment:** Chapter Five, Part J is amended by deleting §5J1.1 in its entirety as follows:

"§5J1.1. Relief From Disability Pertaining to Certain Employment (Policy Statement)

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

A replacement policy statement is inserted as §5J1.1 (Relief from Disability Pertaining to Convicted Persons Prohibited from Holding Certain Positions (Policy Statement)).

Reason for Amendment: The purpose of this amendment is to clarify the policy statement and conform it to the pertinent provisions of the Sentencing Act of 1987.

Effective Date: The effective date of this amendment is June 15, 1988.

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

Reason for Amendment: The purpose of this amendment is to conform the quotation in this section to the wording in the Sentencing Act of 1987.

Effective Date: The effective date of this amendment is June 15, 1988.

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

"(b) The presentence report shall be disclosed to the defendant, counsel for the

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

Reason for Amendment: The purpose of this amendment is to delete material more properly covered elsewhere. See §6A1.2 (Disclosure of Presentence Report; Issues in Dispute (Policy Statement)).

Effective Date: The effective date of this amendment is June 15, 1988.

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

"Position of Parties with Respect to Sentencing Factors

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

and inserting in lieu thereof:

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

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

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

Effective Date: The effective date of this amendment is June 15, 1988.

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

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

Reason for Amendment: The purpose of this amendment is to make the statutory index more comprehensive.

Effective Date: The effective date of this amendment is January 15, 1988.

- 61. Amendment:** Appendix A is amended by deleting:

"16 U.S.C. § 703	2Q2.1",
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"16 U.S.C. § 707 2Q2.1",
and inserting in lieu thereof:
"16 U.S.C. § 707(b) 2Q2.1";
by deleting:
"18 U.S.C. § 112(a) 2A2.1, 2A2.2, 2A2.3",
and inserting in lieu thereof:
"18 U.S.C. § 112(a) 2A2.2, 2A2.3";
by deleting:
"18 U.S.C. § 510(a) 2B5.1",
and inserting in lieu thereof:
"18 U.S.C. § 510 2B5.2";
by deleting:
"18 U.S.C. § 1005 2F1.1, 2S1.3",
and inserting in lieu thereof:
"18 U.S.C. § 1005 2F1.1";
by deleting:
"18 U.S.C. § 1701 2B1.1, 2H3.3",
and inserting in lieu thereof:
"18 U.S.C. § 1700 2H3.3";
by deleting:
"18 U.S.C. § 2113(a) 2B1.1, 2B3.1",
and inserting in lieu thereof:
"18 U.S.C. § 2113(a) 2B1.1, 2B2.2, 2B3.1, 2B3.2";
by deleting "2B5.1," from the line beginning with "18 U.S.C. § 2314"; and
by deleting "2B5.1," from the line beginning with "18 U.S.C. § 2315".

Reason for Amendment: The purpose of this amendment is to correct clerical errors.

Effective Date: The effective date of this amendment is January 15, 1988.

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

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

Reason for Amendment: The purpose of this amendment is to make the statutory index more comprehensive.

Effective Date: The effective date of this amendment is June 15, 1988.

- 63. Amendment:** Appendix A is amended by deleting:

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

by deleting:

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

and inserting in lieu thereof:

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

by deleting:

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

by deleting:

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

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

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

and by deleting the first time it appears:

"50 U.S.C. App. § 462	2M4.1".
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Reason for Amendment: The purposes of this amendment are to correct clerical errors and delete inadvertently included statutes.

Effective Date: The effective date of this amendment is June 15, 1988.

- 64. Amendment:** Chapter Two, Part A is amended by inserting an additional guideline with accompanying commentary as §2A2.4 (Obstructing or Impeding Officers).

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

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

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

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

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

Reason for Amendment: The purpose of this amendment is to make the guidelines more comprehensive.

Effective Date: The effective date of this amendment is October 15, 1988.

- 65. Amendment:** Chapter Two, Part A is amended by inserting an additional guideline with accompanying commentary as §2A5.3 (Committing Certain Crimes Aboard Aircraft).

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

"49 U.S.C. § 1472(k)(1)	2A5.3".
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Reason for Amendment: The purpose of this amendment is to make the guidelines more comprehensive.

Effective Date: The effective date of this amendment is October 15, 1988.

66. Amendment: Chapter Two, Part D is amended by deleting §2D1.5 in its entirety as follows:

"§2D1.5. Continuing Criminal Enterprise

(a) Base Offense Level:

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

Commentary

Statutory Provision: 21 U.S.C. § 848.

Application Note:

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

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

A replacement guideline with accompanying commentary is inserted as §2D1.5 (Continuing Criminal Enterprise).

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

Effective Date: The effective date of this amendment is October 15, 1988.

67. Amendment: Chapter One, Part A (4)(b) is amended in the first sentence by deleting "... that

was" and inserting in lieu thereof "of a kind, or to a degree,".

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

Reason for Amendment: The purposes of this amendment are to conform the quotation to the statute, as amended by Section 3 of the Sentencing Act of 1987, and to correct a clerical error.

Effective Date: The effective date of this amendment is November 1, 1989.

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

"The first kind, which will most frequently be used, is in effect an interpolation between two adjacent, numerically oriented guideline rules. A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than requiring a court to force middle instances into either the 'serious' or the 'simple' category, the guideline commentary suggests that the court may interpolate and select a midpoint increase of three levels. The Commission has decided to call such an interpolation a 'departure' in light of the legal views that a guideline providing for a range of increases in offense levels may violate the statute's 25 percent rule (though other have presented contrary legal arguments). Since interpolations are technically departures, the courts will have to provide reasons for their selection, and it will be subject to review for 'reasonableness' on appeal. The Commission believes, however, that a simple reference by the court to the 'mid-category' nature of the facts will typically provide sufficient reason. It does not foresee serious practical problems arising out of the application of the appeal provisions to this form of departure.";

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purposes of this amendment are to clarify the guideline and conform the language to §1B1.2.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the treatment of a specific enhancement provision.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purposes of this amendment are to clarify the guideline and to make the phraseology of this subsection more consistent with that of §§1B1.1 and 1B1.2(b).

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline and commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

and by inserting the following additional subsections:

"(c) A conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).

(d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit."

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

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

and by inserting the following additional notes:

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

Reason for Amendment: The purpose of this amendment is to add a guideline subsection (subsection (d)) expressly providing that a conviction of conspiracy to commit more than one offense is treated for guideline purposes as if the defendant had been convicted of a separate conspiracy count for each offense that the defendant conspired to commit. The current

instruction in Application Note 9 of §3D1.2 is inadequate. For consistency, material now contained at §1B1.2(a) concerning stipulations to having committed additional offenses is moved to a new subsection (subsection (c)).

Additional commentary (Application Note 5) is provided to address cases in which the jury's

verdict does not specify how many or which offenses were the object of the conspiracy of which the defendant was convicted. Compare United States v. Johnson, 713 F.2d 633, 645-46 (11th Cir. 1983) (conviction stands if there is sufficient proof with respect to any one of the objectives) cert. denied sub nom. Wilkins v. United States, 465 U.S. 1081 (1984) with United States v. Tarnopol, 561 F.2d 466 (3d Cir. 1977) (failure of proof with respect to any one of the objectives renders the conspiracy conviction invalid). In order to maintain consistency with other §1B1.2(a) determinations, this decision should be governed by a reasonable doubt standard. A higher standard of proof should govern the creation of what is, in effect, a new count of conviction for the purposes of Chapter Three, Part D (Multiple Counts). Because the guidelines do not explicitly establish standards of proof, the proposed new application note calls upon the court to determine which offense(s) was the object of the conspiracy as if it were "sitting as a trier of fact." The foregoing determination is not required, however, in the case of offenses that are grouped together under §3D1.2(d) (e.g., fraud and theft) because §1B1.3(a)(2) governs consideration of the defendant's conduct.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

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

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

and inserting in lieu thereof:

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

- "(b) Chapter Four (Criminal History and Criminal Livelihood). To determine the criminal history category and the applicability of the career offender and criminal livelihood guidelines, the court shall consider all conduct relevant to a determination of the factors enumerated in the respective guidelines in Chapter Four."

and inserting in lieu thereof:

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

"If the conviction is for conspiracy, it includes conduct in furtherance of the conspiracy that was known to or was reasonably foreseeable by the defendant. If the conviction is for solicitation, misprision or accessory after the fact, it includes all conduct relevant to determining the offense level for the underlying offense that was known to or reasonably should have been known by the defendant. See generally §§2X1.1-2X4.1."

and inserting in lieu thereof:

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

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

Illustrations of Conduct for Which the Defendant is Accountable

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

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

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

d. Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant

G fraudulently obtains \$35,000. Each is convicted of mail fraud. Each defendant is accountable for the entire amount (\$55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire \$55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable.

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

Reason for Amendment: The purpose of this amendment is to clarify the definition of conduct for which the defendant is "otherwise accountable."

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline and commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to delete an unnecessary sentence. No substantive change is made.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

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

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

and inserting in lieu thereof:

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

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

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

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

Reason for Amendment: The purpose of this amendment is to incorporate new first-degree murder offenses created by Section 7001 of the Anti-Drug Abuse Act of 1988 where the death penalty is not imposed. This amendment also clarifies the existing commentary to this guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in the language between specific offense characteristic subdivisions (b)(2)(B) and (b)(2)(C).

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

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

Reason for Amendment: The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in language between specific offense characteristic subdivisions (b)(2)(B) and (b)(2)(C).

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

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

and by renumbering Note 4 as Note 3.

Reason for Amendment: The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

and inserting in lieu thereof:

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

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to delete references to petty offenses.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

and by inserting the following additional sentence at the end:

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

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to provide a clearer standard by replacing the phrase "striking, wounding, or beating" (a statutory phrase dealing with a petty

offense) with "physical contact." The amendment also provides an enhanced offense level for the case in which a weapon is possessed and its use is threatened.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

and inserting in lieu thereof:

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

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

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

and inserting in lieu thereof:

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

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

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline and commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to provide an intermediate adjustment level for degree of bodily injury.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purposes of this amendment are to clarify that the relevant factor is the age of the victim, and to provide a more specific reference to the underlying statute.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purposes of this amendment are to delete inapt language from the title and to provide a more specific reference to the underlying statute.

Effective Date: The effective date of this amendment is November 1, 1989.

95. Amendment: Chapter Two, Part A is amended by deleting §2A3.4 in entirety as follows:

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

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

Commentary

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

Application Notes:

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

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §2A3.1-3.3). Enhancements are

provided for the use of force or threats. The maximum term of imprisonment authorized by statute for offenses covered in this section is five years (if accomplished as defined in 18 U.S.C. § 2241), three years (if accomplished as defined in 18 U.S.C. § 2242), and six months otherwise. The base offense level applies to conduct that is consensual."

A replacement guideline with accompanying commentary is inserted as §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact).

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

Effective Date: The effective date of this amendment is November 1, 1989.

96. **Amendment:** Section 2A4.1(b)(2) is amended by inserting immediately before the period at the end of the sentence: "; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels".

Reason for Amendment: The purpose of this amendment is to provide an intermediate adjustment level for the degree of bodily injury.

Effective Date: The effective date of this amendment is November 1, 1989.

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

"Application Note:

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

Reason for Amendment: The purpose of this amendment is to simplify the guideline by deleting redundant material.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

and inserting in lieu thereof:

	<u>"Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$100 or less	no increase
(B)	More than \$100	add 1
(C)	More than \$1,000	add 2
(D)	More than \$2,000	add 3
(E)	More than \$5,000	add 4
(F)	More than \$10,000	add 5
(G)	More than \$20,000	add 6
(H)	More than \$40,000	add 7
(I)	More than \$70,000	add 8
(J)	More than \$120,000	add 9
(K)	More than \$200,000	add 10
(L)	More than \$350,000	add 11
(M)	More than \$500,000	add 12
(N)	More than \$800,000	add 13
(O)	More than \$1,500,000	add 14
(P)	More than \$2,500,000	add 15
(Q)	More than \$5,000,000	add 16
(R)	More than \$10,000,000	add 17
(S)	More than \$20,000,000	add 18
(T)	More than \$40,000,000	add 19
(U)	More than \$80,000,000	add 20."

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

and inserting in lieu thereof:

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

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to clarify the coverage of a specific offense characteristic.

Effective Date: The effective date of this amendment is November 1, 1989.

- 101. Amendment:** The Commentary to §2B1.1 captioned "Background" is amended in the first paragraph by deleting "§5A1.1" and inserting in lieu thereof "Chapter Five, Part A".

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

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

Reason for Amendment: The purpose of this amendment is to clarify the nature of the cases to which this guideline applies.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

Reason for Amendment: The purpose of this amendment is to add a specific offense characteristic where stolen property involved "undelivered mail" to conform to §2B1.1.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

- "4. Subsection (b)(5), referring to an 'organized scheme to receive stolen vehicles or vehicle parts,' provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or 'chop shop.'"

'Vehicles' refers to all forms of vehicles, including aircraft and watercraft. See Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).".

Reason for Amendment: The purpose of this amendment is to clarify the coverage of a specific offense characteristic.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purposes of this amendment are to eliminate minor gaps in the loss table and to conform the offense levels for larger losses to the amended loss table at §2B1.1.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline and

commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline and commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purposes of this amendment are to correct a clerical error, to delete a reference to a petty offense and an incorrect statutory reference, and to insert an additional statutory reference.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

	<u>Loss</u>	<u>Increase in Level</u>
(A)	\$2,500 or less	no increase

- (B) \$2,501 - \$10,000 add 1
- (C) \$10,001 - \$50,000 add 2
- (D) \$50,001 - \$250,000 add 3
- (E) \$250,001 - \$1,000,000 add 4
- (F) \$1,000,001 - \$5,000,000 add 5
- (G) more than \$5,000,000 add 6

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

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

and inserting in lieu thereof:

- "(1) If the offense involved robbery or attempted robbery of the property of a financial institution or post office, increase by 2 levels.
- (2) (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished, displayed, or possessed, increase by 3 levels; or (D) if an express threat of death was made, increase by 2 levels."

and by inserting the following additional subdivision:

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

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

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

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

and inserting in lieu thereof:

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

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

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

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

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

- "4. If the degree of bodily injury falls between two injury categories, use of the

intervening level (i.e., interpolation) is appropriate.",

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

Reason for Amendment: The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in language between specific offense characteristic subdivisions (b)(2)(B) and (b)(2)(C).

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

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

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

Reason for Amendment: The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to clarify the coverage of this guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

planning.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

and inserting in lieu thereof:

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

Reason for Amendment: The purpose of this amendment is to clarify the coverage of a specific offense characteristic.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purpose of this amendment is to correct clerical errors.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline and commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

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

"(1) If the offense involved more than one bribe, increase by 2 levels.

(2) (If more than one applies, use the greater):".

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

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

and inserting in lieu thereof:

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

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

"(1) If the offense involved more than one gratuity, increase by 2 levels.

(2) (If more than one applies, use the greater):".

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

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

and inserting in lieu thereof:

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

Section 3D1.2(d) is amended in the listing of offense sections in the third paragraph by deleting

"§2C1.1," and in the listing of offense sections in the second paragraph by inserting in order by section number "§§2C1.1, 2C1.2;"

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

Under the current bribery guideline, there is no enhancement for repeated instances of bribery if the conduct involves the same course of conduct or common scheme or plan and the same victim (as frequently is the case where the government is the victim) because such cases are

grouped under §3D1.2(b). In contrast, the fraud and theft guidelines generally provide a 2-level increase in cases of repeated instances under the second prong of the "more than minimal planning" definition.

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

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to correct a technical error. This section expressly covers extortion and attempted extortion; conspiracy is covered through the operation of §2X1.1.

Effective Date: The effective date of this amendment is November 1, 1989.

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

"(a) Base Offense Level:

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

and inserting in lieu thereof:

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

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

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of the amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

"DRUG QUANTITY TABLE

<u>Controlled Substances and Quantity*</u>	<u>Base Offense Level</u>
10 KG Heroin or equivalent Schedule I or II Opiates, 50 KG Cocaine or equivalent Schedule I or II Stimulants, 500 G Cocaine Base, 10 KG PCP or 1 KG Pure PCP, 100 G LSD or equivalent Schedule I or II Hallucinogens, 4 KG Fentanyl or 1 KG Fentanyl Analogue, 10,000 KG Marihuana, 100,000 Marihuana Plants, 2000 KG Hashish, 200 KG Hashish Oil (or more of any of the above)	Level 36
3-9.9 KG Heroin or equivalent Schedule I or II Opiates, 15-49.9 KG Cocaine or equivalent Schedule I or II Stimulants, 150-499 G Cocaine Base, 3-9.9 KG PCP or 300-999 G Pure PCP, 30-99 G LSD or equivalent Schedule I or II Hallucinogens, 1.2-3.9 KG Fentanyl or 300-999 G Fentanyl Analogue, 3000-9999 KG Marihuana, 30,000-99,999 Marihuana Plants, 600-1999 KG Hashish, 60-199 KG Hashish Oil	Level 34
1-2.9 KG Heroin or equivalent Schedule I or II Opiates, 5-14.9 KG Cocaine or equivalent Schedule I or II Stimulants, 50-149 G Cocaine Base, 1-2.9 KG PCP or 100-299 G Pure PCP, 10-29 G LSD or equivalent Schedule I or II Hallucinogens, 4-1.1 KG Fentanyl or 100-299 G Fentanyl Analogue, 1000-2999 KG Marihuana, 10,000-29,999 Marihuana Plants, 200-599 KG Hashish, 20-59.9 KG Hashish Oil	Level 32**
700-999 G Heroin or equivalent Schedule I or II Opiates, 3.5-4.9 KG Cocaine or equivalent Schedule I or II Stimulants, 35-49 G Cocaine Base, 700-999 G PCP or 70-99 G Pure PCP, 7-9.9 G LSD or equivalent Schedule I or II Hallucinogens, 280-399 G Fentanyl or 70-99 G Fentanyl Analogue, 700-999 KG Marihuana, 7000-9999 Marihuana Plants, 140-199 KG Hashish, 14-19.9 KG Hashish Oil	Level 30
400-699 G Heroin or equivalent Schedule I or II Opiates, 2-3.4 KG Cocaine or equivalent Schedule I or II Stimulants, 20-34.9 G Cocaine Base, 400-699 G PCP or 40-69 G Pure PCP, 4-6.9 G LSD or equivalent Schedule I or II Hallucinogens, 160-279 G Fentanyl or 40-69 G Fentanyl Analogue, 400-699 KG Marihuana, 4000-6999 Marihuana Plants, 80-139 KG Hashish, 8.0-13.9 KG Hashish Oil	Level 28
100-399 G Heroin or equivalent Schedule I or II Opiates, .5-1.9 KG Cocaine or equivalent Schedule I or II Stimulants, 5-19 G Cocaine Base, 100-399 G PCP or 10-39 G Pure PCP, 1-3.9 G LSD or equivalent Schedule I or II Hallucinogens, 40-159 G Fentanyl or 10-39 G Fentanyl Analogue, 100-399 KG Marihuana, 1000-3999 Marihuana Plants, 20-79 KG Hashish, 2.0-7.9 KG Hashish Oil	Level 26**
80-99 G Heroin or equivalent Schedule I or II Opiates, 400-499 G Cocaine or equivalent Schedule I or II Stimulants, 4-4.9 G Cocaine Base, 80-99 G PCP or 8-9.9 G Pure PCP, 800-999 MG LSD or equivalent Schedule I or II Hallucinogens, 32-39 G Fentanyl or 8-9.9 G Fentanyl Analogue, 80-99 KG Marihuana, 800-999 Marihuana Plants, 16-19.9 KG Hashish, 1.6-1.9 KG Hashish Oil	Level 24

60-79 G Heroin or equivalent Schedule I or II Opiates, 300-399 G Cocaine or equivalent Schedule I or II Stimulants, 3-3.9 G Cocaine Base, 60-79 G PCP or 6-7.9 G Pure PCP, 600 - 799 MG LSD or equivalent Schedule I or II Hallucinogens, 24-31.9 G Fentanyl or 6-7.9 G Fentanyl Analogue, 60-79 KG Marihuana, 600-799 Marihuana Plants, 12-15.9 KG Hashish, 1.2-1.5 KG Hashish Oil	Level 22
40-59 G Heroin or equivalent Schedule I or II Opiates, 200-299 G Cocaine or equivalent Schedule I or II Stimulants, 2-2.9 G Cocaine Base, 40-59 G PCP or 4-5.9 G Pure PCP, 400-599 MG LSD or equivalent Schedule I or II Hallucinogens, 16-23.9 G Fentanyl or 4-5.9 G Fentanyl Analogue, 40-59 KG Marihuana, 400-599 Marihuana Plants, 8-11.9 KG Hashish, 8-1.1 KG Hashish Oil, 20 KG+ Schedule III or other Schedule I or II controlled substances	Level 20
20-39 G Heroin or equivalent Schedule I or II Opiates, 100-199 G Cocaine or equivalent Schedule I or II Stimulants, 1-1.9 G Cocaine Base, 20-39 G PCP or 2-3.9 G Pure PCP, 200-399 MG LSD or equivalent Schedule I or II Hallucinogens, 8-15.9 G Fentanyl or 2-3.9 G Fentanyl Analogue, 20-39 KG Marihuana, 200-399 Marihuana Plants, 5-7.9 KG Hashish, 500-799 G Hashish Oil, 10-19 KG Schedule III or other Schedule I or II controlled substances	Level 18
10-19 G Heroin or equivalent Schedule I or II Opiates, 50-99 G Cocaine or equivalent Schedule I or II Stimulants, 500-999 MG Cocaine Base, 10-19.9 G PCP or 1-1.9 G Pure PCP, 100-199 MG LSD or equivalent Schedule I or II Hallucinogens, 4-7.9 G Fentanyl or 1-1.9 G Fentanyl Analogue, 10-19 KG Marihuana, 100-199 Marihuana Plants, 2-4.9 KG Hashish, 200-499 G Hashish Oil, 5-9.9 KG Schedule III or other Schedule I or II controlled substances	Level 16
5-9.9 G Heroin or equivalent Schedule I or II Opiates, 25-49 G Cocaine or equivalent Schedule I or II Stimulants, 250-499 MG Cocaine Base, 5-9.9 G PCP or 500-999 MG Pure PCP, 50-99 MG LSD or equivalent Schedule I or II Hallucinogens, 2-3.9 G Fentanyl or .5-.9 G Fentanyl Analogue, 5-9.9 KG Marihuana, 50-99 Marihuana Plants, 1-1.9 KG Hashish, 100-199 G Hashish Oil, 2.5-4.9 KG Schedule III or other Schedule I or II controlled substances	Level 14
Less than the following: 5 G Heroin or equivalent Schedule I or II Opiates, 25 G Cocaine or equivalent Schedule I or II Stimulants, 250 MG Cocaine Base, 5 G PCP or 500 MG Pure PCP, 50 MG LSD or equivalent Schedule I or II Hallucinogens, 2 G Fentanyl or 500 MG Fentanyl Analogue; 2.5-4.9 KG Marihuana, 25-49 Marihuana Plants, 500-999 G Hashish, 50-99 G Hashish Oil, 1.25-2.4 KG Schedule III or other Schedule I or II controlled substances, 20 KG+ Schedule IV	Level 12
1-2.4 KG Marihuana, 10-24 Marihuana Plants, 200-499 G Hashish, 20-49 G Hashish Oil, .50-1.24 KG Schedule III or other Schedule I or II controlled substances, 8-19 KG Schedule IV	Level 10
250-999 G Marihuana, 3-9 Marihuana Plants, 50-199 G Hashish, 10-19 G Hashish Oil, 125-449 G Schedule III or other Schedule I or II controlled substances, 2-7.9 KG Schedule IV, 20 KG+ Schedule V	Level 8
Less than the following: 250 G Marihuana, 3 Marihuana Plants, 50 G Hashish, 10 G Hashish Oil, 125 G Schedule III or other Schedule I or II controlled substances, 2 KG Schedule IV, 20 KG Schedule V	Level 6

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

** Statute specifies a mandatory minimum sentence."

and inserting in lieu thereof:

"(c) DRUG QUANTITY TABLE

<u>Controlled Substances and Quantity*</u>	<u>Base Offense Level</u>
(1) 300 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); 1500 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); 15 KG or more of Cocaine Base;	Level 42

- 300 KG or more of PCP, or 30 KG or more of Pure PCP;
 300 KG or more of Methamphetamine, or 30 KG or more of Pure Methamphetamine;
 3 KG or more of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 120 KG or more of Fentanyl;
 30 KG or more of a Fentanyl Analogue;
 300,000 KG or more of Marihuana;
 60,000 KG or more of Hashish;
 6,000 KG or more of Hashish Oil.
- (2) At least 100 KG but less than 300 KG of Heroin Level 40
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 500 KG but less than 1500 KG of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 5 KG but less than 15 KG of Cocaine Base;
 At least 100 KG but less than 300 KG of PCP, or at least 10 KG but less than 30 KG of Pure PCP;
 At least 100 KG but less than 300 KG of Methamphetamine, or at least 10 KG but less than 30 KG of Pure Methamphetamine;
 At least 1 KG but less than 3 KG of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 40 KG but less than 120 KG of Fentanyl;
 At least 10 KG but less than 30 KG of a Fentanyl Analogue;
 At least 100,000 KG but less than 300,000 KG of Marihuana;
 At least 20,000 KG but less than 60,000 KG of Hashish;
 At least 2,000 KG but less than 6,000 KG of Hashish Oil.
- (3) At least 30 KG but less than 100 KG of Heroin Level 38
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 150 KG but less than 500 KG of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 1.5 KG but less than 5 KG of Cocaine Base;
 At least 30 KG but less than 100 KG of PCP, or at least 3 KG but less than 10 KG of Pure PCP;
 At least 30 KG but less than 100 KG of Methamphetamine, or at least 3 KG but less than 10 KG of Pure Methamphetamine;
 At least 300 G but less than 1 KG of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 12 KG but less than 40 KG of Fentanyl;
 At least 3 KG but less than 10 KG of a Fentanyl Analogue;
 At least 30,000 KG but less than 100,000 KG of Marihuana;
 At least 6,000 KG but less than 20,000 KG of Hashish;
 At least 600 KG but less than 2,000 KG of Hashish Oil.
- (4) At least 10 KG but less than 30 KG of Heroin Level 36
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 50 KG but less than 150 KG of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 500 G but less than 1.5 KG of Cocaine Base;
 At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of Pure PCP;
 At least 10 KG but less than 30 KG of Methamphetamine, or at least 1 KG but less than 3 KG of Pure Methamphetamine;
 At least 100 G but less than 300 G of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 4 KG but less than 12 KG of Fentanyl;
 At least 1 KG but less than 3 KG of a Fentanyl Analogue;
 At least 10,000 KG but less than 30,000 KG of Marihuana;
 At least 2,000 KG but less than 6,000 KG of Hashish;
 At least 200 KG but less than 600 KG of Hashish Oil.
- (5) At least 3 KG but less than 10 KG of Heroin Level 34
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 15 KG but less than 50 KG of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 150 G but less than 500 G of Cocaine Base;
 At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of Pure PCP;
 At least 3 KG but less than 10 KG of Methamphetamine, or at least 300 G but less

- than 1 KG of Pure Methamphetamine;
 At least 30 G but less than 100 G of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 1.2 KG but less than 4 KG of Fentanyl;
 At least 300 G but less than 1 KG of a Fentanyl Analogue;
 At least 3,000 KG but less than 10,000 KG of Marihuana;
 At least 600 KG but less than 2,000 KG of Hashish;
 At least 60 KG but less than 200 KG of Hashish Oil.
- (6) At least 1 KG but less than 3 KG of Heroin Level 32
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 5 KG but less than 15 KG of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 50 G but less than 150 G of Cocaine Base;
 At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of Pure PCP;
 At least 1 KG but less than 3 KG of Methamphetamine, or at least 100 G but less than 300 G of Pure Methamphetamine;
 At least 10 G but less than 30 G of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 400 G but less than 1.2 KG of Fentanyl;
 At least 100 G but less than 300 G of a Fentanyl Analogue;
 At least 1,000 KG but less than 3,000 KG of Marihuana;
 At least 200 KG but less than 600 KG of Hashish;
 At least 20 KG but less than 60 KG of Hashish Oil.
- (7) At least 700 G but less than 1 KG of Heroin Level 30
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 3.5 KG but less than 5 KG of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 35 G but less than 50 G of Cocaine Base;
 At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of Pure PCP;
 At least 700 G but less than 1 KG of Methamphetamine, or at least 70 G but less than 100 G of Pure Methamphetamine;
 At least 7 G but less than 10 G of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 280 G but less than 400 G of Fentanyl;
 At least 70 G but less than 100 G of a Fentanyl Analogue;
 At least 700 KG but less than 1,000 KG of Marihuana;
 At least 140 KG but less than 200 KG of Hashish;
 At least 14 KG but less than 20 KG of Hashish Oil.
- (8) At least 400 G but less than 700 G of Heroin Level 28
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 2 KG but less than 3.5 KG of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 20 G but less than 35 G of Cocaine Base;
 At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of Pure PCP;
 At least 400 G but less than 700 G of Methamphetamine, or at least 40 G but less than 70 G of Pure Methamphetamine;
 At least 4 G but less than 7 G of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 160 G but less than 280 G of Fentanyl;
 At least 40 G but less than 70 G of a Fentanyl Analogue;
 At least 400 KG but less than 700 KG of Marihuana;
 At least 80 KG but less than 140 KG of Hashish;
 At least 8 KG but less than 14 KG of Hashish Oil.
- (9) At least 100 G but less than 400 G of Heroin Level 26
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 500 G but less than 2 KG of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 5 G but less than 20 G of Cocaine Base;
 At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of Pure PCP;
 At least 100 G but less than 400 G of Methamphetamine, or at least 10 G but less

- than 40 G of Pure Methamphetamine;
 At least 1 G but less than 4 G of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 40 G but less than 160 G of Fentanyl;
 At least 10 G but less than 40 G of a Fentanyl Analogue;
 At least 100 KG but less than 400 KG of Marihuana;
 At least 20 KG but less than 80 KG of Hashish;
 At least 2 KG but less than 8 KG of Hashish Oil.
- (10) At least 80 G but less than 100 G of Heroin Level 24
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 400 G but less than 500 G of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 4 G but less than 5 G of Cocaine Base;
 At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of Pure
 PCP;
 At least 80 G but less than 100 G of Methamphetamine, or at least 8 G but less than
 10 G of Pure Methamphetamine;
 At least 800 MG but less than 1 G of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 32 G but less than 40 G of Fentanyl;
 At least 8 G but less than 10 G of a Fentanyl Analogue;
 At least 80 KG but less than 100 KG of Marihuana;
 At least 16 KG but less than 20 KG of Hashish;
 At least 1.6 KG but less than 2 KG of Hashish Oil.
- (11) At least 60 G but less than 80 G of Heroin Level 22
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 300 G but less than 400 G of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 3 G but less than 4 G of Cocaine Base;
 At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of Pure
 PCP;
 At least 60 G but less than 80 G of Methamphetamine, or at least 6 G but less than
 8 G of Pure Methamphetamine;
 At least 600 MG but less than 800 MG of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 24 G but less than 32 G of Fentanyl;
 At least 6 G but less than 8 G of a Fentanyl Analogue;
 At least 60 KG but less than 80 KG of Marihuana;
 At least 12 KG but less than 16 KG of Hashish;
 At least 1.2 KG but less than 1.6 KG of Hashish Oil.
- (12) At least 40 G but less than 60 G of Heroin Level 20
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 200 G but less than 300 G of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 2 G but less than 3 G of Cocaine Base;
 At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of Pure
 PCP;
 At least 40 G but less than 60 G of Methamphetamine, or at least 4 G but less than
 6 G of Pure Methamphetamine;
 At least 400 MG but less than 600 MG of LSD (or the equivalent
 amount of other Schedule I or II Hallucinogens);
 At least 16 G but less than 24 G of Fentanyl;
 At least 4 G but less than 6 G of a Fentanyl Analogue;
 At least 40 KG but less than 60 KG of Marihuana;
 At least 8 KG but less than 12 KG of Hashish;
 At least 800 G but less than 1.2 KG of Hashish Oil;
 20 KG or more of Schedule I or II Depressants or Schedule III
 substances.
- (13) At least 20 G but less than 40 G of Heroin Level 18
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 100 G but less than 200 G of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 1 G but less than 2 G of Cocaine Base;
 At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of Pure

- PCP;
 At least 20 G but less than 40 G of Methamphetamine, or at least 2 G but less than 4 G of Pure Methamphetamine;
 At least 200 MG but less than 400 MG of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 8 G but less than 16 G of Fentanyl;
 At least 2 G but less than 4 G of a Fentanyl Analogue;
 At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
 At least 500 G but less than 800 G of Hashish Oil;
 At least 10 KG but less than 20 KG of Schedule I or II Depressants
 or Schedule III substances.
- (14) At least 10 G but less than 20 G of Heroin Level 16
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 50 G but less than 100 G of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 500 MG but less than 1 G of Cocaine Base;
 At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of Pure PCP;
 At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Pure Methamphetamine;
 At least 100 MG but less than 200 MG of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 4 G but less than 8 G of Fentanyl;
 At least 1 G but less than 2 G of a Fentanyl Analogue;
 At least 10 KG but less than 20 KG of Marihuana;
 At least 2 KG but less than 5 KG of Hashish;
 At least 200 G but less than 500 G of Hashish Oil;
 At least 5 KG but less than 10 KG of Schedule I or II Depressants
 or Schedule III substances.
- (15) At least 5 G but less than 10 G of Heroin Level 14
 (or the equivalent amount of other Schedule I or II Opiates);
 At least 25 G but less than 50 G of Cocaine
 (or the equivalent amount of other Schedule I or II Stimulants);
 At least 250 MG but less than 500 MG of Cocaine Base;
 At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of Pure PCP;
 At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Pure Methamphetamine;
 At least 50 MG but less than 100 MG of LSD
 (or the equivalent amount of other Schedule I or II Hallucinogens);
 At least 2 G but less than 4 G of Fentanyl;
 At least 500 MG but less than 1 G of a Fentanyl Analogue;
 At least 5 KG but less than 10 KG of Marihuana;
 At least 1 KG but less than 2 KG of Hashish;
 At least 100 G but less than 200 G of Hashish Oil;
 At least 2.5 KG but less than 5 KG of Schedule I or II Depressants
 or Schedule III substances.
- (16) Less than 5 G Heroin (or the equivalent amount of other Level 12
 Schedule I or II Opiates);
 Less than 25 G Cocaine (or the equivalent amount of other
 Schedule I or II Stimulants);
 Less than 250 MG of Cocaine Base;
 Less than 5 G of PCP, or less than 500 MG of Pure PCP;
 Less than 5 G of Methamphetamine, or less than 500 MG of Pure
 Methamphetamine;
 Less than 50 MG of LSD (or the equivalent amount of other
 Schedule I or II Hallucinogens);
 Less than 2 G of Fentanyl;
 Less than 500 MG of a Fentanyl Analogue;
 At least 2.5 KG but less than 5 KG of Marihuana;
 At least 500 G but less than 1 KG of Hashish;
 At least 50 G but less than 100 G of Hashish Oil;
 At least 1.25 KG but less than 2.5 KG of Schedule I or II

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

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

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

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

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

and by deleting the second paragraph as follows:

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

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

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

Drug Quantity Table.",

and inserting in lieu thereof:

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

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

"1 gm of Phenylacetone/P ₂ P (amphetamine precursor) =	0.375 gm of cocaine/0.075 gm of heroin
1 gm of Phenylacetone/P ₂ P (methamphetamine precursor) =	0.833 gm of cocaine/0.167 gm of heroin",

and inserting in lieu thereof:

"1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	2.08 gm of cocaine/0.418 gm of heroin
1 gm Phenylacetone/P ₂ P (in any other case) =	0.375 gm of cocaine/0.075 gm of heroin".

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

"1 Marihuana/Cannabis Plant =	0.1 gm of heroin/100 gm of marihuana".
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The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the second paragraph by deleting "Other Schedule I or II Substances" and inserting in lieu thereof "Schedule I or II Depressants", and in the "Drug Equivalency Tables" by deleting "Other Schedule I or II Substances" and inserting in lieu thereof "Schedule I or II Depressants".

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

Reason for Amendment: The purposes of this amendment are to expand the Drug Quantity Table to reflect offenses involving extremely large quantities of controlled substances, to

eliminate minor gaps in the Drug Quantity Table, to reflect the statutory change with respect to methamphetamine (Section 6470 of the Anti-Drug Abuse Act of 1988) by inserting specific references to the quantity of this substance for each offense level set forth in the table, to reflect the statutory change with respect to fifty or more marihuana plants (Section 6479 of the Anti-Drug Abuse Act of 1988), to correct anomaly in the relationship of hashish oil to hashish in levels 6 and 8 of the Drug Quantity Table, to delete an unnecessary footnote, and to clarify the operation of the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to conform the equivalency for fentanyl and fentanyl analogues to that set forth in the Drug Quantity Table and statute.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purposes of this amendment are to substitute generic names for two substances and to conform the dosage of Phenmetrazine to that currently being manufactured.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

"Pellotine 300 mg",

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

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

Reason for Amendment: The purpose of this amendment is to delete substances that either are not controlled substances or are no longer manufactured.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

"1 gm of 3, 4-Methylenedioxy
 - N - ethylamphetamine/MDEA = 0.03 gm of heroin or PCP",

in the subdivision captioned "Schedule III Substances" by inserting the following as the fourth entry:

"1 gm of Benzphetamine = 4 mg of heroin/4 gm of marihuana",

and in the "Dosage Equivalency Table" in the subdivision captioned "Depressants" by inserting the following in the appropriate place in alphabetical order:

"Glutethimide (Doriden) 500 mg".

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

"Marihuana

1 marihuana cigarette 0.5 gm".

Reason for Amendment: The purpose of this amendment is to make the Drug Equivalency

Tables and Dosage Equivalency Table more comprehensive.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

and inserting in lieu thereof:

"1 ml of Paregoric =	0.25 mg of heroin/0.25 gm of marihuana
1 ml of Hydrocodone	
Cough Syrup =	1 mg of heroin/1 gm of marihuana".

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

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

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

Reason for Amendment: The purposes of this amendment are to provide more accurate approximations of the equivalencies and dosages for certain controlled substances, and to eliminate unnecessary references.

Effective Date: The effective date of this amendment is November 1, 1989.

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

"1 gm of Liquid phencyclidine =	0.1 gm of heroin or PCP".
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Reason for Amendment: The purpose of this amendment is to delete an incorrect equivalency.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

DOSAGE EQUIVALENCY TABLE",

and inserting in lieu thereof:

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

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

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

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

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

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

Reason for Amendment: The purpose of this amendment is to implement the directive to the Commission in Section 6453 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

135. Amendment: Chapter Two, Part D is amended by deleting §§2D1.2 and 2D1.3 in their entirety as follows:

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

Commentary

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

Application Notes:

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

Background: The statute addressed by this section punishes any person eighteen years of age or older who knowingly employs or uses any person younger than eighteen to violate or to conceal any violation of any provision of Title 21. Section 845b provides a minimum mandatory period of imprisonment of one year. An increased penalty for the employment or use of persons fourteen years of age or younger reflects the enhanced sentence authorized by 21 U.S.C. § 845b(d).

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

- (a) Base Offense Level:
- (1) Level from §2D1.1, corresponding to double the drug amount involved, but in no event less than level 13, for distributing a controlled substance to a pregnant woman;
 - (2) (A) Level from §2D1.1, corresponding to double the drug amount involved, but in no event less than level 13, for distributing a controlled substance other than five grams or less of marihuana to an individual under the age of twenty-one years; or
(B) Level from §2D1.1, corresponding to double the drug amount involved, but in no event less than level 13, for distributing or manufacturing a controlled substance other than five grams or less of marihuana within 1000 feet of a schoolyard.

Commentary

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

Application Notes:

1. The provisions addressed by this section contain a mandatory minimum period of imprisonment of one year. The base offense level is determined as in §2D1.2. If both subsections (a)(1) and (a)(2) apply to a single distribution (e.g., the distribution of 10 grams of a controlled substance to a pregnant woman under twenty-one years of age), the enhancements are applied cumulatively, i.e., by using four times rather than two times the amount distributed. However, only one of the enhancements in §2D1.3(a)(2) shall apply in a given case.
2. If multiple drugs or offenses occur, determine the offense level as described in the Commentary to §2D1.2.
3. The reference to the level from §2D1.1 includes the base offense level plus the specific offense characteristic dealing with a weapon. Under §2D1.1(b)(1) there is a 2-level increase for possession of a firearm, or other dangerous weapon

during the commission of the offense.

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

A replacement guideline with accompanying commentary is inserted as §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals).

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

and inserting in lieu thereof:

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

- 137. Amendment:** The Commentary to §2D1.4 captioned "Application Notes" is amended in Note 1 by deleting "the sentence should be imposed only on the basis of the defendant's conduct or

the conduct of co-conspirators in furtherance of the conspiracy that was known to the defendant or was reasonably foreseeable" and inserting in lieu thereof "see Application Note 1 to §1B1.3 (Relevant Conduct)".

Reason for Amendment: The purpose of this amendment is to conform this commentary to the revision of §1B1.3.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

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

Reason for Amendment: The purpose of this amendment is to reflect the increased mandatory minimum penalty for this offense pursuant to Section 6481 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

- 140. Amendment:** Chapter Two, Part D is amended by inserting an additional guideline with accompanying commentary as §2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance).

Reason for Amendment: The purpose of this amendment is to create a guideline covering the

new offense in Section 6301 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

(b) Special Instruction:

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

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

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

Reason for Amendment: The purpose of this amendment is to implement the directive to the Commission in Section 6482 of the Anti-Drug Abuse Act of 1988. In addition, the base offense level under subsection (a)(3) is increased to reflect the seriousness of the offense.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

treatment produces an anomalous result in a particular case, a guideline departure may be warranted."

Reason for Amendment: The purpose of this amendment is to clarify the treatment of certain conduct for which the defendant previously has been sentenced as either part of the instant offense or prior criminal record.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to reflect the redesignation of this statute.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to reflect the redesignation of this statute.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

"Application Note:

1. Apply the guideline most applicable to the underlying conduct, which may include §2B3.1(Robbery), §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), §2B3.3 (Blackmail and Similar Forms of Extortion), or §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe)."

Reason for Amendment: The purpose of this amendment is to move material from the commentary to the guideline where it more appropriately belongs.

Effective Date: The effective date of this amendment is November 1, 1989.

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

in lieu thereof "a dangerous weapon (including a firearm)".

Reason for Amendment: The purposes of this amendment are to clarify that a firearm is a type of dangerous weapon and to remove the inconsistency in language between specific offense characteristic subdivisions (b)(1)(B) and (b)(1)(C).

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

Reason for Amendment: The purpose of this amendment is to provide intermediate adjustment levels for the degree of bodily injury.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of amending the title of this section is to ensure that attempts and solicitations are expressly covered by this guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

"(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the offense involved more than minimal planning, increase by 2 levels.

(2) If the defendant had a fiduciary obligation under the Employee Retirement Income Security Act, increase by 2 levels.

- (3) Increase by corresponding number of levels from the table in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) according to the loss.",

and inserting in lieu thereof:

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

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

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

and by inserting in lieu of Note 1:

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

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

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

Reason for Amendment: The purpose of this amendment is to simplify application of the guidelines.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

"Application Note:

1. 'Criminal conversion' means embezzlement.".

Reason for Amendment: The purpose of this amendment is to ensure that subsection (a)(2) covers any conduct engaged in for the purpose of facilitating or concealing a theft or embezzlement, or an offense involving a bribe or gratuity.

Effective Date: The effective date of this amendment is November 1, 1989.

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

"(a) Base Offense Level: 4

(b) Specific Offense Characteristics

(1) If the offense involved more than minimal planning, increase by 2 levels.

(2) If the defendant was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. § 501(a), increase by 2 levels.

(3) Increase by the number of levels from the table in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) corresponding to the loss.",

and inserting in lieu thereof:

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

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

"1. 'More than minimal planning' is defined in the Commentary to §1B1.1 (Applicable Instructions). Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

2. If the adjustment for being a union officer or occupying a position of trust in a union at §2E5.4(b)(2) is applied, do not apply the adjustment at §3B1.3 (Abuse of a Position of Trust or Use of a Special Skill).",

and inserting in lieu thereof:

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

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

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

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

Reason for Amendment: The purpose of this amendment is to simplify application of the guidelines.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to ensure that subsection (a)(2) covers any conduct engaged in for the purpose of facilitating or concealing a theft or embezzlement, or an offense involving a bribe or gratuity.

Effective Date: The effective date of this amendment is November 1, 1989.

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

	<u>"Loss</u>	<u>Increase in Level</u>
(A)	\$2,000 or less	no increase
(B)	\$2,001 - \$5,000	add 1
(C)	\$5,001 - \$10,000	add 2
(D)	\$10,001 - \$20,000	add 3
(E)	\$20,001 - \$50,00	add 4
(F)	\$50,001 - \$100,000	add 5
(G)	\$100,001 - \$200,000	add 6
(H)	\$200,001 - \$500,000	add 7
(I)	\$500,001 - \$1,000,000	add 8
(J)	\$1,000,001 - \$2,000,000	add 9
(K)	\$2,000,001 - \$5,000,000	add 10
(L)	over \$5,000,000	add 11",

and inserting in lieu thereof:

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

and by inserting at the end of Note 14:

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

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

Reason for Amendment: The purposes of this amendment are to ensure that this guideline is interpreted in a manner consistent with §1B1.2 and to correct a clerical error.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

"(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order,

injunction, decree or process, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

- (4) If the offense involved the conscious or reckless risk of serious bodily injury, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13."

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

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

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

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

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

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

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

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

Reason for Amendment: The purpose of this amendment is to reflect the instruction to the Commission in Section 2(b) of the Major Fraud Act of 1988. The Commission has concluded that a 2-level enhancement with a minimum offense level of 13 should apply to all fraud cases involving a conscious or reckless risk of serious bodily injury. In addition, the amendment

divides former subsection (b)(2) into two separate specific offenses characteristics to better reflect their separate nature.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline and commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

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

"(c) Special Instruction

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

Reason for Amendment: The purpose of this amendment is to provide a special instruction for the application of the multiple count rule in cases involving the transportation of more than one person.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline and commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

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

"(c) Special Instruction

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

Reason for Amendment: The purpose of this amendment is to provide a special instruction for the application of the multiple count rule in cases involving the transportation of more than one person.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to clarify that multiple counts involving different minors are not grouped under §3D1.2.

Effective Date: The effective date of this amendment is November 1, 1989.

- 162. Amendment:** Chapter Two, Part G, is amended by inserting an additional guideline with accompanying commentary as §2G2.3 (Selling or Buying of Children for Use in the Production of Pornography).

Reason for Amendment: The purpose of this amendment is to create a guideline covering the new offense in Section 7512 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purposes of this amendment are to conform the Statutory Provisions to the revision of §2G3.2 and to make them more comprehensive.

Effective Date: The effective date of this amendment is November 1, 1989.

- 164. Amendment:** Chapter Two, Part G is amended by deleting §2G3.2 in its entirety as follows:

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

(a) Base Offense Level: 6

Commentary

Statutory Provision: 47 U.S.C. § 223.

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

A replacement guideline with accompanying commentary is inserted as §2G3.2 (Obscene Telephone Communications for a Commercial Purpose; Broadcasting Obscene Material).

Reason for Amendment: The purposes of this amendment are to delete a guideline covering a petty offense; and to insert a guideline covering felony offenses, including two offenses created by Sections 7523 and 7524 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

Reason for Amendment: The purposes of this amendment are to include a recently enacted offense (18 U.S.C. § 247) expressly in the title of this guideline and to make editorial improvements.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

one-year statutory maximum, a" and inserting in lieu thereof "A", by inserting "one-year" immediately following "near the", and by inserting "or bodily injury" immediately following "resulting in death".

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

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purposes of this amendment are to correct a clerical error and to make editorial improvements.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purpose of this amendment is to correct two clerical errors.

Effective Date: The effective date of this amendment is November 1, 1989.

- 169. Amendment:** Section 2H3.1 is amended by deleting:

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

(1) 9; or

(2) If the purpose of the conduct was to facilitate another offense, apply the guideline applicable to an attempt to commit that offense.

(b) Specific Offense Characteristic

(1) If the purpose of the conduct was to obtain direct or indirect commercial

advantage or economic gain not covered by §2H3.1(a)(2) above, increase by 3 levels.",

and inserting in lieu thereof:

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

and inserting in lieu thereof:

"Apply §2X5.1 (Other Offenses)."

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to delete a reference to a petty offense.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

Reason for Amendment: The purposes of this amendment are to clarify the guideline and to ensure that an attempted obstruction is not excluded from subsection (c) because of the non-parallel language between (b)(1) and (c)(1).

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to delete a reference to a petty offense.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to expand the coverage of an existing guideline to include a new offense (Obstruction of a Federal Audit) created by Section 7078 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

or property damage, in order to suborn perjury".

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

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

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

Reason for Amendment: The purposes of this amendment are to clarify the guideline and to ensure that subornation of perjury is not excluded from subsection (c) due to a lack of parallel wording in the subsections.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

and inserting in lieu thereof:

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

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

"(c) Cross Reference

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

Reason for Amendment: The purpose of this amendment is to relate the offense levels more directly to the underlying offense where the impersonation is committed for the purpose of facilitating another offense.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

178. Amendment: Chapter Two, Part J is amended by deleting §2J1.7 in its entirety as follows:

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

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristics
 - (1) If the offense committed while on release is punishable by death or imprisonment for a term of fifteen years or more, increase by 6 levels.
 - (2) If the offense committed while on release is punishable by a term of imprisonment of five or more years, but less than fifteen years, increase by 4 levels.
 - (3) If the offense committed while on release is a felony punishable by a maximum term of less than five years, increase by 2 levels.

Commentary

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

Application Notes:

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

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

A replacement guideline with accompanying commentary is inserted as §2J1.7 (Commission of Offense While on Release).

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

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

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

- 181. Amendment:** Section 2J1.9(b)(1) is amended by deleting "for refusing to testify" and inserting

in lieu thereof "made or offered for refusing to testify or for the witness absenting himself to avoid testifying".

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

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

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

Reason for Amendment: The purpose of this amendment is to move material from the commentary to the guideline itself where it more properly belongs.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is November 1, 1989.

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

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

"(d) Note

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

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

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

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

Reason for Amendment: The purpose of this amendment is to conform the guideline to a statutory revision to 18 U.S.C. § 844(h).

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

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

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

188. Amendment: Chapter Two, Part K is amended by inserting an additional guideline with accompanying commentary as §2K1.7 (Use of Fire or Explosives to Commit a Federal Felony).

Reason for Amendment: The purpose of this amendment is to conform the guideline to a statutory revision of 18 U.S.C. § 844(h).

Effective Date: The effective date of this amendment is November 1, 1989.

189. Amendment: Section 2K2.1 is amended by deleting the entire guideline and accompanying commentary, except for the commentary captioned "Background", as follows:

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

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

Commentary

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

Application Note:

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

and inserting in lieu thereof:

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

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

- (1) 16, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861; or
 - (2) 12, if the defendant is convicted under 18 U.S.C. § 922(g), (h), or (n); or if the defendant, at the time of the offense, had been convicted in any court of an offense punishable by imprisonment for a term exceeding one year; or
 - (3) 6, otherwise.
- (b) Specific Offense Characteristics
- (1) If the defendant obtained or possessed the firearm or ammunition solely for lawful sporting purposes or collection, decrease the offense level determined above to level 6.
 - (2) If the firearm was stolen or had an altered or obliterated serial number, increase by 2 levels.
- (c) Cross References
- (1) If the offense involved the distribution of a firearm or possession with intent to distribute, apply §2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms) if the resulting offense level is greater than that determined above.
 - (2) If the defendant used or possessed the firearm in connection with commission or attempted commission of another offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above.

Commentary

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

Application Notes:

1. The definition of ‘firearm’ used in this section is that set forth in 18 U.S.C. § 921(a)(3) (if the defendant is convicted under 18 U.S.C. § 922) and 26 U.S.C. § 5845(a) (if the defendant is convicted under 26 U.S.C. § 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to §1B1.1 (Application Instructions). Under 18 U.S.C. § 921(a)(3), the term ‘firearm’ means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of

an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. § 5845(a), the term 'firearm' includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon made from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.

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

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

Chapter Two, Part K, Subpart 2 is amended by deleting §§2K2.2 and 2K2.3 in their entirety as follows:

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

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

Commentary

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

Application Notes:

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

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

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

(a) Base Offense Level:

- (1) 12, if convicted under 26 U.S.C. § 5861; or
- (2) 6, otherwise.

(b) Specific Offense Characteristics

- (1) If the number of firearms unlawfully dealt in exceeded 5, increase as follows:

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

- (2) If any of the following applies, use the greatest:
 - (A) If the defendant knew or had reason to believe that a purchaser was a person prohibited by federal law from owning the firearm, increase by 2 levels.

- (B) If the defendant knew or had reason to believe that a purchaser resided in another state in which he was prohibited from owning the firearm, increase by 1 level.
 - (C) If the defendant knew or had reason to believe that a firearm was stolen or had an altered or obliterated serial number, increase by 1 level.
- (c) Cross Reference
- (1) If the defendant provided the firearm to another for the purpose of committing another offense, or knowing that he planned to use it in committing another offense, apply §2X1.1 (Attempt or Conspiracy) in respect to such other offense, if the resulting offense level is higher.

Commentary

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

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

A replacement guideline with accompanying commentary is inserted as §2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms).

Chapter Two, Part K, Subpart 2 is amended by inserting an additional guideline with accompanying commentary as §2K2.3 (Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense).

Reason for Amendment: This amendment addresses a number of diverse substantive and technical issues, as well as the creation of several new offenses, and increased statutory maximum penalties for certain other offenses. Because there exist a large number of overlapping statutory provisions, the three basic guidelines, §2K2.1 (Possession by a prohibited person), §2K2.2 (Possession of certain types of weapons), and §2K2.3 (Unlawful trafficking) are not closely tied to the actual conduct. The amendment addresses this issue by consolidating the current three guidelines into two guidelines: (1) unlawful possession, receipt, or transportation, and (2) unlawful trafficking; and by more carefully drawing the distinctions between the base offense levels provided. The third guideline in this amendment is a new guideline to address transfer of a weapon with intent or knowledge that it will be used to

commit another offense (formerly covered in a cross reference) and a new offense added by the Anti-Drug Abuse Act of 1988 (Section 6211)(Interstate travel to acquire a firearm for a criminal purpose).

The base offense level for conduct covered by the current §2K2.1 is increased in the

amendment from 9 to 12. The statutorily authorized maximum sentence for the conduct covered under §2K2.1 was increased from five to ten years by the Anti-Drug Abuse Act of 1988 (Section 6462). Note, however, that the most aggravated conduct under §2K2.1 (possession of a weapon during commission of another offense) is handled by the cross-reference at subsection (c) and is based upon the offense level for an attempt to commit the underlying offense. See Background Commentary to current §2K2.1. The offense level for unlawful possession of a machine gun, sawed off shotgun, or destructive device is increased from 12 to 16. In addition, the amendment raises the enhancement for stolen weapons or obliterated serial numbers from 1 to 2 levels to better reflect the seriousness of this conduct. The numbers currently used in the table for the distribution of multiple weapons in §2K2.2 are amended to increase the offense level more rapidly for sale of multiple weapons.

Effective Date: The effective date of this amendment is November 1, 1989.

190. Amendment: Section 2K2.4 is amended by deleting "penalties are those" and inserting in lieu thereof "term of imprisonment is that".

The Commentary to §2K2.4 captioned "Application Notes" is amended by inserting the following additional note:

- "3. Imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release)."

Section 2K2.4 is amended by inserting "(a)" immediately before "If", and by inserting the following additional subsection:

- "(b) Special Instructions for Fines
- (1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section."

The Commentary to §2K2.4 captioned "Application Notes" is amended by inserting the following additional note:

- "4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 924(c) or 929(a). This is because the offense level for the underlying offense may be reduced when there is also a conviction under 18 U.S.C. § 924(c) or 929(a) in that any specific offense characteristic for possession, use, or discharge of a firearm is not applied (see Application Note 2). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense."

Reason for Amendment: The purpose of this amendment is to address the imposition of a fine or term of supervised release when this guideline applies.

Effective Date: The effective date of this amendment is November 1, 1989.

- 191. Amendment:** Chapter Two, Part K is amended by inserting an additional guideline with accompanying commentary as §2K2.5 (Possession of Firearms and Dangerous Weapons in Federal Facilities).

Reason for Amendment: The purpose of this amendment is to reflect a new offense enacted by Section 6215 of the Anti-Drug Abuse Act of 1988. A base offense level of 6 is provided for the misdemeanor portion of this statute. The felony portion of this statute (possession with intent to commit another offense) is treated as if an attempt to commit that other offense.

Effective Date: The effective date of this amendment is November 1, 1989.

- 192. Amendment:** Section 2L1.1(b) is amended by inserting the following additional subsection:

- "(3) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, and the offense level determined above is less than level 8, increase to level 8."

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 6 by deleting "enhancement at §2L1.1(b)(1) does not apply" and inserting in lieu thereof "reduction at §2L1.1(b)(1) applies".

Reason for Amendment: The purposes of this amendment are to provide an offense level that is no less than that provided under §2L1.2 in the case of a defendant who is a previously deported alien, and to conform Application Note 6 of the Commentary to §2L1.1 to the January 1988 revision of §2L1.1.

Effective Date: The effective date of this amendment is November 1, 1989.

- 193. Amendment:** Section 2L1.2 is amended by inserting the following additional subsection:

- "(b) Specific Offense Characteristic
- (1) If the defendant previously was deported after sustaining a conviction for a felony, other than a felony involving violation of the immigration laws, increase by 4 levels."

The Commentary to §2L1.2 captioned "Application Notes" is amended by inserting the following additional notes:

- "3. A 4-level increase is provided under subsection (b)(1) in the case of a defendant who was previously deported after sustaining a conviction for a felony, other than a felony involving a violation of the immigration laws. In the case of a defendant previously deported after sustaining a conviction for an aggravated felony as defined in 8 U.S.C. § 1101(a), or for any other violent felony, an upward departure may be warranted.
4. The adjustment under §2L1.2(b)(1) is in addition to any criminal history points

added for such conviction in Chapter 4, Part A (Criminal History)."

Reason for Amendment: The purpose of this amendment is to add a specific offense characteristic to provide an increase in the case of an alien previously deported after conviction of a felony other than an immigration law violation. This specific offense characteristic is in addition to, and not in lieu of, criminal history points added for the prior sentence. The amendment provides for consideration of an upward departure where the previous deportation was for an "aggravated felony" or for any other violent felony.

Effective Date: The effective date of this amendment is November 1, 1989.

194. Amendment: Chapter Two, Part L, Subpart 1 is amended by deleting §2L1.3 in its entirety as follows:

"§2L1.3. Engaging in a Pattern of Unlawful Employment of Aliens

(a) Base Offense Level: 6

Commentary

Statutory Provision: 8 U.S.C. § 1324a(f)(1).

Background: The offense covered under this section is a misdemeanor for which the maximum term of imprisonment authorized by statute is six months."

Reason for Amendment: The purpose of this amendment is to delete a guideline applying only to a petty offense. Petty offenses were deleted from coverage of the guidelines by the adoption of §1B1.9 (effective June 15, 1988).

Effective Date: The effective date of this amendment is November 1, 1989.

195. Amendment: Section 2L2.1(a) is amended by deleting "6" and inserting in lieu thereof "9".

Section 2L2.1(b)(1) is amended by deleting "for profit, increase by 3 levels" and inserting in lieu thereof "other than for profit, decrease by 3 levels".

Reason for Amendment: The purpose of this amendment is to conform the structure of this guideline to that of §2L1.1.

Effective Date: The effective date of this amendment is November 1, 1989.

196. Amendment: Section 2L2.2 is amended by inserting the following additional subsection:

"(b) Specific Offense Characteristic

(1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense,

increase by 2 levels."

The Commentary to §2L2.2 captioned "Application Notes" is amended by deleting:

- "1. In the case of a defendant who is an unlawful alien and has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, the Commission recommends an upward departure of 2 levels in order to provide a result equivalent to §2L1.2.",

by renumbering Note 2 as Note 1, and by deleting "Notes" and inserting in lieu thereof "Note".

Reason for Amendment: The purpose of this amendment is to convert a departure recommendation into a specific offense characteristic.

Effective Date: The effective date of this amendment is November 1, 1989.

197. Amendment: Section 2L2.3(a) is amended by deleting "6" and inserting in lieu thereof "9".

Section 2L2.3(b)(1) is amended by deleting "for profit, increase by 3 levels" and inserting in lieu thereof "other than for profit, decrease by 3 levels".

Reason for Amendment: The purpose of this amendment is to conform the structure of this guideline to that of §2L1.1.

Effective Date: The effective date of this amendment is November 1, 1989.

198. Amendment: Section 2L2.4 is amended by inserting the following additional subsection:

- "(b) Specific Offense Characteristic
 - (1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by 2 levels."

The Commentary to §2L2.4 captioned "Application Notes" is amended by deleting:

- "1. In the case of a defendant who is an unlawful alien and has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, the Commission recommends an upward departure of 2 levels in order to provide a result equivalent to §2L1.2.",

by renumbering Note 2 as Note 1, and by deleting "Notes" and inserting in lieu thereof "Note".

Reason for Amendment: The purpose of this amendment is to convert a departure recommendation into a specific offense characteristic.

Effective Date: The effective date of this amendment is November 1, 1989.

199. Amendment: Section 2N3.1 is amended by deleting:

"(b) If more than one vehicle was involved, apply §2F1.1 (Offenses Involving Fraud or Deceit).",

and inserting in lieu thereof:

"(b) Cross Reference

(1) If the offense involved more than one vehicle, apply §2F1.1 (Fraud and Deceit).".

Reason for Amendment: The purposes of this amendment are to correct a clerical error and to conform the phraseology of this subsection to that used elsewhere in the guidelines.

Effective Date: The effective date of this amendment is November 1, 1989.

200. Amendment: Section 2P1.1(a) is amended by deleting:

"(1) 13, if from lawful custody resulting from a conviction or as a result of a lawful arrest for a felony;

(2) 8, if from lawful custody awaiting extradition, pursuant to designation as a recalcitrant witness or as a result of a lawful arrest for a misdemeanor.",

and inserting in lieu thereof:

"(1) 13, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense;

(2) 8, otherwise.".

Reason for Amendment: The purpose of this amendment is to clarify the language of the guideline by making it conform more closely to that used in 18 U.S.C. § 751, the statute from which it was derived.

Effective Date: The effective date of this amendment is November 1, 1989.

201. Amendment: Section 2P1.1(b)(3) is amended by deleting:

"If the defendant committed the offense while a correctional officer or other employee of the Department of Justice, increase by 2 levels.",

and inserting in lieu thereof:

"If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by 2 levels.".

Reason for Amendment: The current specific offense characteristic (b)(3) applies only to

correctional officers or Justice Department employees, and not to local or state law enforcement officers who might have custody of a federal prisoner, or even to federal law enforcement officers who are not employed by the Department of Justice (e.g., Secret Service agents are employed by the Treasury Department). It also does not appear to apply to law enforcement or correctional employees who are not sworn officers unless they are Justice Department employees. The purpose of this amendment is to correct this anomaly.

Effective Date: The effective date of this amendment is November 1, 1989.

202. Amendment: Section 2P1.2(b)(1) is amended by deleting:

"If the defendant committed the offense while a correctional officer or other employee of the Department of Justice, increase by 2 levels.",

and inserting in lieu thereof:

"If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by 2 levels.".

Reason for Amendment: The current specific offense characteristic (b)(1) applies only to correctional officers or Justice Department employees, and not to local or state law enforcement officers who might have custody of a federal prisoner, or even to federal law enforcement officers who are not employed by the Department of Justice (e.g., Secret Service agents are employed by the Treasury Department). It also does not appear to apply to law enforcement or correctional employees who are not sworn officers unless they are Justice Department employees. The purpose of this amendment is to correct this anomaly.

Effective Date: The effective date of this amendment is November 1, 1989.

203. Amendment: Section 2P1.2 is amended by inserting the following additional subsection:

"(c) Cross Reference

- (1) If the defendant is convicted under 18 U.S.C. § 1791(a)(1) and is punishable under 18 U.S.C. § 1791(b)(1), the offense level is 2 plus the offense level from §2D1.1, but in no event less than level 26."

The Commentary to §2P1.2 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional note:

- "2. Pursuant to 18 U.S.C. § 1791(c), as amended, a sentence imposed upon an inmate for a violation of 18 U.S.C. § 1791 shall be consecutive to the sentence being served at the time of the violation."

Reason for Amendment: The purpose of this amendment is to implement the direction to the Commission in Section 6468 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

204. Amendment: Chapter Two, Part P is amended by deleting §2P1.4 in its entirety as follows:

"§2P1.4. Trespass on Bureau of Prisons Facilities

(a) Base Offense Level: 6

Commentary

Statutory Provision: 18 U.S.C. § 1793."

Reason for Amendment: The purpose of this amendment is to delete a guideline applying only to a petty offense. Petty offenses were deleted from coverage of the guidelines by the adoption of §1B1.9 (effective June 15, 1988).

Effective Date: The effective date of this amendment is November 1, 1989.

205. Amendment: The Commentary to §2Q1.3 captioned "Statutory Provisions" is amended by deleting "§ 4912,".

Reason for Amendment: The purpose of this amendment is to delete a reference to a petty offense.

Effective Date: The effective date of this amendment is November 1, 1989.

206. Amendment: Section 2Q1.4(b)(1) is amended by inserting "bodily" immediately preceding "injury".

The Commentary to §2Q1.4 captioned "Application Note" is amended by deleting:

"1. 'Serious injury' means serious bodily injury as defined in the Commentary to §1B1.1 (Applicable Instructions).",

and inserting in lieu thereof:

"1. 'Serious bodily injury' is defined in the Commentary to §1B1.1 (Application Instructions).".

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is November 1, 1989.

207. Amendment: Section 2Q1.5(b) is amended by deleting:

"(2) If the purpose of the offense was to influence government action or to extort money, increase by 8 levels.",

and by inserting the following additional subsection:

"(c) Cross Reference

- (1) If the purpose of the offense was to influence government action or to extort money, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage)."

Section 2Q1.5(b) is amended by deleting "Characteristics" and inserting in lieu thereof "Characteristic".

Reason for Amendment: The purposes of this amendment are to convert a specific offense characteristic to a cross-reference and render the guidelines internally more consistent.

Effective Date: The effective date of this amendment is November 1, 1989.

208. Amendment: Chapter Two, Part Q, Subpart 1, is amended by inserting an additional guideline with accompanying commentary as §2Q1.6 (Hazardous or Injurious Devices on Federal Lands).

Reason for Amendment: The purpose of this amendment is to reflect a new offense created by Section 6254(f) of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

209. Amendment: Section 2Q2.1 is amended in the title by inserting at the end "; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants".

The Commentary to §2Q2.1 captioned "Statutory Provisions" is amended by inserting immediately before the period at the end ", 3373(d); 18 U.S.C. § 545".

The Commentary to §2Q2.1 captioned "Background" is amended by deleting "and the Fur Seal Act. These statutes provide special protection to particular species of fish, wildlife and plants." and inserting in lieu thereof "the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants."

Chapter Two, Part Q, Subpart 2 is amended by deleting §2Q2.2 in its entirety as follows:

"§2Q2.2. Lacey Act; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants

(a) Base Offense Level:

- (1) 6, if the defendant knowingly imported or exported fish, wildlife, or plants, or knowingly engaged in conduct involving the sale or purchase of fish, wildlife, or plants with a market value greater than \$350; or

- (2) 4.

(b) Specific Offense Characteristics

- (1) If the offense involved a commercial purpose, increase by 2 levels.
- (2) If the offense involved fish, wildlife, or plants that were not quarantined as required by law, increase by 2 levels.
- (3) Apply the greater:
 - (A) If the market value of the fish, wildlife, or plants exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or
 - (B) If the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by 4 levels.

Commentary

Statutory Provisions: 16 U.S.C. § 3773(d); 18 U.S.C. § 545.

Application Note:

1. This section applies to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants. In other cases, see §§2T3.1 and 2T3.2.

Background: This section applies to violations of the Lacey Act Amendments of 1981, 16 U.S.C. § 3373(d), and to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants. These are the principal enforcement statutes utilized to combat interstate and foreign commerce in unlawfully taken fish, wildlife, and plants. The adjustments for specific offense characteristics are identical to those in §2Q2.1."

Reason for Amendment: The purpose of this amendment is to consolidate two guidelines that cover very similar offenses.

Effective Date: The effective date of this amendment is November 1, 1989.

- 210. Amendment:** Section 2Q2.1(b)(3) is amended by deleting "Apply the greater:" and inserting in lieu thereof "(If more than one applies, use the greater):".

Reason for Amendment: The purpose of this amendment is to conform the guideline to the style of other guidelines.

Effective Date: The effective date of this amendment is November 1, 1989.

- 211. Amendment:** Section 2R1.1(b)(2) is amended in the first column of the table by deleting:

"Volume of Commerce

- (A) less than \$1,000,000
- (B) \$1,000,000 - \$4,000,000
- (C) \$4,000,001 - \$15,000,000
- (D) \$15,000,001 - \$50,000,000
- (E) over \$50,000,000",

and inserting in lieu thereof:

"Volume of Commerce (Apply the Greatest)

- (A) Less than \$1,000,000
- (B) \$1,000,000 - \$4,000,000
- (C) More than \$4,000,000
- (D) More than \$15,000,000
- (E) More than \$50,000,000".

Reason for Amendment: The purpose of this amendment is to eliminate minor gaps in the loss table.

Effective Date: The effective date of this amendment is November 1, 1989.

212. Amendment: Section 2S1.1(b)(2) is amended in the first column of the table by deleting:

"Value

- (A) \$100,000 or less
- (B) \$100,001 - \$200,000
- (C) \$200,001 - \$350,000
- (D) \$350,001 - \$600,000
- (E) \$600,001 - \$1,000,000
- (F) \$1,000,001 - \$2,000,000
- (G) \$2,000,001 - \$3,500,000
- (H) \$3,500,001 - \$6,000,000
- (I) \$6,000,001 - \$10,000,000
- (J) \$10,000,001 - \$20,000,000
- (K) \$20,000,001 - \$35,000,000
- (L) \$35,000,001 - \$60,000,000
- (M) \$60,000,001 - \$100,000,000
- (N) more than \$100,000,000",

and inserting in lieu thereof:

"Value (Apply the Greatest)

- (A) \$100,000 or less
- (B) More than \$100,000
- (C) More than \$200,000
- (D) More than \$350,000

(E)	More than \$600,000
(F)	More than \$1,000,000
(G)	More than \$2,000,000
(H)	More than \$3,500,000
(I)	More than \$6,000,000
(J)	More than \$10,000,000
(K)	More than \$20,000,000
(L)	More than \$35,000,000
(M)	More than \$60,000,000
(N)	More than \$100,000,000".

Reason for Amendment: The purpose of this amendment is to eliminate minor gaps in the value table.

Effective Date: The effective date of this amendment is November 1, 1989.

- 213. Amendment:** The Commentary to §2S1.1 captioned "Background" is amended in the third paragraph by inserting the following additional sentences at the end: "Effective November 18, 1988, 18 U.S.C. § 1956(a)(1)(A) contains two subdivisions. The base offense level of 23 applies to § 1956(a)(1)(A)(i) and (ii).".

Reason for Amendment: The purpose of this amendment is to reflect a statutory revision made by Section 6471 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

- 214. Amendment:** The Commentary to §2S1.1 captioned "Background" is amended in the fourth paragraph by deleting "scope of the criminal enterprise as well as the degree of the defendant's involvement" and inserting in lieu thereof "magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise".

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

- 215. Amendment:** Section 2S1.2(b)(1)(A) is amended by inserting at the end "or".

The Commentary to §2S1.2 captioned "Background" is amended in the third paragraph by deleting "(b)(1)" and inserting in lieu thereof "(b)(1)(B)".

Reason for Amendment: The purpose of this amendment is to correct clerical errors.

Effective Date: The effective date of this amendment is November 1, 1989.

- 216. Amendment:** Section 2S1.3(a)(1)(C) is amended by deleting "the proceeds of criminal activity" and inserting in lieu thereof "criminally derived property", and in subsection (b)(1) by inserting "property" immediately following "criminally derived".

The Commentary to §2S1.3 captioned "Application Note" is amended by deleting:

- "1. As used in this guideline, funds or other property are the 'proceeds of criminal activity' or 'criminally derived' if they are 'criminally derived property,' within the meaning of 18 U.S.C. § 1957.",

and inserting in lieu thereof:

- "1. 'Criminally derived property' means any property constituting, or derived from, proceeds obtained from a criminal offense. See 18 U.S.C. § 1957(f)(2).".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

- 217. Amendment:** The Commentary to §2S1.3 captioned "Statutory Provisions" is amended by inserting "26 U.S.C. § 7203 (if a willful violation of 26 U.S.C. § 6050I);" immediately before "31 U.S.C.".

Reason for Amendment: The purpose of this amendment is to conform the guideline to a revision of the relevant statute.

Effective Date: The effective date of this amendment is November 1, 1989.

- 218. Amendment:** Section 2S1.3(a)(1)(A) is amended by inserting "or" immediately following "requirements;".

Section 2S1.3(a)(1)(B) is amended by deleting "activity" and inserting in lieu thereof "evasion of reporting requirements".

The Commentary to §2S1.3 captioned "Application Note" is amended in the caption by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional note:

- "2. Subsection (a)(1)(C) applies where a reasonable person would have believed from the circumstances that the funds were criminally derived property. Subsection (b)(1) applies if the defendant knew or believed the funds were criminally derived property. Subsection (b)(1) applies in addition to, and not in lieu of, subsection (a)(1)(C). Where subsection (b)(1) applies, subsection (a)(1)(C) also will apply. It is possible that a defendant 'believed' or 'reasonably should have believed' that the funds were criminally derived property even if, in fact, the funds were not so derived (e.g., in a 'sting' operation where the defendant is told the funds were derived from the unlawful sale of controlled substances).".

The Commentary to §2S1.3 captioned "Background" is amended in the second paragraph by deleting:

"The base offense level is set at 13 for the great majority of cases. However, the base offense level is set at 5 for those cases in which these offenses may be committed with innocent motives and the defendant reasonably believed that the funds were from legitimate sources. The higher base offense level applies in all other cases. The offense level is increased by 5 levels if the defendant knew that the funds were criminally

derived.",

and inserting in lieu thereof:

"A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements, made false statements to conceal or disguise the activity, or reasonably should have believed that the funds were criminally derived property. A lower alternative base offense level of 5 is provided in all other cases. The Commission anticipates that such cases will involve simple recordkeeping or other more minor technical violations of the regulatory scheme governing certain monetary transactions committed by defendants who reasonably believe that the funds at issue emanated from legitimate sources.

Where the defendant actually knew or believed that the funds were criminally derived property, subsection (b)(1) provides for a 5 level increase in the offense level."

The Commentary to §2S1.3 captioned "Background" is amended in the last paragraph by deleting "The dollar value of the the transactions not reported is an important sentencing factor, except in rare cases. It is an" and inserting in lieu thereof "Except in rare cases, the dollar value of the transactions not reported is an important".

The Commentary to §2S1.3 captioned "Statutory Provisions" is amended by inserting "18 U.S.C. § 1005;" immediately following "Provisions".

Reason for Amendment: The purposes of this amendment are to clarify the guideline and commentary, to provide more complete statutory references, and to conform the format of the guideline to that used in other guidelines.

Effective Date: The effective date of this amendment is November 1, 1989.

219. Amendment: Section 2T1.1(a) is amended by deleting the last sentence as follows: "When more than one year is involved, the tax losses are to be added."

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 2 by deleting:

"The court is to determine this amount as it would any other guideline factor.",

and inserting in lieu thereof:

"Although the definition of tax loss corresponds to what is commonly called the 'criminal deficiency,' its amount is to be determined by the same rules applicable in determining any other sentencing factor."

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 3 by deleting:

"Although the definition of tax loss corresponds to what is commonly called the 'criminal deficiency,' its amount is to be determined by the same rules applicable in

determining any other sentencing factor. In accordance with the 'relevant conduct' approach adopted by the guidelines, tax losses resulting from more than one year are to be added whether or not the defendant is convicted of multiple counts.",

and inserting in lieu thereof:

"In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: (a) there is a continuing pattern of violations of the tax laws by the defendant; (b) the defendant uses a consistent method to evade or camouflage income, e.g., backdating documents or using off-shore accounts; (c) the violations involve the same or a related series of transactions; (d) the violation in each instance involves a false or inflated claim of a similar deduction or credit; and (e) the violation in each instance involves a failure to report or an understatement of a specific source of income, e.g., interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive."

Reason for Amendment: The purposes of this amendment are to clarify the determination of tax loss and to make this instruction consistent among §§2T1.1-2T1.3.

Effective Date: The effective date of this amendment is November 1, 1989.

- 220. Amendment:** Section 2T1.1(a) is amended by deleting ", including interest to the date of filing an indictment or information" immediately following "attempted to evade".

The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 2 in the first sentence by deleting ", plus interest to the date of the filing of an indictment or information" immediately following "attempted to evade", and in the second sentence by inserting "interest or" immediately before "penalties."

Reason for Amendment: The purpose of this amendment is to simplify the application of the guideline by deleting interest from the calculation of tax loss.

Effective Date: The effective date of this amendment is November 1, 1989.

- 221. Amendment:** Section 2T1.1(b)(1) is amended by deleting "(A)" immediately before "the defendant failed", by deleting ", or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income" immediately following "criminal activity", by inserting "or to correctly identify the source of" immediately after "report", and by deleting "per" and inserting in lieu thereof "in any".

Reason for Amendment: The purposes of this amendment are to provide a more objective test for application of this enhancement, and to make clear that this enhancement applies if the defendant fails to report or disguises income exceeding \$10,000 from criminal activity in any year.

Effective Date: The effective date of this amendment is November 1, 1989.

- 222. Amendment:** The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 6 by deleting:

"Whether 'sophisticated means' were employed (§2T1.1(b)(2)) requires a subjective determination similar to that in §2F1.1(b)(2).",

and inserting in lieu thereof:

"'Sophisticated means,' as used in §2T1.1(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case."

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

- 223. Amendment:** The Commentary to §2T1.1 captioned "Background" is amended in the second paragraph by deleting "Tax Table" wherever it appears and inserting in lieu thereof in each instance "Sentencing Table".

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is November 1, 1989.

- 224. Amendment:** Section 2T1.2(b)(1) is amended by deleting "(A)" immediately before "the defendant failed", by deleting ", or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income" immediately following "criminal activity", by inserting "or to correctly identify the source of" immediately after "report", and by deleting "per" and inserting in lieu thereof "in any".

Reason for Amendment: The purposes of this amendment are to provide a more objective test for application of this enhancement, and to make clear that this enhancement applies if the defendant fails to report or disguises income exceeding \$10,000 from criminal activity in any year.

Effective Date: The effective date of this amendment is November 1, 1989.

- 225. Amendment:** Section 2T1.2 is amended by inserting the following additional subsection:

"(c) Cross Reference

- (1) If the defendant is convicted of a willful violation of 26 U.S.C. § 6050I, apply §2S1.3 (Failure to Report Monetary Transactions) in lieu of this guideline."

The Commentary to §2T1.2 captioned "Statutory Provision" is amended by inserting immediately before the period at the end "(other than a willful violation of 26 U.S.C. § 6050I)".

Reason for Amendment: The purpose of this amendment is to reflect a revision of 26 U.S.C. § 6050I made by Section 7601 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

226. Amendment: The Commentary to §2T1.2 captioned "Application Note" is amended in Note 2 by deleting:

"Whether 'sophisticated means' were employed (§2T1.2(b)(2)) requires a determination similar to that in §2F1.1(b)(2).",

and inserting in lieu thereof:

"'Sophisticated means,' as used in §2T1.2(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case."

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

227. Amendment: The Commentary to §2T1.2 captioned "Application Note" is amended in the caption by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional note:

"3. In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. See Application Note 3 of the Commentary to §2T1.1."

Reason for Amendment: The purpose of this amendment is to clarify the determination of tax loss.

Effective Date: The effective date of this amendment is November 1, 1989.

228. Amendment: Section 2T1.3(b)(1) is amended by deleting "(A)" immediately before "the defendant failed", by deleting ", or (B) the offense concealed or furthered criminal activity from which the defendant derived a substantial portion of his income" immediately following "criminal activity", by inserting "or to correctly identify the source of" immediately after "report", and by deleting "per" and inserting in lieu thereof "in any".

Reason for Amendment: The purposes of this amendment are to provide a more objective test for application of this enhancement, and to make clear that this enhancement applies if the defendant fails to report or disguises income exceeding \$10,000 from criminal activity in any year.

Effective Date: The effective date of this amendment is November 1, 1989.

- 229. Amendment:** The Commentary to §2T1.3 captioned "Application Notes" is amended in Note 2 by deleting:

"Whether 'sophisticated means' were employed (§2T1.3(b)(2)) requires a determination similar to that in §2F1.1(b)(2).",

and inserting in lieu thereof:

"'Sophisticated means,' as used in §2T1.3(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case."

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

- 230. Amendment:** The Commentary to §2T1.3 captioned "Application Notes" is amended by inserting the following additional note:

"3. In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. See Application Note 3 of the Commentary to §2T1.1."

Reason for Amendment: The purpose of this amendment is to clarify the determination of tax loss.

Effective Date: The effective date of this amendment is November 1, 1989.

- 231. Amendment:** The Commentary to §2T1.4 captioned "Application Notes" is amended in Note 2 by deleting:

"Whether 'sophisticated means' were employed (§2T1.1(b)(2)) requires a determination similar to that in §2F1.1(b)(2).",

and inserting in lieu thereof:

"'Sophisticated means,' as used in §2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case."

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

- 232. Amendment:** Section 2T1.6(a) is amended by deleting ", plus interest" immediately following

"paid over".

Reason for Amendment: The purpose of this amendment is to simplify the application of the guideline by deleting interest from the calculation of tax loss.

Effective Date: The effective date of this amendment is November 1, 1989.

233. Amendment: Section 2T1.9(b) is amended by deleting "either of the following adjustments" and inserting in lieu thereof "more than one".

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is November 1, 1989..

234. Amendment: The Commentary to section 2T1.9 captioned "Application Notes" is amended by deleting:

- "2. The minimum base offense level is 10. If a tax loss from the conspiracy can be established under either §2T1.1 or §2T1.3 (whichever applies to the underlying conduct), and that tax loss corresponds to a higher offense level in the Tax Table (§2T4.1), use that higher base offense level.
3. The specific offense characteristics are in addition to those specified in §2T1.1 and §2T1.3.
4. Because the offense is a conspiracy, adjustments from Chapter Three, Part B (Role in the Offense) usually will apply.",

and inserting in lieu thereof:

- "2. The base offense level is the offense level (base offense level plus any applicable specific offense characteristics) from §2T1.1 or §2T1.3 (whichever is applicable to the underlying conduct), if that offense level is greater than 10. Otherwise, the base offense level is 10.
3. Specific offense characteristics from §2T1.9(b) are to be applied to the base offense level determined under §2T1.9(a)(1) or (2)."

Reason for Amendment: The purpose of this amendment is to clarify Application Notes 2 and 3. Application Note 4 (the content of which does not appear in any of the other guidelines covering conspiracy) is deleted as unnecessary.

Effective Date: The effective date of this amendment is November 1, 1989.

235. Amendment: The Commentary to §2T3.1 captioned "Application Notes" is amended in Note 2 by inserting "if the increase in market value due to importation is not readily ascertainable" immediately following "United States".

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

236. Amendment: The Commentary to §2T3.2 is amended by inserting at the end:

"Application Note:

1. Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, the court should impose a sentence above the guideline. A sentence based upon an alternative measure of the 'duty' evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States if the increase in market value due to importation is not readily ascertainable, might be considered."

Reason for Amendment: The purpose of this amendment is to clarify the application of the guideline by adding the text from Application Note 2 of the Commentary to §2T3.1, which applies equally to this guideline section.

Effective Date: The effective date of this amendment is November 1, 1989.

237. Amendment: Section 2T4.1 is amended by deleting:

<u>"Tax Loss</u>	<u>Offense Level</u>
(A) less than \$2,000	6
(B) \$2,000 - \$5,000	7
(C) \$5,001 - \$10,000	8
(D) \$10,001 - \$20,000	9
(E) \$20,001 - \$40,000	10
(F) \$40,001 - \$80,000	11
(G) \$80,001 - \$150,000	12
(H) \$150,001 - \$300,000	13
(I) \$300,001 - \$500,000	14
(J) \$500,001 - \$1,000,000	15
(K) \$1,000,001 - \$2,000,000	16
(L) \$2,000,001 - \$5,000,000	17
(M) more than \$5,000,000	18",

and inserting in lieu thereof:

<u>"Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(A) \$2,000 or less	6
(B) More than \$2,000	7
(C) More than \$5,000	8
(D) More than \$10,000	9

(E)	More than \$20,000	10
(F)	More than \$40,000	11
(G)	More than \$70,000	12
(H)	More than \$120,000	13
(I)	More than \$200,000	14
(J)	More than \$350,000	15
(K)	More than \$500,000	16
(L)	More than \$800,000	17
(M)	More than \$1,500,000	18
(N)	More than \$2,500,000	19
(O)	More than \$5,000,000	20
(P)	More than \$10,000,000	21
(Q)	More than \$20,000,000	22
(R)	More than \$40,000,000	23
(S)	More than \$80,000,000	24."

Reason for Amendment: The purposes of this amendment are to increase the offense levels for offenses with larger losses in order to provide additional deterrence and better reflect the seriousness of the conduct, and to eliminate minor gaps in the table.

Effective Date: The effective date of this amendment is November 1, 1989.

238. Amendment: Section 2X1.1(b)(1) is amended by deleting "or solicitation" immediately following "If an attempt".

Section 2X1.1(b) is amended by deleting:

"(3) If a solicitation, and the statute treats solicitation identically with the object of the offense, do not apply §2X1.1(b)(1); i.e., the offense level for solicitation is the same as that for the object offense.",

and inserting in lieu thereof:

"(3)(A) If a solicitation, decrease by 3 levels unless the person solicited to commit or aid the offense completed all the acts he believed necessary for successful completion of the object offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond such person's control.

(B) If the statute treats solicitation of the offense identically with the object offense, do not apply subdivision (A) above; i.e., the offense level for solicitation is the same as that for the object offense."

Reason for Amendment: The current subsection (b)(1) does not clearly address how a solicitation is to be treated where the person solicited to commit the offense completes all the acts necessary for the successful completion of the offense. The purpose of this amendment is to clarify the treatment of such cases in a manner consistent with the treatment of attempts and conspiracies.

Effective Date: The effective date of this amendment is November 1, 1989.

239. Amendment: Section 2X1.1 is amended in the title by deleting "Not Covered by a Specific Guideline" and inserting in lieu thereof "(Not Covered by a Specific Offense Guideline)".

Section 2X1.1 is amended by inserting the following additional subsection:

"(c) Cross Reference

- (1) When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section."

The Commentary to §2X1.1 captioned "Application Notes" is amended by deleting:

- "1. Certain attempts, conspiracies, and solicitations are covered by specific guidelines (e.g., §2A2.1 includes attempt, conspiracy, or solicitation to commit murder; §2A3.1 includes attempted criminal sexual abuse; and §2D1.4 includes attempts and conspiracies to commit controlled substance offenses). Section 2X1.1 applies only in the absence of a more specific guideline."

and inserting in lieu thereof:

- "1. Certain attempts, conspiracies, and solicitations are expressly covered by other offense guidelines.

Offense guidelines that expressly cover attempts include: §2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder); §2A3.1 (Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse); §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts); §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts); §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact); §2A4.2 (Demanding or Receiving Ransom Money); §2A5.1 (Aircraft Piracy or Attempted Aircraft Piracy); §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); §2D1.4 (Attempts and Conspiracies); §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan); §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Serious Injury); §2Q1.4 (Tampering or Attempted Tampering with Public Water System).

Offense guidelines that expressly cover conspiracies include: §2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder); §2D1.4 (Attempts and Conspiracies); §2H1.2 (Conspiracy to Interfere with Civil Rights); §2T1.9 (Conspiracy to Impair, Impede or Defeat Tax).

Offense guidelines that expressly cover solicitations include: §2A2.1 (Assault with Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder); §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe;

Extortion Under Color of Official Right); §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan).".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

240. Amendment: The Commentary to §2X1.1 captioned "Application Notes" is amended by deleting:

"4. If the defendant was convicted of conspiracy or solicitation and also for the completed offense, the conviction for the conspiracy or solicitation shall be imposed to run concurrently with the sentence for the object offense, except in cases where it is otherwise specifically provided for by the guidelines or by law. 28 U.S.C. § 994(1)(2).".

Reason for Amendment: The purpose of this amendment is to delete an application note that does not apply to any determination under this section. The circumstances which this application note addresses are covered under Chapter Three, Part D and Chapter Five, Part G.

Effective Date: The effective date of this amendment is November 1, 1989.

241. Amendment: The Commentary to §2X1.1 captioned "Application Notes" is amended by inserting the following additional note:

"4. In certain cases, the participants may have completed (or have been about to complete but for apprehension or interruption) all of the acts necessary for the successful completion of part, but not all, of the intended offense. In such cases, the offense level for the count (or group of closely-related multiple counts) is whichever of the following is greater: the offense level for the intended offense minus 3 levels (under §2X1.1(b)(1), (b)(2), or (b)(3)(A)), or the offense level for the part of the offense for which the necessary acts were completed (or about to be completed but for apprehension or interruption). For example, where the intended offense was the theft of \$800,000 but the participants completed (or were about to complete) only the acts necessary to steal \$30,000, the offense level is the offense level for the theft of \$800,000 minus 3 levels, or the offense level for the theft of \$30,000, whichever is greater.

In the case of multiple counts that are not closely-related counts, whether the 3-level reduction under §2X1.1(b)(1) or (2) applies is determined separately for each count.".

Reason for Amendment: The purpose of this amendment is to clarify how the guidelines are to be applied to partially completed offenses.

Effective Date: The effective date of this amendment is November 1, 1989.

242. Amendment: The Commentary to §2X1.1 captioned "Application Notes" is amended in the last sentence of Note 2 by deleting "intended" and inserting in lieu thereof "attempted".

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

243. Amendment: The Commentary to §2X3.1 captioned "Application Notes" is amended in Note 1 by deleting:

"'Underlying offense' means the offense as to which the defendant was an accessory.",

and inserting in lieu thereof:

"'Underlying offense' means the offense as to which the defendant is convicted of being an accessory. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 1 of the Commentary to §1B1.3 (Relevant Conduct)."

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

244. Amendment: The Commentary to §2X4.1 captioned "Application Notes" is amended in Note 1 by deleting:

"'Underlying offense' means the offense as to which the misprision was committed.",

and inserting in lieu thereof:

"'Underlying offense' means the offense as to which the defendant is convicted of committing the misprision. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 1 of the Commentary to §1B1.3 (Relevant Conduct)."

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

245. Amendment: Section 3A1.1 is amended by deleting "the victim" wherever it appears and inserting in lieu thereof in each instance "a victim", and by inserting "otherwise" immediately before "particularly".

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

"any offense where the victim's vulnerability played any part in the defendant's decision to commit the offense",

and inserting in lieu thereof:

"offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant",

and by deleting:

"sold fraudulent securities to the general public and one of the purchasers",

and inserting in lieu thereof:

"sold fraudulent securities by mail to the general public and one of the victims".

Reason for Amendment: The purpose of the amendment is to clarify the guideline and commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

246. Amendment: Section 3A1.2 is amended by deleting:

"any law-enforcement or corrections officer, any other official as defined in 18 U.S.C. § 1114, or a member of the immediate family thereof, and",

and inserting in lieu thereof:

"a law enforcement or corrections officer; a former law enforcement or corrections officer; an officer or employee included in 18 U.S.C. § 1114; a former officer or employee included in 18 U.S.C. § 1114; or a member of the immediate family of any of the above, and".

Reason for Amendment: The purpose of this amendment is to expand the coverage of this provision to reflect a statutory revision effected by Section 6487 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

247. Amendment: Section 3A1.2 is amended by deleting "If the victim" and inserting in lieu thereof:

"If--

(a) the victim",

and by deleting "crime was motivated by such status, increase by 3 levels." and inserting in lieu thereof:

"offense of conviction was motivated by such status; or

(b) during the course of the offense or immediate flight therefrom, the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having

reasonable cause to believe that a person was a law enforcement or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury,

increase by 3 levels."

The Commentary to §3A1.2 captioned "Application Notes" is amended by inserting the following additional notes:

- "4. 'Motivated by such status' in subdivision (a) means that the offense of conviction was motivated by the fact that the victim was a law enforcement or corrections officer or other person covered under 18 U.S.C. § 1114, or a member of the immediate family thereof. This adjustment would not apply, for example, where both the defendant and victim were employed by the same government agency and the offense was motivated by a personal dispute.
5. Subdivision (b) applies in circumstances tantamount to aggravated assault against a law enforcement or corrections officer, committed in the course of, or in immediate flight following, another offense, such as bank robbery. While this subdivision may apply in connection with a variety of offenses that are not by nature targeted against official victims, its applicability is limited to assaultive conduct against law enforcement or corrections officers that is sufficiently serious to create at least a 'substantial risk of serious bodily injury' and that is proximate in time to the commission of the offense.
6. The phrase 'substantial risk of serious bodily injury' in subdivision (b) is a threshold level of harm that includes any more serious injury that was risked, as well as actual serious bodily injury (or more serious harm) if it occurs."

Reason for Amendment: The purpose of the amendment is to set forth more clearly the categories of cases to which this adjustment is intended to apply.

Effective Date: The effective date of this amendment is November 1, 1989.

248. Amendment: The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 3 by inserting the following additional sentences at the end:

"In most cases, the offenses to which subdivision (a) will apply will be from Chapter Two, Part A (Offenses Against the Person). The only offense guideline in Chapter Two, Part A that specifically incorporates this factor is §2A2.4 (Obstructing or Impeding Officers)."

Reason for Amendment: The purpose of this amendment is to clarify the application of the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

249. Amendment: Section 3A1.3 is amended by deleting "the victim of a crime" and inserting in lieu thereof "a victim".

The Commentary to §3A1.3 captioned "Application Notes" is amended in Note 2 by deleting "the victim" and inserting in lieu thereof "a victim".

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

250. Amendment: The Commentary to §3A1.3 captioned "Application Notes" is amended by inserting the following additional note:

"3. If the restraint was sufficiently egregious, an upward departure may be warranted. See §5K2.4 (Abduction or Unlawful Restraint)."

Reason for Amendment: The purpose of this amendment is to clarify the relationship between §3A1.3 and §5K2.4.

Effective Date: The effective date of this amendment is November 1, 1989.

251. Amendment: Section 3C1.1 is amended by deleting "from Chapter Two" immediately following "the offense level".

Reason for Amendment: The purpose of this amendment is to delete an incorrect reference.

Effective Date: The effective date of this amendment is November 1, 1989.

- 252. Amendment:** The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 4 by deleting:

", except in determining the combined offense level as specified in Chapter Three, Part D (Multiple Counts). Under §3D1.2(e), a count for obstruction will be grouped with the count for the underlying offense. Ordinarily, the offense level for that Group of Closely Related Counts will be the offense level for the underlying offense, as increased by the 2-level adjustment specified by this section. In some instances, however, the offense level for the obstruction offense may be higher, in which case that will be the offense level for the Group. See §3D1.3(a). In cases in which a significant further obstruction occurred during the investigation or prosecution of an obstruction offense itself (one of the above listed offenses), an upward departure may be warranted (e.g., where a witness to an obstruction offense is threatened during the course of the prosecution for the obstruction offense).",

and inserting in lieu thereof:

"to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely-Related Counts). The offense level for that Group of Closely-Related Counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater."

Reason for Amendment: The purpose of this amendment is to resolve an inconsistency between the commentary in this section and the Commentaries in Chapter Two, Part J.

Effective Date: The effective date of this amendment is November 1, 1989.

- 253. Amendment:** Section 3D1.2(b)(3) is amended by deleting "§ 994(u)" and inserting in lieu thereof "§ 994(v)".

Section 3D1.2(d) is amended in the second paragraph by deleting ", 2D1.3", and in the third paragraph by deleting ", 2G3.2" and ", 2P1.4".

Reason for Amendment: The purposes of this amendment are to correct an erroneous reference, and to delete references to two guidelines covering petty offenses that have been deleted and to a guideline that has been deleted by consolidation with another guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

254. Amendment: The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 3 by deleting "(6)", "(7)", and "(8)" and inserting in lieu thereof "(5)", "(6)", and "(7)" respectively.

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is November 1, 1989.

255. Amendment: The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 9 by inserting immediately following the second sentence: "See §1B1.2(d) and accompanying commentary."

Reason for Amendment: The purpose of this amendment is to cross reference the newly created guideline subsection dealing with a multiple object conspiracy.

Effective Date: The effective date of this amendment is November 1, 1989.

256. Amendment: The Commentary to §3D1.2 captioned "Background" is amended in the second paragraph by deleting:

"In general, counts are grouped together only when they involve both the same victim (or societal harm in 'victimless' offenses) and the same or contemporaneous transactions, except as provided in §3D1.2(c) or (d).",

and inserting in lieu thereof:

"Counts involving different victims (or societal harms in the case of 'victimless' crimes) are grouped together only as provided in subsection (c) or (d)."

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

257. Amendment: Section 3D1.3(b) is amended in the second sentence by deleting "varying" immediately following "involve", and by inserting "of the same general type to which different guidelines apply (e.g., theft and fraud)" immediately following "offenses".

Reason for Amendment: The purpose of this amendment is to enhance the clarity of the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

258. Amendment: The Commentary to §3E1.1 captioned "Application Notes" is amended by deleting:

"4. An adjustment under this section is not warranted where a defendant perjures himself, suborns perjury, or otherwise obstructs the trial or the administration of justice (see §3C1.1), regardless of other factors."

and inserting in lieu thereof:

- "4. Conduct resulting in an enhancement under §3C1.1 (Willfully Obstructing or Impeding Proceedings) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply."

Reason for Amendment: The purposes of this amendment are to provide for extraordinary cases in which adjustments under both §3C1.1 and §3E1.1 are appropriate, and to clarify the reference to obstructive conduct.

Effective Date: The effective date of this amendment is November 1, 1989.

- 259. Amendment:** Section 4A1.1(e) is amended by inserting "or while in imprisonment or escape status on such a sentence" immediately before the period at the end of the first sentence.

The Commentary to §4A1.1 captioned "Application Notes" is amended in the second sentence of Note 5 by deleting "still in confinement" and inserting in lieu thereof "in imprisonment or escape status".

Reason for Amendment: The purpose of this amendment is to clarify that subsection (e) applies to defendants who are still in confinement status at the time of the instant offense (e.g., a defendant who commits the instant offense while in prison or on escape status).

Effective Date: The effective date of this amendment is November 1, 1989.

- 260. Amendment:** The Commentary to §4A1.1 captioned "Application Notes" is amended in Note 4 by inserting the following additional sentence at the end: "For the purposes of this item, a 'criminal justice sentence' means a sentence countable under §4A1.2 (Definitions and Instructions for Computing Criminal History)."

Reason for Amendment: The purpose of this amendment is to clarify the application of the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

- 261. Amendment:** The Commentary to §4A1.1 captioned "Background" is amended in the third paragraph by inserting "a" immediately before "criminal", and by deleting "control" and inserting in lieu thereof "sentence".

Reason for Amendment: The purpose of this amendment is to conform the commentary to the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

- 262. Amendment:** Section 4A1.2(e)(1) is amended by inserting ", whenever imposed," immediately before "that resulted", and by deleting "defendant's incarceration" and inserting in lieu thereof "defendant being incarcerated".

Reason for Amendment: The purpose of this amendment is to clarify that "resulted in the defendant's incarceration" applies to any part of the defendant's imprisonment and not only to the commencement of the defendant's imprisonment.

Effective Date: The effective date of this amendment is November 1, 1989.

263. Amendment: Section 4A1.2(e) is amended by inserting the following additional subdivision:

"(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by §4A1.2(d)(2)."

Reason for Amendment: The purpose of this amendment is to clarify the relationship between §4A1.2(d)(2) and (e).

Effective Date: The effective date of this amendment is November 1, 1989.

264. Amendment: Section 4A1.2(f) is amended by inserting ", or a plea of nolo contendere," immediately following "admission of guilt".

Reason for Amendment: The purpose of this amendment is to clarify that a plea of nolo contendere is equivalent to a finding of guilt for the purpose of §4A1.2(f).

Effective Date: The effective date of this amendment is November 1, 1989.

265. Amendment: The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 8 by deleting "4A1.2(e)" and inserting in lieu thereof "4A1.2(d)(2) and (e)", and by inserting immediately following the first sentence:

"As used in §4A1.2(d)(2) and (e), the term 'commencement of the instant offense' includes any relevant conduct. See §1B1.3 (Relevant Conduct)."

Reason for Amendment: The purposes of this amendment are to correct a clerical error by inserting a reference to §4A1.2(d)(2), and to clarify that "commencement of the instant offense" includes any relevant conduct.

Effective Date: The effective date of this amendment is November 1, 1989.

266. Amendment: Section 4B1.1 is amended by deleting "Offense Level" and inserting in lieu thereof "Offense Level*", and by inserting at the end:

"*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by 2 levels."

Reason for Amendment: The purpose of this amendment is to authorize the application of §3E1.1 (Acceptance of Responsibility) to the determination of the offense level under this section to provide an incentive for the acceptance of responsibility by defendants subject to the career offender provision.

Effective Date: The effective date of this amendment is November 1, 1989.

267. Amendment: The Commentary to §4B1.1 captioned "Application Note" is amended in Note 1 by deleting "felony conviction" and inserting in lieu thereof "two prior felony convictions".

The Commentary to §4B1.1 captioned "Application Note" is amended by inserting the following additional note:

- "2. 'Offense Statutory Maximum' refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that authorizes the greatest maximum term of imprisonment.",

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

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

"128 Cong. Rec. 12792, 97th Cong., 2d Sess. (1982) ('Career Criminals' amendment No. 13 by Senator Kennedy), 12796 (explanation of amendment), and 12798 (remarks by Senator Kennedy)",

and inserting in lieu thereof:

"128 Cong. Rec. 26, 511-12 (1982) (text of 'Career Criminals' amendment by Senator Kennedy), 26, 515 (brief summary of amendment), 26, 517-18 (statement of Senator Kennedy)".

Reason for Amendment: The purposes of this amendment are to clarify the operation of the guideline and to provide a citation to the more readily available edition of the Congressional Record.

Effective Date: The effective date of this amendment is November 1, 1989.

268. Amendment: Section 4B1.2(1) is amended by deleting "as used in this provision is defined under 18 U.S.C. § 16" and inserting in lieu thereof:

"means any offense under federal or state law punishable by imprisonment for a term exceeding one year that --

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another".

Section 4B1.2(2) is amended by deleting "as used in this provision" immediately before "means", and by deleting "identified in 21 U.S.C. §§841, 845(b), 856, 952(a), 955, 955(a), 959; and similar offenses" and inserting in lieu thereof:

"under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute".

The Commentary to §4B1.2 captioned "Application Notes" is amended by deleting:

1. 'Crime of violence' is defined in 18 U.S.C. § 16 to mean an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that by its nature involves a substantial risk that physical force against the person or property of another may be used in committing the offense. The Commission interprets this as follows: murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit, forcible sex offenses, arson, or robbery are covered by this provision. Other offenses are covered only if the conduct for which the defendant was specifically convicted meets the above definition. For example, conviction for an escape accomplished by force or threat of injury would be covered; conviction for an escape by stealth would not be covered. Conviction for burglary of a dwelling would be covered; conviction for burglary of other structures would not be covered.
2. 'Controlled substance offense' includes any federal or state offense that is substantially similar to any of those listed in subsection (2) of the guideline. These offenses include manufacturing, importing, distributing, dispensing, or possessing with intent to manufacture, import, distribute, or dispense, a controlled substance (or a counterfeit substance). This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed.",

and inserting in lieu thereof:

1. The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.
2. 'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use attempted use, or threatened use, of physical force against the person of another, or (B) the conduct set forth in the count of which the defendant was convicted involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another."

The caption of §4B1.2 is amended by deleting "Definitions" and inserting in lieu thereof "Definitions of Terms Used in Section 4B1.1".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 4 by deleting "§4A1.2(e) (Applicable Time Period), §4A1.2(h) (Foreign Sentences), and §4A1.2(j) (Expunged Convictions)" and inserting in lieu thereof "§4A1.2 (Definitions and Instructions

for Computing Criminal History)", and by deleting the last sentence as follows: "Also applicable is the Commentary to §4A1.2 pertaining to invalid convictions."

Reason for Amendment: The purpose of this amendment is to clarify the definitions of crime of violence and controlled substance offense used in this guideline. The definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e). In addition, the amendment clarifies that all pertinent definitions and instructions in §4A1.2 apply to this section.

Effective Date: The effective date of this amendment is November 1, 1989.

269. Amendment: Section 4B1.3 is amended by deleting "from which he derived a substantial portion of his income" and inserting in lieu thereof "engaged in as a livelihood".

The Commentary to §4B1.3 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes", and by inserting the following additional note:

- "2. 'Engaged in as a livelihood' means that (1) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law (currently 2,000 times the hourly minimum wage under federal law is \$6,700); and (2) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period (e.g., the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for his criminal conduct)."

The Commentary to §4B1.3 captioned "Application Notes" is amended in Note 1 by deleting the last sentence as follows: "This guideline is not intended to apply to minor offenses."

The Commentary to §4B1.3 captioned "Background" is amended by deleting "proportion" and inserting in lieu thereof "portion".

Reason for Amendment: The purpose of this amendment is to provide a better definition of the intended scope of this enhancement. Compare, for example, United States v. Kerr, 686 F. Supp. 1174 (W.D. Penn. 1988) with United States v. Rivera, 694 F. Supp. 1105 (S.D.N.Y. 1988). The first prong of the definition in application Note 2 above is derived from former 18 U.S.C. § 3575, the provision from which the statutory instruction underlying this guideline (28 U.S.C. § 994 (i)(2)) was itself derived.

Effective Date: The effective date of this amendment is November 1, 1989.

270. Amendment: Chapter Five, Part A, is amended in the Sentencing Table by deleting "0-1, 0-2, 0-3, 0-4, and 0-5" wherever it appears, and inserting in each instance "0-6".

Chapter Five, Part A, is amended in the Sentencing Table by inserting "(in months of imprisonment)" immediately under the title "Sentencing Table", by inserting "(Criminal History Points)" immediately following the caption "Criminal History Category", and by enclosing in parentheses each of the six sets of criminal history points displayed under that caption.

Reason for Amendment: This amendment provides that the maximum of the guideline range is six months wherever the minimum of the guideline range is zero months. The court has discretion to impose a sentence of up to 6 months imprisonment for a Class B misdemeanor (Class B or C misdemeanors and infractions are not covered by the guidelines; see §1B1.9). It appears anomalous that the Commission guidelines allow less discretion for certain felonies and Class A misdemeanors. In fact, in certain cases, a plea to a reduced charge of a Class B misdemeanor could result in a higher potential sentence because the sentence for the felony or Class A misdemeanor might be restricted to less than 6 months by the guidelines. This can happen when the Sentencing Table provides a guideline range of 0-1 month, 0-2 months, 0-3, 0-4, or 0-5 months. These very narrow ranges are not required by statute, which allows a 6 month guideline range in such cases. This anomaly is removed by amending the guideline table to provide that whenever the lower limit of the guideline range is 0 months, the upper limit of the guideline range is six months.

In addition, this amendment makes minor editorial improvements to the title and caption of the Sentencing Table.

Effective Date: The effective date of this amendment is November 1, 1989.

271. Amendment: Section 5B1.4(b)(20) is amended by inserting ", but only as a substitute for imprisonment" immediately following "release".

Section 5C2.1(c)(2) is amended by deleting "or community confinement" and inserting in lieu thereof ", community confinement, or home detention".

Section 5C2.1(c)(3) is amended by inserting "or home detention" immediately following "community confinement".

Section 5C2.1(d)(2) is amended by inserting "or home detention" immediately following "community confinement".

Section 5C2.1(e) is amended by inserting the following additional subdivision:

"(3) One day of home detention for one day of imprisonment.",

and by deleting the period at the end of subsection (e)(2) and inserting a semicolon in lieu thereof.

The Commentary to §5C2.1 captioned "Application Notes" is amended in the first sentence of the second subparagraph of Note 3 by deleting "intermittent confinement or community confinement, or combination of intermittent and community confinement," and inserting in lieu thereof "intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention,".

The Commentary to §5C2.1 captioned "Application Notes" is amended in the second sentence of the second subparagraph of Note 3 by deleting "intermittent or community confinement" and inserting in lieu thereof "intermittent confinement, community confinement, or home detention".

The Commentary to §5C2.1 captioned "Application Notes" is amended in the third subparagraph of Note 3 by inserting "or home detention" immediately following "community confinement", wherever the latter appears.

The Commentary to §5C2.1 captioned "Application Notes" is amended in the last paragraph of Note 3 by inserting "or home detention" immediately following "community confinement", wherever the latter appears.

The Commentary to §5C2.1 captioned "Application Notes" is amended in Note 4 by inserting "or home detention" immediately following "community confinement", wherever the latter appears.

The Commentary to §5C2.1 captioned "Application Notes" is amended in Note 5 by deleting the last sentence as follows: "Home detention may not be substituted for imprisonment."

Section 5F5.2 is amended by inserting ", but only as a substitute for imprisonment" immediately following "release".

The Commentary to §5F5.2 captioned "Application Notes" is amended in Note 1 by deleting:

"'Home detention' means a program of confinement and supervision that restricts the defendant to his place of residence continuously, or during specified hours, enforced by appropriate means of surveillance by the probation office. The judge may also impose other conditions of probation or supervised release appropriate to effectuate home detention. If the confinement is only during specified hours, the defendant shall engage exclusively in gainful employment, community service or treatment during the non-residential hours.",

and inserting in lieu thereof:

"'Home detention' means a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention. However, alternative means of surveillance may be used so long as they are as effective as electronic monitoring."

The Commentary to §5F5.2 captioned "Application Notes" is amended in Note 2 by deleting:

"Home detention generally should not be imposed for a period in excess of six months. However, a longer term may be appropriate for disabled, elderly or extremely ill defendants who would otherwise be imprisoned.",

and inserting in lieu thereof:

"The court may impose other conditions of probation or supervised release appropriate to effectuate home detention. If the court concludes that the amenities available in the residence of a defendant would cause home detention not to be sufficiently punitive, the court may limit the amenities available."

The Commentary to §5F5.2 captioned "Application Notes" is amended by inserting the following additional note:

"3. The defendant's place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence (and any other person(s) from whom consent is necessary) agrees to any conditions that may be imposed by the court, e.g., conditions that a monitoring system be installed, that there will be no 'call forwarding' or 'call waiting' services, or that there will be no cordless telephones or answering machines."

The Commentary to §5F5.2 is amended by inserting at the end:

"Background: The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring. However, in some cases home detention may effectively be enforced without electronic monitoring, e.g., when the defendant is physically incapacitated, or where some other effective means of surveillance is available. Accordingly, the Commission has not required that electronic monitoring be a necessary condition for home detention. Nevertheless, before ordering home detention without electronic monitoring, the court should be confident that an alternative form of surveillance will be equally effective.

In the usual case, the Commission assumes that a condition requiring that the defendant seek and maintain gainful employment will be imposed when home detention is ordered."

Section 5B1.1(a)(2) is amended by deleting "or community confinement" and inserting in lieu thereof ", community confinement, or home detention".

The Commentary to §5B1.1 captioned "Application Notes" is amended in Note 1 by inserting ", home detention," immediately after "community confinement" wherever the latter appears.

Chapter One, Part A, section 4(d) is amended in the third sentence of the third paragraph by deleting "or intermittent confinement" and inserting in lieu thereof ", intermittent confinement, or home detention", and in the fourth sentence of the third paragraph by inserting "or home detention" immediately following "of community confinement".

Reason for Amendment: The purpose of this amendment is to conform the guidelines with Section 7305 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

272. Amendment: Section 5B1.4(b) is amended by inserting the following additional paragraph at the end:

"(25) Curfew

If the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant, a condition of curfew is recommended. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order."

Section 5B1.4 is amended by inserting the following commentary:

"Commentary

Application Note:

1. Home detention, as defined by §5F5.2, may only be used as a substitute for imprisonment. See §5C2.1 (Imposition of a Term of Imprisonment). Under home detention, the defendant, with specified exceptions, is restricted to his place of residence during all non-working hours. Curfew, which limits the defendant to his place of residence during evening and nighttime hours, is less restrictive than home detention and may be imposed as a condition of probation whether or not imprisonment could have been ordered."

Reason for Amendment: The purposes of this amendment are to set forth the conditions under which curfew is a recommended condition of probation and clarify that electronic monitoring may be used as a means of surveillance in connection with an order of curfew.

Effective Date: The effective date of this amendment is November 1, 1989.

- 273. Amendment:** Section 5B1.3(c) is amended by inserting immediately before the period at the end of the first sentence:

", unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under 18 U.S.C. § 3563(b)".

Reason for Amendment: The purpose of this amendment is to conform the guideline to a statutory revision.

Effective Date: The effective date of this amendment is November 1, 1989.

- 274. Amendment:** Section 5B1.3(a) is amended by inserting at the end: "The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3)".

Section 5B1.3 is amended by inserting the following commentary:

"Commentary

A broader form of the condition required under 18 U.S.C. § 3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)."

Reason for Amendment: The purpose of this amendment is to reference a mandatory condition of probation added by Section 7303 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

275. Amendment: Section 5C2.1(e) is amended by deleting "Thirty days" and inserting in lieu thereof "One day", by deleting "one month" wherever it appears and inserting in lieu thereof in each instance "one day", and by deleting "One month" and inserting in lieu thereof "One day".

Reason for Amendment: The purpose of this amendment is to enhance the internal consistency of the guidelines.

Effective Date: The effective date of this amendment is November 1, 1989.

276. Amendment: Section 5D3.3 is amended by deleting:

"(b) In order to fulfill any authorized purposes of sentencing, the court may impose other conditions reasonably related to (1) the nature and circumstances of the offense, and (2) the history and characteristics of the defendant. 18 U.S.C. § 3583(d).",

and inserting in lieu thereof:

"(b) The court may impose other conditions of supervised release, to the extent that such conditions are reasonably related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant, and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. §§ 3553(a)(2) and 3583(d)."

Reason for Amendment: The purposes of this amendment are to clarify the guideline and conform it to the statute as amended by Section 7108 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

277. Amendment: Section 5D3.3(a) is amended by inserting at the end: "The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3)."

The Commentary to §5D3.3 captioned "Background" is amended by inserting the following additional sentence at the end:

"A broader form of the condition required under 18 U.S.C. § 3563(a)(3) (pertaining to

possession of controlled substances) is set forth as recommended condition (7) at §5B1.4 (Recommended Conditions of Probation and Supervised Release)."

Reason for Amendment: The purpose of this amendment is to reference a mandatory condition of supervised release added by Section 7303 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

278. Amendment: Section 5E4.1 is amended by inserting the following additional subsection:

"(c) With the consent of the victim of the offense, the court may order a defendant to perform services for the benefit of the victim in lieu of monetary restitution or in conjunction therewith. 18 U.S.C. § 3663(b)(4)."

Reason for Amendment: The purpose of this amendment is to insert language previously contained in §5F5.3(b) where it had been erroneously placed.

Effective Date: The effective date of this amendment is November 1, 1989.

279. Amendment: The Commentary to §5E4.1 captioned "Background" is amended in the first paragraph by deleting:

"See S. Rep. No. 225, 98th Cong., 1st Sess. 95-96.",

and inserting in lieu thereof:

"See 18 U.S.C. § 3563(b)(3) as amended by Section 7110 of Pub. L. No. 100-690 (1988)."

Reason for Amendment: This amendment replaces a reference to legislative history with a citation to a revised statute. Section 7110 of the Anti-Drug Abuse Act of 1988 confirms the authority of a sentencing court to impose restitution as a condition of probation. Previously, such authority was inferred from 18 U.S.C. §3563(b)(20) (defendant may be ordered to "satisfy such other conditions as the court may impose") and from legislative history.

Effective Date: The effective date of this amendment is November 1, 1989.

280. Amendment: Section 5E4.2(a) is amended by deleting the second sentence as follows:

"If the guideline for the offense in Chapter Two prescribes a different rule for imposing fines, that rule takes precedence over this subsection."

Section 5E4.2(b) is amended by inserting at the end:

"If, however, the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) of this section."

Reason for Amendment: The purpose of this amendment is to clarify the guideline. The last

sentence of current §5E4.2(a) is in the wrong place. This amendment moves the content of this sentence to subsection (b) where it belongs.

Effective Date: The effective date of this amendment is November 1, 1989.

281. Amendment: Section 5E4.2(c)(3) is amended by deleting:

"1	\$ 25	\$ 250
2-3	\$100	\$1,000
4-5	\$250	\$2,500",

and inserting in lieu thereof:

"3 and below	\$100	\$5,000
4-5	\$250	\$5,000".

Reason for Amendment: The purpose of this amendment is to increase the maximum in the fine table for offense levels 5 and below to \$5,000, an amount equal to the maximum fine authorized for a petty offense. Moreover, because the guidelines now cover only felonies and class A misdemeanors, the minimum fine guideline is increased to \$100.

Effective Date: The effective date of this amendment is November 1, 1989.

282. Amendment: The Commentary to Section 5E4.3 captioned "Background" is amended in the first paragraph by inserting at the end:

"Under the Victims of Crime Act, as amended by Section 7085 of the Anti-Drug Abuse Act of 1988, the court is required to impose assessments in the following amounts with respect to offenses committed on or after November 18, 1988:

Individuals:

\$5, if the defendant is an individual convicted of an infraction or a Class C misdemeanor;
 \$10, if the defendant is an individual convicted of a Class B misdemeanor;
 \$25, if the defendant is an individual convicted of a Class A misdemeanor; and
 \$50, if the defendant is an individual convicted of a felony.

Organizations:

\$50, if the defendant is an organization convicted of a Class B misdemeanor;
 \$125, if the defendant is an organization convicted of a Class A misdemeanor; and
 \$200, if the defendant is an organization convicted of a felony. 18 U.S.C. § 3013.",

and in the second paragraph by deleting "The Act requires the court" and inserting in lieu thereof "With respect to offenses committed prior to November 18, 1988, the court is required".

Reason for Amendment: The purpose of this amendment is to conform the commentary to the statute as amended by Section 7085 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

- 283. Amendment:** Section 5F5.3(a) is amended by deleting "(a)", and by inserting "and sentenced to probation" immediately following "felony".

Section 5F5.3(b) is amended by deleting:

- "(b) With the consent of the victim of the offense, the court may order a defendant to perform services for the benefit of the victim in lieu of monetary restitution. 18 U.S.C. § 3663(b)(4)."

Reason for Amendment: The purposes of this amendment are to correct an erroneous statement in §5F5.3(a) and to delete §5F5.3(b), which deals with restitution, and therefore should appear at §5E4.1.

Effective Date: The effective date of this amendment is November 1, 1989.

- 284. Amendment:** The Commentary to §5F5.4 captioned "Background" is amended by deleting the third paragraph as follows:

"The legislative history indicates that, although the sanction was designed to provide actual notice to victims, a court might properly limit notice to only those victims who could be most readily identified, if to do otherwise would unduly prolong or complicate the sentencing process."

Reason for Amendment: The purpose of this amendment is to delete an unnecessary statement that could be subject to misinterpretation.

Effective Date: The effective date of this amendment is November 1, 1989.

- 285. Amendment:** Section 5F5.5(a) is amended by deleting:

- "(2) there is a risk that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted; and
(3) imposition of such a restriction is reasonably necessary to protect the public.",

and inserting in lieu thereof:

- "(2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.",

and by inserting "and" at the end of subsection (a)(1).

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

286. Amendment: Chapter Five, Part G is amended by deleting §5G1.1 in its entirety as follows:

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

- (a) If application of the guidelines results in a sentence above the maximum authorized by statute for the offense of conviction, the statutory maximum shall be the guideline sentence.
- (b) If application of the guidelines results in a sentence below the minimum sentence required by statute, the statutory minimum shall be the guideline sentence.
- (c) In any other case, the sentence imposed shall be the sentence as determined from application of the guidelines.

Commentary

If the statute requires imposition of a sentence other than that required by the guidelines, the statute shall control. The sentence imposed should be consistent with the statute but as close as possible to the guidelines."

A replacement guideline with accompanying commentary is inserted as §5G1.1 (Sentencing on a Single Count of Conviction).

Reason for Amendment: The purpose of this amendment is to clarify the guideline.

Effective Date: The effective date of this amendment is November 1, 1989.

287. Amendment: The Commentary to §5G1.2 is amended in the second paragraph by deleting "any combination of concurrent and consecutive sentences that produces the total punishment may be imposed" and inserting in lieu thereof "consecutive sentences are to be imposed to the extent necessary to achieve the total punishment".

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

288. Amendment: The Commentary to §5G1.2 is amended by inserting the following additional paragraph immediately after the first paragraph:

" This section applies to multiple counts of conviction (1) contained in the same indictment or information, or (2) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding."

Reason for Amendment: The purpose of this amendment is to clarify that this guideline applies in the case of separate indictments that are consolidated for purposes of sentencing.

Effective Date: The effective date of this amendment is November 1, 1989.

289. Amendment: Chapter Five, Part G is amended by deleting §5G1.3 in its entirety as follows:

"§5G1.3. Convictions on Counts Related to Unexpired Sentences

If at the time of sentencing, the defendant is already serving one or more unexpired sentences, then the sentences for the instant offense(s) shall run consecutively to such unexpired sentences, unless one or more of the instant offenses(s) arose out of the same transactions or occurrences as the unexpired sentences. In the latter case, such instant sentences and the unexpired sentences shall run concurrently, except to the extent otherwise required by law.

Commentary

This section reflects the statutory presumption that sentences imposed at different times ordinarily run consecutively. See 18 U.S.C. § 3584(a). This presumption does not apply when the new counts arise out of the same transaction or occurrence as a prior conviction.

Departure would be warranted when independent prosecutions produce anomalous results that circumvent or defeat the intent of the guidelines."

A replacement guideline with accompanying commentary is inserted as §5G1.3 (Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment).

Reason for Amendment: The purpose of this amendment is to specify the circumstances in which a consecutive sentence is required by the guidelines.

Effective Date: The effective date of this amendment is November 1, 1989.

290. Amendment: Section 5K1.1 is amended by deleting "made a good faith effort to provide" and inserting in lieu thereof "provided".

Section 5K1.1(a) is amended in the first sentence by deleting "conduct" immediately following "of the following".

Reason for Amendment: The purpose of this amendment is to clarify the Commission's intent that departures under this policy statement be based upon the provision of substantial assistance. The existing policy statement could be interpreted as requiring only a willingness to provide such assistance. The amendment also makes an editorial correction.

Effective Date: The effective date of this amendment is November 1, 1989.

291. Amendment: The Commentary to §5K1.2 is deleted in its entirety as follows:

"Commentary

Background: The Commission considered and rejected the use of a defendant's refusal to assist authorities as an aggravating sentencing factor. Refusal to assist authorities based upon continued involvement in criminal activities and association with accomplices may be considered, however, in evaluating a defendant's sincerity in claiming acceptance of responsibility."

Reason for Amendment: The purpose of this amendment is to delete unnecessary commentary containing an unclear example.

Effective Date: The effective date of this amendment is November 1, 1989.

292. Amendment: Chapter Five, Part K, Subpart 2, is amended by inserting an additional policy statement as §5K2.15 (Terrorism (Policy Statement)).

Reason for Amendment: The purpose of this amendment is to add a specific policy statement concerning consideration of an upward departure when the offense is committed for a terroristic purpose. This amendment does not make a substantive change. Such conduct is currently included in the broader policy statement at §5K2.9 (Criminal Purpose) and other policy statements. See United States v. Kikumura, 706 F. Supp. 331 (D. N.J. 1989).

Effective Date: The effective date of this amendment is November 1, 1989.

293. Amendment: Section 6A1.1 is amended in the title by inserting at the end "(Policy Statement)".

Reason for Amendment: The purpose of this amendment is to designate §6A1.1 as a policy statement. Designation of this section as a policy statement is more consistent with the nature of the subject matter.

Effective Date: The effective date of this amendment is November 1, 1989.

294. Amendment: Section 6A1.3 is amended in the title by inserting at the end "(Policy Statement)".

Reason for Amendment: The purpose of this amendment is to designate §6A1.3 as a policy statement. Designation of this section as a policy statement is more consistent with the nature of the subject matter.

Effective Date: The effective date of this amendment is November 1, 1989.

295. Amendment: The Commentary to §6B1.2 is amended in the second paragraph by deleting "and does not undermine the basic purposes of sentencing.", and inserting in lieu thereof "(i.e., that such departure is authorized by 18 U.S.C. § 3553(b)). See generally Chapter 1, Part A (4)(b)(Departures)".

Reason for Amendment: The purpose of this amendment is to clarify the commentary.

Effective Date: The effective date of this amendment is November 1, 1989.

- 296. Amendment:** Appendix A (Statutory Index) is amended in the second sentence of the "Introduction" by deleting "conduct" and inserting in lieu thereof "nature of the offense conduct charged in the count", and by deleting "select" and inserting in lieu thereof "use"; and in the third sentence of the "Introduction" by deleting "the court is to apply" and inserting in lieu thereof "use", by deleting "which is" immediately before "most applicable", and by deleting "conduct for" and inserting in lieu thereof "nature of the offense conduct charged in the count of".

Reason for Amendment: The purpose of this amendment is to clarify the operation of the Statutory Index in relation to §§1B1.1 and 1B1.2(a).

Effective Date: The effective date of this amendment is November 1, 1989.

- 297. Amendment:** Appendix A is amended by inserting the following additional paragraph at the end of the Introduction:

" The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. (See §1B1.9.)".

Appendix A is amended by deleting:

"7 U.S.C. § 52	2N2.1",
"7 U.S.C. § 60	2N2.1",
"10 U.S.C. § 847	2J1.1, 2J1.5",
"16 U.S.C. § 198c	2B1.1, 2B1.3, 2B2.3",
"16 U.S.C. § 204c	2B1.1, 2B1.3",
"16 U.S.C. § 604	2B1.3",
"16 U.S.C. § 606	2B1.1, 2B1.3",
"16 U.S.C. § 668dd	2Q2.1",
"16 U.S.C. § 670j(a)(1)	2B2.3",
"16 U.S.C. § 676	2B2.3",
"16 U.S.C. § 682	2B2.3",
"16 U.S.C. § 683	2B2.3",
"16 U.S.C. § 685	2B2.3",
"16 U.S.C. § 689b	2B2.3",
"16 U.S.C. § 692a	2B2.3",
"16 U.S.C. § 694a	2B2.3",
"18 U.S.C. § 113(d)	2A2.3",
"18 U.S.C. § 113(e)	2A2.3",
"18 U.S.C. § 290	2F1.1",
"18 U.S.C. § 402	2J1.1",
"18 U.S.C. § 437	2C1.3",
"18 U.S.C. § 1164	2B1.3",
"18 U.S.C. § 1165	2B2.3",
"18 U.S.C. § 1382	2B2.3",

"18 U.S.C. § 1504	2J1.2",
"18 U.S.C. § 1726	2F1.1",
"18 U.S.C. § 1752	2B2.3",
"18 U.S.C. § 1793	2P1.4",
"18 U.S.C. § 1856	2B1.3",
"18 U.S.C. § 1863	2B2.3",
"40 U.S.C. § 193e	2B1.1, 2B1.3",
"42 U.S.C. § 1995	2J1.1",
"42 U.S.C. § 2000h	2J1.1",
"42 U.S.C. § 4912	2Q1.3".

Reason for Amendment: The purposes of this amendment are to clarify that the guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction, and to delete references to statutes that apply solely to such offenses.

Effective Date: The effective date of this amendment is November 1, 1989.

298. Amendment: Appendix A is amended by deleting:

"18 U.S.C. § 1512	2J1.2",
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and inserting in lieu thereof:

"18 U.S.C. § 1512(a)	2A1.1, 2A1.2, 2A2.1
18 U.S.C. § 1512(b)	2A2.2, 2J1.2
18 U.S.C. § 1512(c)	2J1.2",

and by deleting:

"21 U.S.C. § 848	2D1.5",
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and inserting in lieu thereof:

"21 U.S.C. § 848(a)	2D1.5
21 U.S.C. § 848(b)	2D1.5
21 U.S.C. § 848(e)	2A1.1".

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

"18 U.S.C. § 247	2H1.3",
"18 U.S.C. § 709	2F1.1",
"18 U.S.C. § 930	2K2.5",
"18 U.S.C. § 1460	2G3.1",
"18 U.S.C. § 1466	2G3.1",
"18 U.S.C. § 1516	2J1.2",
"18 U.S.C. § 1716C	2B5.2",
"18 U.S.C. § 1958	2A2.1, 2E1.4",
"18 U.S.C. § 1959	2E1.3",

"42 U.S.C. § 7270b	2B2.3",
"43 U.S.C. § 1733(a)	
(43 C.F.R. 4140.1(b)(1)(i)	2B2.3",
"49 U.S.C. § 1472(c)	2A5.2".

Appendix A is amended on the line beginning "18 U.S.C. § 371" by inserting "2A2.1, 2D1.4," immediately before "2T1.9".

Appendix A is amended in the line beginning "18 U.S.C. § 1005" by inserting ", 2S1.3" immediately following "2F1.1".

Appendix A is amended in the line beginning "18 U.S.C. § 1028" by inserting ", 2L1.2, 2L2.1, 2L2.3" immediately following "2F1.1".

Appendix A is amended in the line beginning "26 U.S.C. § 7203" by inserting "2S1.3," immediately before "2T1.2".

Reason for Amendment: The purpose of this amendment is to make the statutory index more comprehensive.

Effective Date: The effective date of this amendment is **November 1, 1989**.

299. Amendment: Appendix A is amended in the line beginning "18 U.S.C. § 113(a)" by deleting ", 2A3.1" .

Appendix A is amended in the line beginning "18 U.S.C. § 1854" by deleting ", 2B2.3".

Appendix A is amended in the line beginning "42 U.S.C. § 2278(a)(c)" by deleting "42 U.S.C. § 2278(a)(c)" and inserting in lieu thereof "42 U.S.C. § 2278a(c)".

Reason for Amendment: The purposes of this amendment are to delete incorrect references and to insert a correct reference.

Effective Date: The effective date of this amendment is **November 1, 1989**.

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

"18 U.S.C. § 2251A	2G2.3",
"21 U.S.C. § 858	2D1.10".

Appendix A is amended on the line beginning "18 U.S.C. § 1464" by deleting "2G3.1" and inserting in lieu thereof "2G3.2", and by inserting the following statute in the appropriate place according to statutory title and section number:

"18 U.S.C. § 1468	2G3.2".
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Appendix A is amended on the line beginning "21 U.S.C. § 845" by deleting "2D1.3" and inserting in lieu thereof "2D1.2", and on the line beginning "21 U.S.C. § 845a" by deleting

"2D1.3" and inserting in lieu thereof "2D1.2".

Appendix A is amended in the line beginning "47 U.S.C. § 223" by deleting "47 U.S.C. § 223" and inserting in lieu thereof "47 U.S.C. § 223(b)(1)(A)".

Reason for Amendment: The purpose of this amendment is to reflect the creation of new offense guidelines.

Effective Date: The effective date of this amendment is November 1, 1989.

- 301. Amendment:** Appendix A is amended on the line beginning "18 U.S.C. § 844(h)" by deleting ", 2K1.6" and inserting in lieu thereof "(offenses committed prior to November 18, 1988), 2K1.6, 2K1.7".

Reason for Amendment: The purpose of this amendment is to reflect a revision in the offense covered by 18 U.S.C. § 844(h).

Effective Date: The effective date of this amendment is November 1, 1989.

- 302. Amendment:** Sections 5C2.1, 5D3.1, 5D3.2, 5D3.3, 5E4.1, 5E4.2, 5E4.3, 5E4.4, 5F5.1, 5F5.2, 5F5.3, 5F5.4, and 5F5.5, and references thereto, are amended by deleting the number designating the subpart (i.e., the digit immediately following the letter in the section designation) wherever it appears and inserting in lieu thereof "1" in each instance.

Reason for Amendment: The purpose of this amendment is to correct a clerical error.

Effective Date: The effective date of this amendment is November 1, 1989.

- 303. Amendment:** The Commentary to §1B1.1 captioned "Application Notes" is amended in the third sentence of Note 4 by deleting "subsection" and inserting in lieu thereof "subdivision" and by deleting "subsections (A), (B) and (C)" and inserting in lieu thereof "subdivisions (A) - (E)".

The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 3 by deleting "at Sentencing)" and inserting in lieu thereof "in Imposing Sentence)".

The Commentary to §1B1.3 captioned "Application Notes" is amended in the first sentence of Note 1 by deleting "is" and inserting in lieu thereof "would be".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 4 by deleting "(Assault)" and inserting in lieu thereof "(Aggravated Assault)", and by deleting "(Fraud)" and inserting in lieu thereof "(Fraud and Deceit)".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 5 by deleting "§2K2.3" and inserting in lieu thereof "§2K2.2", by deleting "12" and inserting in lieu thereof "16", by deleting "convicted under" and inserting in lieu thereof "the defendant is convicted under 18 U.S.C. § 922(o) or ", by deleting "§2A3.4(b)(2)" and inserting in lieu thereof "§2A3.4(a)(2)", and by deleting "abusive contact was accomplished as defined in 18 U.S.C. § 2242, increase by 4 levels" and inserting in lieu thereof "offense was committed by the means set forth in 18 U.S.C. § 2242".

The Commentary to §1B1.3 captioned "Background" is amended in the fourth sentence of the third paragraph by deleting "are part" and inserting in lieu thereof "were part".

The Commentary to §1B1.4 captioned "Background" is amended by deleting "3557" and inserting in lieu thereof "3577".

The Commentary to §2B3.2 captioned "Application Notes" is amended in the third sentence of Note 3 by inserting "and Racketeering" immediately before the period at the end of the sentence.

The Commentary to §2B3.2 captioned "Application Notes" is amended in Note 5 by deleting "items taken" and inserting in lieu thereof "loss".

The Commentary to §2A5.2 captioned "Background" is amended by inserting "or Aboard" immediately following "Materials While Boarding".

The Introductory Commentary to Chapter 2, Part B is amended by deleting "Order and" immediately before "Safety".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 2 by deleting "(Attempt, Solicitation, or Conspiracy Not Covered by a Specific Guideline)" and inserting in lieu thereof "(Attempt, Solicitation, or Conspiracy)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 3 by deleting "§§2D1.2-2D1.4" and inserting in lieu thereof "§§2D1.2, 2D1.4, 2D1.5".

The Commentary to §2D1.1 captioned "Background" is amended in the fifth paragraph by deleting "§§5D1.1-5D1.3" and inserting in lieu thereof "Part D (Supervised Release)".

The Commentary to §2F1.1 captioned "Application Notes" is amended in the third sentence of Note 11 by deleting "Part B" and inserting in lieu thereof "Part B of this Chapter".

The Commentary to §2H1.1 captioned "Application Notes" is amended in the last sentence of Note 1 by deleting "for any" and inserting in lieu thereof "applicable to".

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

The Commentary to §2H1.2 captioned "Background" is amended in the second sentence by deleting ", except where death results, in which case" and inserting in lieu thereof "; except where death results,".

Section 2K1.5(c)(1) is amended by deleting "(Attempt or Conspiracy)" and inserting in lieu thereof "(Attempt, Solicitation, or Conspiracy)".

Section 2K1.6(b)(1) is amended by deleting "(Attempt or Conspiracy)" and inserting in lieu thereof "(Attempt, Solicitation, or Conspiracy)".

The Commentary to §2R1.1 captioned "Application Notes" is amended in Note 7 by inserting "Category" immediately following "Criminal History".

The Commentary to §2T1.4 captioned "Application Notes" is amended in Note 3 by inserting "Use of" immediately before "Special Skill".

The Commentary to §3B1.4 is amended by deleting "(Role in the Offense)" the first time it appears and inserting in lieu thereof "(Aggravating Role)", and by deleting "(Role in the Offense)" the second time it appears and inserting in lieu thereof "(Mitigating Role)".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 1 by deleting "25 (18 + 1 + 6) rather than 28" and inserting in lieu thereof "28 (18 + 4 + 6) rather than 31".

The Commentary to §3D1.3 captioned "Application Notes" is amended in the last sentence of Note 4 by deleting "Loss or Damage" and inserting in lieu thereof "Damage or Loss".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 1 by deleting "19" and inserting in lieu thereof "22", by deleting "1-Level" and inserting in lieu thereof "4-Level", by deleting "25." and inserting in lieu thereof "28.", by deleting "(25)" and inserting in lieu thereof "(28)", and by deleting "28" and inserting in lieu thereof "31".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in the last 2 sentences of example 3 by deleting "10" wherever it appears and inserting in lieu thereof in each instance "8".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 5 by deleting "13" wherever it appears and inserting in lieu thereof "14".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended by deleting:

- "2. Defendant B, a federal housing inspector, was convicted on four counts of bribery. Counts one and two charged receiving payments of \$3,000 and \$2,000 from Landlord X in return for a single action with respect to a single property. Count three charged receipt of \$1,500 from Landlord X for taking action with respect to another property, and count four charged receipt of \$1,000 from Landlord Y for taking action with respect to a third property. Counts one and two, which arise out of the same transaction, are combined into a single Group involving a \$5,000 bribe and hence an offense level of 11 (§2C1.1(a)(1), §2F1.1). Each of the two remaining counts represents a distinct Group, at offense level 10. As there are three Count Units, the offense level for the most serious (11) is increased by 3 levels. The combined offense level is 14.",

by renumbering Illustrations 3, 4, and 5 as 2, 3, and 4, respectively, and by redesignating defendants "C", "D", and "E" as "B", "C", and "D", respectively.

Reason for Amendment: The purposes of this amendment are to conform cross-references and illustrations of the operation of the guidelines to the guidelines, as amended, and to make editorial improvements.

Effective Date: The effective date of this amendment is November 1, 1989.

304. Amendment: Section 2D2.1 is amended by inserting the following additional subsection:

"(b) Cross Reference

- (1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute."

The Commentary to §2D2.1 captioned "Background" is amended by deleting the entire text as follows:

"Background: Absent a prior drug related conviction, the maximum term of imprisonment authorized by statute is one year. With a single prior drug related conviction, a mandatory minimum term of imprisonment of fifteen days is required by statute and the maximum term of imprisonment authorized is increased to two years. With two or more prior drug related convictions, a mandatory minimum term of imprisonment of ninety days is required by statute and the maximum term of imprisonment authorized is increased to three years."

and inserting in lieu thereof:

"Background: Mandatory minimum penalties for several categories of cases, ranging from fifteen days' to five years' imprisonment, are set forth in 21 U.S.C. § 844(a). When a mandatory minimum penalty exceeds the guideline range, the mandatory minimum becomes the guideline sentence. §5G1.1(b).

Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under Section 6371 of the Anti-Drug Abuse Act of 1988. Other cases for which enhanced penalties are provided under Section 6371 of the Anti-Drug Abuse Act of 1988 (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b)."

Reason for Amendment: The purpose of this amendment is to reflect revisions in 21 U.S.C. § 844(a) made by Section 6371 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

- 305. Amendment:** Chapter Five, Part F, is amended by inserting an additional guideline with accompanying commentary as §5F1.6 (Denial of Federal Benefits to Drug Traffickers and Possessors).

Reason for Amendment: The purpose of this amendment is to reflect the enactment of 21 U.S.C. § 853a by Section 5301 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1989.

- 306. Amendment:** Chapter One, Part B, is amended by inserting an additional policy statement with accompanying commentary as §1B1.10 (Retroactivity of Amended Guideline Range (Policy Statement)).

Reason for Amendment: The purpose of this amendment is to implement the directive in 28 U.S.C. § 994(u).

Effective Date: The effective date of this amendment is November 1, 1989.

- 307. Amendment:** Chapter One, Part A, is amended by deleting subparts 2-5 in their entirety as follows:

"2. The Statutory Mission

The Comprehensive Crime Control Act of 1984 foresees guidelines that will further the basic purposes of criminal punishment, *i.e.*, deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender. It delegates to the Commission broad authority to review and rationalize the federal sentencing process.

The statute contains many detailed instructions as to how this determination should be made, but the most important of them instructs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/\$2500 taken.' An offender characteristic category might be 'offender with one prior conviction who was not sentenced to imprisonment.' The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons, to be determined by coordinating the offense behavior categories with the offender characteristic categories. The statute contemplates the guidelines will establish a range of sentences for every coordination of categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum imprisonment cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

The sentencing judge must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the judge to depart from the guidelines and sentence outside the range. In that case, the judge must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to see if the guideline was correctly

applied. If the judge departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act requires the offender to serve virtually all of any prison sentence imposed, for it abolishes parole and substantially restructures good behavior adjustments.

The law requires the Commission to send its initial guidelines to Congress by April 13, 1987, and under the present statute they take effect automatically on November 1, 1987. Pub. L. No. 98-473, § 235, reprinted at 18 U.S.C. § 3551. The Commission may submit guideline amendments each year to Congress between the beginning of a regular session and May 1. The amendments will take effect automatically 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The Commission, with the aid of its legal and research staff, considerable public testimony, and written commentary, has developed an initial set of guidelines which it now transmits to Congress. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines by submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts throughout the nation.

3. The Basic Approach (Policy Statement)

To understand these guidelines and the rationale that underlies them, one must begin with the three objectives that Congress, in enacting the new sentencing law, sought to achieve. Its basic objective was to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system. To achieve this objective, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by 'good time' credits. In addition, the parole commission is permitted to determine how much of the remainder of any prison sentence an offender actually will serve. This usually results in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence handed down by the court.

Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

Honesty is easy to achieve: The abolition of parole makes the sentence imposed by the court the sentence the offender will serve. There is a tension, however, between the mandate of uniformity (treat similar cases alike) and the mandate of proportionality (treat different cases differently) which, like the historical tension between law and equity, makes it difficult to achieve both goals simultaneously. Perfect uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer,

but might lump together offenses that are different in important respects. For example, a single category for robbery that lumps together armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, is far too broad.

At the same time, a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect. A bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected (and therefore may already be counted, to a different degree, in the punishment for the underlying offense); and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies, depending on how much other harm has occurred. (Thus, one cannot easily assign points for each kind of harm and simply add them up, irrespective of context and total amounts.)

The larger the number of subcategories, the greater the complexity that is created and the less workable the system. Moreover, the subcategories themselves, sometimes too broad and sometimes too narrow, will apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system of subcategories, would have to make a host of decisions about whether the underlying facts are sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different judges will apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to eliminate.

In view of the arguments, it is tempting to retreat to the simple, broad-category approach and to grant judges the discretion to select the proper point along a broad sentencing range. Obviously, however, granting such broad discretion risks correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. That is to say, such an approach risks a return to the wide disparity that Congress established the Commission to limit.

In the end, there is no completely satisfying solution to this practical stalemate. The Commission has had to simply balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any ultimate system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the moral principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Thus, if a defendant is less culpable, the defendant deserves less punishment. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. Defendants sentenced under this scheme should receive the punishment that most effectively lessens the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of these points of view have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation. As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result.

For now, the Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point. It has analyzed data drawn from 10,000 presentence investigations, crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and resulting statistics, and data from other relevant sources, in order to determine which distinctions are important in present practice. After examination, the Commission has accepted, modified, or rationalized the more important of these distinctions.

This empirical approach has helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, is short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit many distinctions that some may believe important, yet they include most of the major distinctions that statutes and presentence data suggest make a significant difference in sentencing decisions. Important distinctions that are ignored in existing practice probably occur rarely. A sentencing judge may take this unusual case into account by departing from the guidelines.

The Commission's empirical approach has also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what punishment is deserved for a particular crime, specified in minute detail. Likewise, those who subscribe to a

philosophy of crime control may acknowledge that the lack of sufficient, readily available data might make it difficult to say exactly what punishment will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a moral or crime-control perspective.

The Commission has not simply copied estimates of existing practice as revealed by the data (even though establishing offense values on this basis would help eliminate disparity, for the data represent averages). Rather, it has departed from the data at different points for various important reasons. Congressional statutes, for example, may suggest or require departure, as in the case of the new drug law that imposes increased and mandatory minimum sentences. In addition, the data may reveal inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from present practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these initial guidelines are but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission has developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, and therefore effective, sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-writing process has required the Commission to resolve a host of important policy questions, typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction will briefly discuss several of those issues. Commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away damaging property during escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a real offense system. After all, the present sentencing system is, in a sense, a real offense system. The sentencing court (and the parole commission) take account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process, given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable, and, in the Commission's view, risked return to wide disparity in practice.

The Commission therefore abandoned the effort to devise a 'pure' real offense system and instead experimented with a 'modified real offense system,' which it published for public comment in a September 1986 preliminary draft.

This version also foundered in several major respects on the rock of practicality. It was highly complex and its mechanical rules for adding harms (e.g., bodily injury added the same punishment irrespective of context) threatened to work considerable unfairness. Ultimately, the Commission decided that it could not find a practical or fair and efficient way to implement either a pure or modified real offense system of the sort it originally wanted, and it abandoned that approach.

The Commission, in its January 1987 Revised Draft and the present guidelines, has moved closer to a 'charge offense' system. The system is not, however, pure; it has a number of real elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law have forced the Commission to write guidelines that are descriptive of generic conduct rather than tracking purely statutory language. For another, the guidelines, both through specific offense characteristics and adjustments, take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken.

Finally, it is important not to overstate the difference in practice between a real and a charge offense system. The federal criminal system, in practice, deals mostly with drug offenses, bank robberies and white collar crimes (such as fraud, embezzlement, and bribery). For the most part, the conduct that an indictment charges approximates the real and relevant conduct in which the offender actually engaged.

The Commission recognizes its system will not completely cure the problems of a real offense system. It may still be necessary, for example, for a court to determine some particular real facts that will make a difference to the sentence. Yet, the Commission believes that the instances of controversial facts will be far fewer; indeed,

there will be few enough so that the court system will be able to devise fair procedures for their determination. See United States v. Fatico, 579 F.2d 707 (2d Cir. 1978) (permitting introduction of hearsay evidence at sentencing hearing under certain conditions), on remand, 458 F. Supp. 388 (E.D.N.Y. 1978), aff'd, 603 F.2d 1053 (2d Cir. 1979) (holding that the government need not prove facts at sentencing hearing beyond a reasonable doubt), cert. denied, 444 U.S. 1073 (1980).

The Commission also recognizes that a charge offense system has drawbacks of its own. One of the most important is its potential to turn over to the prosecutor the power to determine the sentence by increasing or decreasing the number (or content) of the counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin, or theft of \$10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of \$30,000. Further, a sentencing court may control any inappropriate manipulation of the indictment through use of its power to depart from the specific guideline sentence. Finally, the Commission will closely monitor problems arising out of count manipulation and will make appropriate adjustments should they become necessary.

(b) Departures.

The new sentencing statute permits a court to depart from a guideline-specified sentence only when it finds 'an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . .'. 18 U.S.C. § 3553(b). Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of §5H1.4, and the last sentence of §5K2.12, list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two basic reasons. First is the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that in the initial set of guidelines it need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time,

will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time. Thus, for example, where the presence of actual physical injury currently makes an important difference in final sentences, as in the case of robbery, assault, or arson, the guidelines specifically instruct the judge to use this factor to augment the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data do not permit the Commission, at this time, to conclude that the factor is empirically important in relation to the particular offense. Of course, a factor (say physical injury) may nonetheless sometimes occur in connection with a crime (such as fraud) where it does not often occur. If, however, as the data indicate, such occurrences are rare, they are precisely the type of events that the court's departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed. Of course, the Commission recognizes that even its collection and analysis of 10,000 presentence reports are an imperfect source of data sentencing estimates. Rather than rely heavily at this time upon impressionistic accounts, however, the Commission believes it wiser to wait and collect additional data from our continuing monitoring process that may demonstrate how the guidelines work in practice before further modification.

It is important to note that the guidelines refer to two different kinds of departure.

The first kind involves instances in which the guidelines provide specific guidance for departure, by analogy or by other numerical or non-numerical suggestions. For example, the commentary to §2G1.1 (Transportation for Prostitution), recommends a downward adjustment of eight levels where commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions, and that the courts of appeals may prove more likely to find departures 'unreasonable' where they fall outside suggested levels.

A second kind of departure will remain unguided. It may rest upon grounds referred to in Chapter 5, Part K (Departures), or on grounds not mentioned in the guidelines. While Chapter 5, Part K lists factors that the Commission believes may constitute grounds for departure, those suggested grounds are not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly unusual.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas, and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts have urged the Commission not to attempt any major reforms of the agreement process, on the grounds that any set of guidelines that threatens

to radically change present practice also threatens to make the federal system unmanageable. Others, starting with the same facts, have argued that guidelines which fail to control and limit plea agreements would leave untouched a 'loophole' large enough to undo the good that sentencing guidelines may bring. Still other commentators make both sets of arguments.

The Commission has decided that these initial guidelines will not, in general, make significant changes in current plea agreement practices. The court will accept or reject any such agreements primarily in accordance with the rules set forth in Fed.R.Crim.P. 11(e). The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate.

The Commission nonetheless expects the initial set of guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. Insofar as a prosecutor and defense attorney seek to agree about a likely sentence or range of sentences, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which judges will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation. Since they will have before them the norm, the relevant factors (as disclosed in the plea agreement), and the reason for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to 'reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .' 28 U.S.C. § 994(j). Under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.' If the guidelines were to permit courts to impose probation instead of prison in many or all such cases, the present sentences would continue to be ineffective.

The Commission's solution to this problem has been to write guidelines that classify as 'serious' (and therefore subject to mandatory prison sentences) many offenses for which probation is now frequently given. At the same time, the guidelines will permit the sentencing court to impose short prison terms in many such cases. The Commission's view is that the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the

offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

(e) Multi-Count Convictions.

The Commission, like other sentencing commissions, has found it particularly difficult to develop rules for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The reason it is difficult is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to life sentences of imprisonment--sentences that neither 'just deserts' nor 'crime control' theories of punishment would find justified.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment when multiple offenses that are the subjects of separate counts take place.

These rules are set out in Chapter Three, Part D. They essentially provide: (1) When the conduct involves fungible items, e.g., separate drug transactions or thefts of money, the amounts are added and the guidelines apply to the total amount. (2) When nonfungible harms are involved, the offense level for the most serious count is increased (according to a somewhat diminishing scale) to reflect the existence of other counts of conviction.

The rules have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures where necessary to produce a mitigated sentence.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related

offenses such as failure to keep accurate records or to provide requested information. These criminal statutes pose two problems. First, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it cannot comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission has sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses are particularly important in light of the need for enforcement of the general regulatory scheme. The Commission has sought to treat these offenses in these initial guidelines. It will address the less common regulatory offenses in the future.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses, dividing them into four categories.

First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper treatment of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense is as follows:

- (1) The guideline provides a low base offense level (6) aimed at the first type of recordkeeping or reporting offense. It gives the court the legal authority to impose a punishment ranging from probation up to six months of imprisonment.
- (2) Specific offense characteristics designed to reflect substantive offenses that do occur (in respect to some regulatory offenses), or that are likely to occur, increase the offense level.
- (3) A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will be treated like the substantive offense.

The Commission views this structure as an initial effort. It may revise its approach in light of further experience and analysis of regulatory crimes.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission began by estimating the average sentences now being served within each

category. It also examined the sentence specified in congressional statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's forthcoming detailed report will contain a comparison between estimates of existing sentencing practices and sentences under the guidelines.

While the Commission has not considered itself bound by existing sentencing practice, it has not tried to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences in many instances will approximate existing practice, but adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons now receive probation, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who now receive probation from those who receive more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a current sentencing practice of very wide variability in which some defendants receive probation while others receive several years in prison for the same offense. Moreover, inasmuch as those who currently plead guilty often receive lesser sentences, the guidelines also permit the court to impose lesser sentences on those defendants who accept responsibility and those who cooperate with the government.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the new drug law and the career offender provisions of the sentencing law, require the Commission to promulgate rules that will lead to substantial prison population increases. These increases will occur irrespective of any guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum, or career offender, sentences), will lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons, estimate at approximately 10 percent, over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table. For technical and practical reasons it has 43 levels. Each row in the table contains levels that overlap with the levels in the preceding and succeeding rows. By overlapping the levels, the table should discourage unnecessary litigation. Both prosecutor and defendant will realize that the difference between one level and another will not necessarily make a difference in the sentence that the judge imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether \$10,000 or \$11,000 was obtained as a result of a fraud. At the same time, the rows work to increase a sentence proportionately. A change of 6 levels roughly doubles the sentence irrespective of the level at which one starts. The Commission, aware of the legal requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months, also wishes to permit courts the greatest possible range for exercising discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the judge within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many, rather than a few levels.

Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation as to which category an offender fell within would become more likely. Where a table has many smaller monetary distinctions, it minimizes the likelihood of litigation, for the importance of the precise amount of money involved is considerably less.

5. A Concluding Note

The Commission emphasizes that its approach in this initial set of guidelines is one of caution. It has examined the many hundreds of criminal statutes in the United States Code. It has begun with those that are the basis for a significant number of prosecutions. It has sought to place them in a rational order. It has developed additional distinctions relevant to the application of these provisions, and it has applied sentencing ranges to each resulting category. In doing so, it has relied upon estimates of existing sentencing practices as revealed by its own statistical analyses, based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from existing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with these guidelines will lead to additional information and provide a firm empirical basis for revision.

Finally, the guidelines will apply to approximately 90 percent of all cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in this initial set of guidelines. They will, however, be addressed in the near future. Their exclusion from this initial submission does not reflect any judgment about their seriousness. The Commission has also deferred promulgation of guidelines pertaining to fines, probation and other sanctions for organizational defendants, with the exception of antitrust violations. The Commission also expects to address this area in the near future."

Replacement subparts are inserted as Subparts 2 (The Statutory Mission), 3 (The Basic Approach (Policy Statement)), 4 (The Guidelines' Resolution of Major Issues (Policy Statement)), and 5 (A Concluding Note).

Reason for Amendment: This amendment updates this part to reflect the implementation of guideline sentencing on November 1, 1987, and makes various clarifying and editorial changes to enhance the usefulness of this part both as a historical overview and as an introduction to the structure and operation of the guidelines. For example, in the discussion of departures in subpart 4(b), language concerning what the Commission, in principle, might have done is deleted as unnecessary, but no substantive change is made.

Effective Date: The effective date of this amendment is November 1, 1990.

- 308. Amendment:** Section 1B1.8(a) is amended by inserting "as part of that cooperation agreement" immediately following "unlawful activities of others, and"; and by deleting "so provided" and inserting in lieu thereof "provided pursuant to the agreement".

Section 1B1.8(b)(3) is amended by inserting "by the defendant" immediately before the period at the end of the sentence.

Section 1B1.8(b) is amended by renumbering subdivisions (2) and (3) as (3) and (4) respectively; and by inserting the following as subdivision (2):

"(2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);".

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 2 by deleting:

"The Commission does not intend this guideline to interfere with determining adjustments under Chapter Four, Part A (Criminal History) or §4B1.1 (Career Offender) (e.g., information concerning the defendant's prior convictions).",

and inserting in lieu thereof:

"Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender).".

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 3 by deleting "408" and inserting in lieu thereof "410".

Reason for Amendment: This amendment clarifies the Commission's intention that the use of information concerning the defendant's prior criminal convictions and sentences not be restricted by a cooperation agreement, makes several additional clarifying changes, and corrects a clerical error.

Effective Date: The effective date of this amendment is November 1, 1990.

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

"This subsection applies to offenses of types for which convictions on multiple counts would be grouped together pursuant to §3D1.2(d); multiple convictions are not required.",

and inserting in lieu thereof:

"'Offenses of a character for which §3D1.2(d) would require grouping of multiple counts,' as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug

sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply."

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 4 by renumbering example (4) as (5); and by inserting, immediately before "But:", the following:

"(4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under §1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting."

Reason for Amendment: This amendment clarifies the intended scope of §1B1.3(a)(2) in conjunction with Chapter Three, Part D (Multiple Counts) to ensure that the latter is not read to limit the former only to conduct of which the defendant was convicted.

Effective Date: The effective date of this amendment is November 1, 1990.

310. Amendment: The Commentary to §2A1.1 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. § 1111" and inserting in lieu thereof "18 U.S.C. §§ 1111, 2113(e), 2118(c)(2)".

The Commentary to §2A1.1 is amended in the first paragraph of Application Note 1 by deleting "the 'willful, deliberate, malicious, and premeditated killing' to which 18 U.S.C. § 1111 applies" and inserting in lieu thereof: "premeditated killing"; and by deleting:

"However, the same statute applies when death results from certain enumerated felonies -- arson, escape, murder, kidnapping, treason, espionage, sabotage, rape, burglary, or robbery.",

and inserting in lieu thereof:

"However, this guideline also applies when death results from the commission of certain felonies."

The Commentary to §2A1.1 captioned "Background" is amended in the first paragraph by deleting:

"Prior to the applicability of the Sentencing Reform Act of 1984, a defendant convicted

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

and inserting in lieu thereof:

"Whether a mandatory minimum term of life imprisonment is applicable to every defendant convicted of first degree murder under 18 U.S.C. § 1111 is a matter of statutory interpretation for the courts. The discussion in Application Note 1, supra, regarding circumstances in which a downward departure may be warranted is relevant in the event the penalty provisions of 18 U.S.C. § 1111 are construed to permit a sentence less than life imprisonment, or in the event the defendant is convicted under a statute that expressly authorizes a sentence of less than life imprisonment (e.g., 18 U.S.C. §§ 2113(e), 2118(c)(2), 21 U.S.C. § 848(e))."

Reason for Amendment: This amendment clarifies the commentary with respect to circumstances that may warrant a departure below the guideline range for offenses to which this guideline applies. This amendment also reserves for the courts the issue of whether life imprisonment is the mandatory minimum sentence for first degree murder under 18 U.S.C. § 1111.

Effective Date: The effective date of this amendment is November 1, 1990.

311. Amendment: Section 2A2.1 is amended in the title by deleting "Conspiracy or Solicitation to Commit Murder;" immediately before "Attempted Murder".

Section 2A2.1 is amended by deleting:

- "(a) Base Offense Level: 20
- (b) Specific Offense Characteristics
 - (1) If an assault involved more than minimal planning, increase by 2 levels.
 - (2) (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.
 - (3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	<u>Degree of Bodily Injury</u>	<u>Increase in Level</u>
(A)	Bodily Injury	add 2
(B)	Serious Bodily Injury	add 4
(C)	Permanent or Life-Threatening Bodily Injury	add 6
(D)	If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or	
(E)	If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels.	

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.

- (4) If a conspiracy or assault was motivated by a payment or offer of money or other thing of value, increase by 2 levels.",

and inserting in lieu thereof:

"(a) Base Offense Level:

- (1) 28, if the object of the offense would have constituted first degree murder; or
- (2) 22, otherwise.

(b) Specific Offense Characteristics

- (1) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.
- (2) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels."

The Commentary to §2A2.1 captioned "Statutory Provisions" is amended by deleting "(d), 373, 1113, 1116(a), 1117, 1751(c), (d), 1952A(a)" and inserting in lieu thereof "1113, 1116(a), 1751(c)".

The Commentary to §2A2.1 captioned "Application Note" is amended in Note 1 by deleting "'more than minimal planning,' 'firearm,' 'dangerous weapon,' 'brandished,' 'otherwise used,' 'bodily injury,' 'serious bodily injury,'" and inserting in lieu thereof "'serious bodily injury'".

The Commentary to §2A2.1 captioned "Application Note" is amended by inserting the following additional note:

- "2. 'First degree murder,' as used in subsection (a)(1), means conduct that, if

committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111.";

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

The Commentary to §2A2.1 captioned "Background" is amended in the first paragraph by deleting ", conspiracy to commit murder, solicitation to commit murder," immediately before "and attempted murder"; and by inserting the following additional sentence at the end:

"An attempted manslaughter, or assault with intent to commit manslaughter, is covered under §2A2.2 (Aggravated Assault)."

The Commentary to §2A2.1 captioned "Background" is amended by deleting the second and third paragraphs as follows:

" The maximum term of imprisonment authorized by statute for conspiracy to murder is life imprisonment (18 U.S.C. § 1117). The maximum term of imprisonment authorized by statute for solicitation to murder is twenty years (18 U.S.C. § 373). The statutes that prohibit attempted murder, or assaults with intent to commit murder, vary widely in the maximum term of imprisonment authorized. Assault with intent to commit murder (18 U.S.C. § 113(a)) carries a maximum authorized term of twenty years imprisonment. An attempted assassination of certain essential government officials (18 U.S.C. § 351(c)) carries a maximum authorized term of life imprisonment. An attempted murder of foreign officials (18 U.S.C. § 1116(a)) carries a maximum authorized term of twenty years imprisonment. An attempt to commit murder, other than an assault with intent to commit murder covered by 18 U.S.C. § 113(a), carries a maximum term of three years imprisonment (18 U.S.C. § 1113).

Enhancements are provided for planning, weapon use, injury, and commission of the crime for hire. All of the factors can apply in the case of an assault; only the last can apply in the case of a conspiracy that does not include an assault; and none can apply in the case of a mere solicitation."

The Commentary to §2A2.2 captioned "Application Notes" is amended in Note 3 by inserting the following additional sentence as the first sentence: "This guideline also covers attempted manslaughter and assault with intent to commit manslaughter."

The Commentary to §2A2.2 captioned "Background" is amended in the first sentence of the first paragraph by deleting "where there is no intent to kill" immediately following " assaults".

Chapter Two, Part A, Subpart 1, is amended by inserting an additional guideline with accompanying commentary as §2A1.5 (Conspiracy or Solicitation to Commit Murder).

Section 2E1.4(a)(1) is amended by deleting "23" and inserting in lieu thereof "32".

The Commentary to §2E1.4 captioned "Application Notes" is amended by deleting Note 2 as follows:

"2. If the offense level for the underlying conduct is less than the alternative

minimum base offense level specified (i.e., 23), the alternative minimum base offense level is to be used.";

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

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 in the paragraph beginning "Offense guidelines that expressly cover attempts" by deleting "Conspiracy or Solicitation to Commit Murder;" immediately before "Attempted Murder"; in the paragraph beginning "Offense guidelines that expressly cover conspiracies" by deleting "§2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder)" and inserting in lieu thereof "§2A1.5 (Conspiracy or Solicitation to Commit Murder)"; and in the paragraph beginning "Offense guidelines that expressly cover solicitations" by deleting "§2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder)" and inserting in lieu thereof "§2A1.5 (Conspiracy or Solicitation to Commit Murder)".

Reason for Amendment: This amendment restructures §2A2.1, and increases the offense level for attempted murder and assault with intent to commit murder where the intended offense, if successful, would have constituted first degree murder to better reflect the seriousness of this conduct. For the same reason, the enhancement for an offense involving the offer or receipt of anything of pecuniary value for undertaking the murder is increased. For greater clarity, an additional guideline (§2A1.5) is inserted to cover conspiracy or solicitation to commit murder. Section 2E1.4 is amended to conform the offense level to that of §2A1.5.

Effective Date: The effective date of this amendment is November 1, 1990.

312. Amendment: Section 2B1.1(b) is amended by transposing subdivisions (4) and (5); and by renumbering the transposed subdivisions accordingly.

Section 2B1.2(b) is amended by transposing subdivisions (3) and (4); and by renumbering the transposed subdivisions accordingly.

Section 2B1.3(b) is amended by transposing subdivisions (2) and (3); and by renumbering the transposed subdivisions accordingly.

Reason for Amendment: This amendment reorders the specific offense characteristics in §§2B1.1, 2B1.2, and 2B1.3 that address offenses involving U.S. mail. In cases involving the theft or destruction of U.S. mail, the theft guideline (§2B1.1), stolen property guideline (§2B1.2), property destruction guideline (§2B1.3), and forgery guideline (§2B5.2) produce identical results if the amount involved more than \$1,000, or if the offense did not involve more than minimal planning. However, because of the ordering of the specific offense characteristics, there is a 1 or 2-level difference between §§2B1.1, 2B1.2 and 2B1.3 on the one hand, and §2B5.2 on the other, in cases of stolen or destroyed mail involving more than minimal planning and a loss of \$1,000 or less. In these cases, §§2B1.1, 2B1.2 and 2B1.3 produce a result that is 1 or 2-levels lower than §2B5.2. This amendment corrects this anomaly by conforming the offense levels in §§2B1.1, 2B1.2, and 2B1.3 to that of §2B5.2 in such cases.

Effective Date: The effective date of this amendment is November 1, 1990.

313. Section 2B1.3 is amended by inserting the following additional subsection:

"(c) Cross Reference

- (1) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives).";

and in the title by deleting "(Other than by Arson or Explosives)" immediately following "or Destruction".

The Commentary to §2B1.3 captioned "Statutory Provisions" is amended by deleting the last sentence as follows:

"Arson is treated separately in Part K, Offenses Involving Public Order and Safety."

The Commentary to §2H1.1 captioned "Application Notes" is amended in Note 1 by deleting "(Other than by Arson or Explosives)" immediately following "or Destruction".

Section 2H3.3(a)(3) is amended by deleting "(Other than by Arson or Explosives)" immediately following "or Destruction".

The Commentary to §2H3.3 captioned "Background" is amended by deleting "(Other than by Arson or Explosives)" immediately following "or Destruction".

Section 2Q1.6(a)(2) is amended by deleting "(Other Than by Arson or Explosives)" immediately following "or Destruction".

Reason for Amendment: This amendment inserts a cross reference providing that offense conduct constituting arson or property destruction by explosives is to be treated under §2K1.4 (Arson, Property Destruction by Explosives). Because arson or property damage by use of explosives is an aggravated form of property destruction, just as armed robbery is an aggravated form of robbery, the use of the same "relevant conduct" standard to determine the offense level is appropriate.

Effective Date: The effective date of this amendment is November 1, 1990.

314. Section 2B3.1(b)(1) is amended by deleting "offense involved robbery or attempted robbery of the" immediately following "If the"; and by inserting "was taken, or if the taking of such property was an object of the offense" immediately before ", increase".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 6 by deleting "actually" immediately following "defendant", and by inserting "; Attempted Murder" immediately following "Assault With Intent to Commit Murder".

Reason for Amendment: This amendment clarifies the guideline and Commentary.

Effective Date: The effective date of this amendment is November 1, 1990.

315. Amendment: Section 2B2.1(b)(3) is amended by deleting "obtaining" immediately before "a firearm", and by deleting "an object" and inserting in lieu thereof "taken, or if the taking of such item was an object".

The Commentary to §2B2.1 is amended by inserting between "Commentary" and "Application Notes" the following:

"Statutory Provision: 18 U.S.C. § 1153."

The Commentary to §2B2.1 captioned "Application Notes" is amended by deleting Note 2 as follows:

"2. Obtaining a weapon or controlled substance is to be presumed to be an object of the offense if such an item was in fact taken.";

and by renumbering Notes 3 and 4 as 2 and 3, respectively.

Section 2B2.2(b)(3) is amended by deleting "obtaining" immediately before "a firearm"; and by deleting "an object" and inserting in lieu thereof "taken, or if the taking of such item was an object".

The Commentary to §2B2.2 captioned "Application Notes" is amended by deleting Note 2 as follows:

"2. Obtaining a weapon or controlled substance is to be presumed to be an object of the offense if such an item was in fact taken.";

and by renumbering Notes 3 and 4 as 2 and 3, respectively.

Section 2B3.1(b)(5) is amended by deleting "obtaining" immediately before "a firearm"; and by deleting "the object" and inserting in lieu thereof "taken, or if the taking of such item was an object".

The Commentary to §2B3.1 captioned "Application Notes" is amended by deleting Note 5 as follows:

"5. Obtaining a weapon or controlled substance is to be presumed to be an object of the offense if such an item was in fact taken.";

and by renumbering Notes 6, 7, and 8 as 5, 6, and 7 respectively.

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

" Obtaining drugs or other controlled substances is often the motive for robberies of a Veterans Administration Hospital, a pharmacy on a military base, or a similar facility. A specific offense characteristic is included for robberies where drugs or weapons were the object of the offense to take account of the dangers involved when such items are taken."

Reason for Amendment: This amendment provides that the specific offense characteristic related to the taking of a firearm or controlled substance applies whenever such item is taken or is an object of the offense. Also, it inserts additional Commentary to §2B2.1 referencing a statutory provision contained in Appendix A (Statutory Index) to conform the format of this guideline to that of other offense guidelines.

Effective Date: The effective date of this amendment is November 1, 1990.

316. Amendment: Section 2B3.2(b)(1) is amended by deleting "§2B3.1" and inserting in lieu thereof "§2B2.1(b)(2)".

Reason for Amendment: This amendment references the loss table to §2B2.1(b)(2) rather than §2B3.1. The amendment to the loss table in §2B3.1, effective November 1, 1989, inadvertently reduced the offense level for certain cases under this guideline by one level.

Effective Date: The effective date of this amendment is November 1, 1990.

317. Amendment: Section 2B1.1(b) is amended by inserting the following additional subdivision:

"(7) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24."

The Commentary to §2B1.1 captioned "Application Notes" is amended by inserting the following additional notes:

"9. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 215, 656-657, 1005-1008, 1014, and 1344; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

10. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations."

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

" Subsection (b)(7) implements, in a broader form, the statutory directive to the Commission in Section 961(m) of Public Law 101-73."

Section 2B4.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics"; and by inserting the following additional subdivision:

"(2) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24."

The Commentary to §2B4.1 captioned "Statutory Provisions" is amended by deleting "§§ 1," and inserting in lieu thereof "§§".

The Commentary to §2B4.1 captioned "Application Notes" is amended by inserting the following additional notes:

3. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 215, 656-657, 1005-1008, 1014, and 1344; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.
4. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations."

The Commentary to §2B4.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

" Subsection (b)(2) implements, in a broader form, the statutory directive to the Commission in Section 961(m) of Public Law 101-73."

Section 2F1.1(b) is amended by inserting the following additional subdivision:

- "(6) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24."

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by deleting "290" and inserting in lieu thereof "289".

The Commentary to §2F1.1 captioned "Application Notes" is amended by inserting the following additional notes:

- "14. 'Financial institution,' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 215, 656-657, 1005-1008, 1014, and 1344; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.
15. An offense shall be deemed to have 'substantially jeopardized the safety and soundness of a financial institution' if as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations."

The Commentary to §2F1.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

- " Subsection (b)(6) implements, in a broader form, the statutory directive to the Commission in Section 961(m) of Public Law 101-73."

Reason for Amendment: This amendment implements, in a broader form, the following statutory directive in Section 961(m) of Public Law 101-73: "Pursuant to section 994 of title 28, United States Code, and section 21 of the Sentencing Act of 1987, the United States Sentencing Commission shall promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution." In addition, this amendment deletes an incorrect statutory provision in the

Commentary to §2B4.1, and deletes a reference to a petty offense in the Commentary to §2F1.1 that was inadvertently retained when other references to petty offenses were deleted.

Effective Date: The effective date of this amendment is November 1, 1990.

- 318. Amendment:** The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)" by inserting the following additional entry as the seventh entry: "1 gm of Methamphetamine (Pure) = 50 gm of cocaine/10 gm of heroin".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)" in the twelfth (formerly eleventh) entry by deleting "0.418 gm" and inserting in lieu thereof "0.416 gm".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the subdivision of the "Drug Equivalency Tables" captioned "Schedule IV Substances" by deleting the sixth entry as follows:

"1 gm of Mephobarbital = 0.125 mg of heroin/0.125 gm of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 11 by inserting "in the table below" immediately before "to estimate"; by deleting "Bufotenine at 1 mg per dose = 100 mg of Bufotenine" and inserting in lieu thereof "Mescaline at 500 mg per dose = 50 gms of mescaline"; and by deleting "common controlled substances" and inserting in lieu thereof "certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 11 by deleting the following from the table captioned "Typical Weight Per Unit (Dose, Pill, or Capsule) Table":

"Bufotenine	1 mg
Diethyltryptamine	60 mg
Dimethyltryptamine	50 mg",
"Barbiturates	100 mg
Glutethimide (Doriden)	500 mg",
"Thiobarbital	50 mg";

by inserting an asterisk immediately after each of the following:

"LSD (Lysergic acid diethylamide)", "MDA", "PCP", "Psilocin", "Psilocybin", "2,5-Dimethoxy-4-methylamphetamine (STP, DOM)", "Methaqualone", "Amphetamine", "Methamphetamine", "Phenmetrazine (Preludin)";

and by inserting the following at the end:

"*For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight."

Reason for Amendment: This amendment provides an additional equivalency to reflect the distinction between methamphetamine and pure methamphetamine in the Drug Quantity Table at §2D1.1(c), corrects an error in the equivalency for Phenylacetone/P₂P, and deletes a duplicate listing for Mephobarbital.

In addition, this amendment clarifies that the "Typical Weight Per Unit Table" in Note 11 of the Commentary to §2D1.1 is not to be used where a more reliable estimate of the weight of the mixture or substance containing the controlled substance is available from case-specific information. This amendment also clarifies that for certain controlled substances this table provides an estimate of the weight of the actual controlled substance, not necessarily the weight of the mixture or substance containing the controlled substance, and therefore use of this table in such cases will provide a very conservative estimate. Finally, this amendment deletes listings for several controlled substances that are generally legitimately manufactured and then unlawfully diverted; in such cases, more accurate weight estimates can be obtained from other sources (e.g., from the Drug Enforcement Administration or the manufacturer).

Effective Date: The effective date of this amendment is November 1, 1990.

319. Amendment: Section 2D1.2(a)(1) is amended by inserting "applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual" immediately following "§2D1.1".

Section §2D1.2(a) is amended by renumbering subdivisions (2) and (3) as (3) and (4), respectively; and by inserting the following as subdivision (2):

"(2) 1 plus the offense level from §2D1.1 applicable to the total quantity of controlled substances involved in the offense; or".

The Commentary to §2D1.2 is amended by inserting, immediately before "Background", the following:

"Application Note:

1. Where only part of the relevant offense conduct directly involved a protected location or an underage or pregnant individual, subsections (a)(1) and (a)(2) may result in different offense levels. For example, if the defendant, as part of the same course of conduct or common scheme or plan, sold 5 grams of heroin near a protected location and 10 grams of heroin elsewhere, the offense level from subsection (a)(1) would be level 16 (2 plus the offense level for the sale of 5 grams of heroin, the amount sold near the protected location); the offense level from subsection (a)(2) would be level 17 (1 plus the offense level for the sale of 15 grams of heroin, the total amount of heroin involved in the offense)."

Reason for Amendment: This amendment provides for the determination of the offense level in cases in which only part of the relevant offense conduct involves a protected location or an underage or pregnant individual.

Effective Date: The effective date of this amendment is November 1, 1990.

- 320. Amendment:** Section 2D1.6 is amended by deleting "12" and inserting in lieu thereof: "the offense level applicable to the underlying offense."

The Commentary to §2D1.6 is amended by inserting, immediately before "Background", the following:

"Application Note:

1. Where the offense level for the underlying offense is to be determined by reference to §2D1.1, see Application Note 12 of the Commentary to §2D1.1, and Application Notes 1 and 2 of the Commentary to §2D1.4, for guidance in determining the scale of the offense. Note that the Drug Quantity Table in §2D1.1 provides a minimum offense level of 12 where the offense involves heroin (or other Schedule I or II Opiates), cocaine (or other Schedule I or II Stimulants), cocaine base, PCP, Methamphetamine, LSD (or other Schedule I or II Hallucinogens), Fentanyl, or Fentanyl Analogue (§2D1.1(c)(16)); and a minimum offense level of 6 otherwise (§2D1.1(c)(19))."

Reason for Amendment: This amendment is designed to reduce unwarranted disparity by requiring consideration in the guideline of the amount of the controlled substance involved in the offense, thus conforming this guideline section to the structure of §§2D1.1, 2D1.2, 2D1.4, and 2D1.5. The statute to which this guideline applies (21 U.S.C. § 843(b)) prohibits the use of a communications facility to commit, cause, or facilitate a felony controlled substance offense. Frequently, a conviction under this statute is the result of a plea bargain because the statute has a low maximum (four years with no prior felony drug conviction; eight years with a prior felony drug conviction) and no mandatory minimum. The current guideline has a base offense level of 12 and no specific offense characteristics. Therefore, the scale of the underlying drug offense is not reflected in the guideline. This results in a departure from the guideline range frequently being warranted. Without guidance as to whether or how far to depart, the potential for unwarranted disparity is substantial. Under this amendment, the guideline itself will take into account the scale of the underlying offense.

Effective Date: The effective date of this amendment is November 1, 1990.

- 321. Amendment:** Section 2D2.1(a)(1) is amended by deleting "or an analogue of these" and inserting in lieu thereof "an analogue of these, or cocaine base".

Reason for Amendment: This amendment specifies the appropriate offense level for possession of cocaine base ("crack") in cases not covered by the enhanced penalties created by section 6371 of the Anti-Drug Abuse Act of 1988.

Effective Date: The effective date of this amendment is November 1, 1990.

- 322. Amendment:** Section 2G1.1(c)(1) is amended by deleting "involves" and inserting in lieu thereof "involved".

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 3 by inserting at the end:

"This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of transportation involving an adult, rather than a minor, this characteristic generally will not apply where the alcohol or drug was voluntarily taken."

The Commentary to §2G1.1 captioned "Application Notes" is amended in Note 5 by deleting ", distinct offense, even if several persons are transported in a single act" and inserting in lieu thereof:

"victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, each such person shall be treated as if contained in a separate count of conviction".

Reason for Amendment: This amendment clarifies the application of this guideline and corrects a clerical error.

Effective Date: The effective date of this amendment is November 1, 1990.

- 323. Amendment:** Section 2G1.2(c)(1) is amended by deleting "involves" and inserting in lieu thereof "involved".

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

"(d) Cross Reference

- (1) If the offense involved the defendant causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production)."

The Commentary to §2G1.2 captioned "Statutory Provisions" is amended by deleting "§ 2423" and inserting in lieu thereof "§§ 2421, 2422, 2423".

The Commentary to §2G1.2 captioned "Application Notes" is amended in Note 1 by deleting ", distinct offense, even if several persons are transported in a single act" and inserting in lieu thereof:

"victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, each such person shall be treated as if contained in a separate count of conviction".

The Commentary to §2G1.2 captioned "Application Notes" is amended in Note 3 by inserting the following at the end:

"This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol."

The Commentary to §2G1.2 captioned "Application Notes" is amended by inserting the following additional notes:

- "4. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.
5. The cross reference in (d)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct."

Reason for Amendment: This amendment clarifies the application of this guideline and corrects a clerical error. In addition, a cross reference to §2G2.1 is inserted where the offense involves conduct that is more appropriately covered by that guideline to provide an offense level that more appropriately reflects the seriousness of such conduct.

Effective Date: The effective date of this amendment is November 1, 1990.

324. Amendment: Section 2G2.1 is amended in the title by inserting "; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production" immediately following "Printed Material".

Section 2G2.1 is amended by deleting:

"(1) If the minor was under the age of twelve years, increase by 2 levels.";

and inserting in lieu thereof:

- "(1) If the offense involved a minor under the age of twelve years, increase by 4 levels; otherwise, if the offense involved a minor under the age of sixteen years, increase by 2 levels.
- (2) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(c) Special Instruction

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

and by deleting "Characteristic" and inserting in lieu thereof "Characteristics".

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by deleting "8 U.S.C. § 1328;"; and by inserting "(a), (b), (c)(1)(B)" immediately following "18 U.S.C. § 2251".

The Commentary to §2G2.1 captioned "Application Notes" is amended in Note 1 by inserting at the end:

"Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction."

The Commentary to §2G2.1 captioned "Application Note" is amended by inserting the following additional notes:

2. Specific offense characteristic (b)(2) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.
3. If specific offense characteristic (b)(2) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).";

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

The Commentary to §2G2.1 captioned "Background" is deleted in its entirety as follows:

"Background: This offense commonly involves the production source of a child pornography enterprise. Because the offense directly involves the exploitation of minors, the base offense level is higher than for the distribution of the sexually explicit material after production. An enhancement is provided when the conduct involves the exploitation of a minor under age twelve to reflect the more serious nature of exploiting young children."

Reason for Amendment: This amendment revises subsection (b)(1) to provide distinctions for the age of the victim consistent with §2G1.2, and adds subsection (b)(2) to provide an increase for defendants who abuse a position of trust in exploiting minor children. A special instruction is added to conform the operation of the multiple count rule in this guideline with §§2G1.1 and 2G1.2. A revision to the statutory provisions removes 8 U.S.C. § 1328; such

offenses are now brought under this guideline by the cross reference appearing in §2G1.2. In addition, the reference in the statutory provisions to 18 U.S.C. § 2251 is made specific to the appropriate subsections.

Effective Date: The effective date of this amendment is November 1, 1990.

325. Amendment: Section 2G2.2 is amended by inserting the following at the end:

- " (3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
- (c) Cross Reference
- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) if the resulting offense level is greater than that determined above."

The Commentary to §2G2.2 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions"; and by inserting "§ 1460, 2251(c)(1)(A)," immediately before "2252".

The Commentary to §2G2.2 captioned "Application Note" is amended by inserting the following additional notes:

- "2. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.
3. The cross reference in (c)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.
4. If the defendant sexually abused a minor at any time, whether or not such sexual abuse occurred during the course of the offense, an upward departure is warranted. In determining the extent of such a departure, the court should take into consideration the offense levels provided in §§2A3.1, 2A3.2, and 2A3.4 most commensurate with the defendant's conduct.";

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

Reason for Amendment: This amendment provides a specific offense characteristic for materials involving depictions of sadistic or masochistic conduct or other violence, and a cross reference for offenses more appropriately treated under §2G2.1. It also provides Commentary

recommending consideration of an upward departure in cases in which the defendant has sexually abused a minor at any time, whether or not such sexual abuse occurred during the course of the instant offense. In addition, it inserts a statutory provision indicating the applicability of this guideline to violations of 18 U.S.C. § 2251(c)(1)(A).

Effective Date: The effective date of this amendment is November 1, 1990.

326. Amendment: Section 2G3.1(b)(2) is amended by deleting "sodomasochistic" and inserting in lieu thereof "sadistic or masochistic".

Section 2G3.1(c) is amended by deleting:

"(1) If the offense involved a criminal enterprise, apply the appropriate guideline from Chapter Two, Part E (Offenses Involving Criminal Enterprises and Racketeering) if the resulting offense level is greater than that determined above.",

and inserting in lieu thereof:

"(1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply §2G2.2 (Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor).".

Reason for Amendment: This amendment inserts a cross reference to §2G2.2 for offenses involving materials which, in fact, depict children to ensure that the penalties for such offenses adequately reflect their seriousness. The current cross reference at subsection (c)(1) is deleted. In addition, the amendment conforms the terminology of specific offense characteristic (b)(2) to that used in other offense guidelines.

Effective Date: The effective date of this amendment is November 1, 1990.

327. Amendment: Section 2H1.1 is amended in the title by inserting "Conspiracy to Interfere with Civil Rights;" immediately before "Going".

Chapter Two, Part H, Subpart 1 is amended by deleting §2H1.2 in its entirety as follows:

"§2H1.2. Conspiracy to Interfere with Civil Rights

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

(1) 13; or

(2) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

(1) If the defendant was a public official at the time of the

offense, increase by 4 levels.

Commentary

Statutory Provision: 18 U.S.C. § 241.

Application Notes:

1. '2 plus the offense level applicable to any underlying offense' is defined in the Commentary to §2H1.1.
2. Where the adjustment in §2H1.2(b)(1) is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This section applies to conspiracies to interfere with civil rights. The maximum term of imprisonment authorized by statute is ten years; except where death results, the maximum term of imprisonment authorized by statute is life imprisonment. The base offense level for this guideline assumes threatening or otherwise serious conduct."

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 in the paragraph beginning "Offense guidelines that expressly cover conspiracies" by deleting "§2H1.2 (Conspiracy to Interfere with Civil Rights)" and inserting in lieu thereof "§2H1.1 (Conspiracy to Interfere With Civil Rights; Going in Disguise to Deprive of Rights)".

Reason for Amendment: This amendment consolidates two guidelines and raises the minimum base offense level from level 13 to level 15 for cases currently covered under §2H1.2 to better reflect the seriousness of this offense.

Effective Date: The effective date of this amendment is November 1, 1990.

- 328. Amendment:** The Commentary to §2H1.5 captioned "Statutory Provisions" is amended by deleting "Provisions" and inserting in lieu thereof "Provision"; and by deleting "; 42 U.S.C. § 3631".

The Commentary to §2H1.5 captioned "Application Notes" is amended by deleting Note 3 as follows:

- "3. In the case of a violation of 42 U.S.C. § 3631, apply this guideline where the offense did not involve the threat or use of force. If the offense involved the threat or use of force, apply §2H1.3."

Reason for Amendment: This amendment deletes references to a statute to which this guideline does not apply.

Effective Date: The effective date of this amendment is November 1, 1990.

- 329. Amendment:** Section 2J1.6 is amended by deleting:

- "(a) Base Offense Level: 6
- (b) Specific Offense Characteristics
- (1) If the underlying offense is punishable by death or imprisonment for a term of fifteen years or more, increase by 9 levels.
 - (2) If the underlying offense is punishable by a term of imprisonment of five or more years, but less than fifteen years, increase by 6 levels.
 - (3) If the underlying offense is a felony punishable by a maximum term of less than five years, increase by 3 levels."

and inserting in lieu thereof:

- "(a) Base Offense Level:
- (1) 11, if the offense constituted a failure to report for service of sentence; or
 - (2) 6, otherwise.
- (b) Specific Offense Characteristics
- (1) If the base offense level is determined under subsection (a)(1), and the defendant --
 - (A) voluntarily surrendered within 96 hours of the time he was originally scheduled to report, decrease by 5 levels; or
 - (B) was ordered to report to a community corrections center, community treatment center, 'halfway house,' or similar facility, and subdivision (A) above does not apply, decrease by 2 levels.

Provided, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more.
 - (2) If the base offense level is determined under subsection (a)(2), and the underlying offense is --
 - (A) punishable by death or imprisonment for a term of fifteen years or more, increase by 9 levels; or
 - (B) punishable by a term of imprisonment of five years or more, but less than fifteen years, increase by 6 levels; or
 - (C) a felony punishable by a term of imprisonment of less than five years, increase by 3 levels."

The Commentary to §2J1.6 captioned "Background" is amended by deleting "The offense level for this offense" and inserting in lieu thereof "Where the base offense level is determined under subsection (a)(2), the offense level".

Reason for Amendment: This amendment provides greater differentiation in the guideline offense levels for the various types of conduct covered by this guideline.

Effective Date: The effective date of this amendment is November 1, 1990.

330. Amendment: Chapter Two, Part K, Subpart 1 is amended by deleting §2K1.4 in its entirety as follows:

"§2K1.4. Arson; Property Damage By Use of Explosives

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristics

If more than one applies, use the greatest:

- (1) If the defendant knowingly created a substantial risk of death or serious bodily injury, increase by 18 levels.
 - (2) If the defendant recklessly endangered the safety of another, increase by 14 levels.
 - (3) If the offense involved destruction or attempted destruction of a residence, increase by 12 levels.
 - (4) If the defendant used fire or an explosive to commit another offense that is a felony under federal law, or carried explosives during the commission of any offense that is a felony under federal law (*i.e.*, the defendant is convicted under 18 U.S.C. § 844(h)), increase by 7 levels.
 - (5) If the defendant endangered the safety of another person, increase by 4 levels.
 - (6) If a destructive device was used, increase by 2 levels.
- (c) Cross References
 - (1) If the defendant caused death, or intended to cause bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.

(2) Apply §2B1.3 (Property Damage or Destruction) if the resulting offense level is greater than that determined above.

(d) Note

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 32, 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 2275.

Application Notes:

1. 'Destructive device' means any article described in 18 U.S.C. § 921(a)(4) (for example, explosive, incendiary, or poison gas bombs, grenades, mines, and similar devices and certain rockets, missiles, and large bore weapons).
2. If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Background: Review of presentence reports indicates that many arson cases involve 'malicious mischief,' i.e., minor property damage under circumstances that do not present an appreciable danger. A low base offense level is provided for these cases. However, aggravating factors are provided for instances where a defendant knowingly or recklessly endangered others, destroyed or attempted to destroy a residence, used a destructive device, or otherwise endangered others. As amended by Section 6474(b) of the Anti-Drug Abuse Act of 1988 (effective November 18, 1988), 18 U.S.C. § 844(h) sets forth a mandatory sentencing enhancement of five years for the first offense and ten years for subsequent offenses if the defendant was convicted of using fire or an explosive to commit a felony or of carrying an explosive during the commission of a felony. See §2K1.7."

A replacement guideline with accompanying commentary is inserted as §2K1.4 (Arson; Property Damage by Use of Explosives).

Reason for Amendment: This amendment restructures this guideline to provide more appropriate offense levels for the conduct covered. The Commission has determined that the

offense levels provided in the current guideline do not adequately reflect the seriousness of the offenses that are covered under this section.

Effective Date: The effective date of this amendment is November 1, 1990.

331. Amendment: Section 2K1.6(a) is amended by deleting "greater" and inserting in lieu thereof "greatest"; and by inserting the following additional subdivision:

"(3) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide)."

Section 2K1.6(a)(2) is amended by deleting the period at the end and inserting in lieu thereof "; or".

Reason for Amendment: This amendment adds an additional alternative base offense level to cover the situation in which the commission of this offense results in death.

Effective Date: The effective date of this amendment is November 1, 1990.

332. Amendment: Section 2K1.7 is amended by inserting "(a)" immediately before "If"; and by inserting the following additional subsection:

"(b) Special Instruction for Fines

(1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section."

The Commentary to §2K1.7 captioned "Application Notes" is amended by inserting the following additional notes:

"3. Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the use of fire or explosives is not to be applied in respect to the guideline for the underlying offense.

4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 844(h). This is required because the offense level for the underlying offense may be reduced in that any specific offense characteristic for use of fire or explosives would not be applied (see Application Note 3). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571."

The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 4 in the third sentence by inserting "required" immediately before "because"; and by inserting ", although a fine is authorized under 18 U.S.C. § 3571" immediately before the period at the end of the last

sentence.

Reason for Amendment: This amendment conforms §2K1.7 to §2K2.4, which includes specific instructions concerning treatment of fines and double counting. Both sections are based upon similarly written statutes that provide for a fixed mandatory, consecutive sentence of imprisonment. In addition, Application Note 4 of the Commentary to §2K2.4 is revised and expanded for greater clarity.

Effective Date: The effective date of this amendment is November 1, 1990.

- 333. Amendment:** Section 2K2.1(a)(1) is amended by deleting "16" and inserting in lieu thereof "18".

Section 2K2.1(b)(1) is amended by inserting ", other than a firearm covered in 26 U.S.C. § 5845(a)," immediately following "ammunition".

Section 2K2.2(a)(1) is amended by deleting "16" and inserting in lieu thereof "18".

Reason for Amendment: This amendment provides that the reduction in offense level under subsection (b)(1) for possession of a weapon for sporting purposes or collection may not be applied in the case of any weapon described in 26 U.S.C. § 5845(a). In addition, the amendment increases the base offense level in subsection (a)(1) of §§2K2.1 and 2K2.2 from 16 to 18 to better reflect the seriousness of the conduct covered.

Effective Date: The effective date of this amendment is November 1, 1990.

- 334. Amendment:** Chapter Two, Part K, Subpart 3 is amended by inserting an additional guideline with accompanying commentary as §2K3.2 (Feloniously Mailing Injurious Articles).

Reason for Amendment: This amendment adds an additional guideline covering the felony provisions of 18 U.S.C. § 1716.

Effective Date: The effective date of this amendment is November 1, 1990.

- 335. Amendment:** Section 2L1.1(b)(1) is amended by deleting "and without knowledge that the alien was excludable under 8 U.S.C. §§ 1182(a)(27), (28), (29)," immediately before "decrease".

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

"7. 8 U.S.C. §§ 1182(a)(27), (a)(28), and (a)(29) concern certain aliens who are excludable because they are subversives."

and inserting in lieu thereof:

"7. Where the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, an upward departure may be warranted."

The Commentary to §2L1.1 captioned "Background" is amended in the second sentence by deleting "and did not know the alien was excludable as a subversive" immediately following "profit".

Reason for Amendment: This amendment deletes a portion of specific offense characteristic (b)(1) that is unclear in application, and in any event rarely occurs, and replaces it with an application note indicating that an upward departure may be warranted in the circumstances specified.

Effective Date: The effective date of this amendment is November 1, 1990.

- 336. Amendment:** Section 2M4.1(b)(1) is amended by deleting "while" and inserting in lieu thereof "at a time when"; and by deleting "into the armed services, other than in time of war or armed conflict" and inserting in lieu thereof "for compulsory military service".

The Commentary to §2M4.1 captioned "Application Notes" is amended by deleting:

- "1. 'While persons were being inducted into the armed services' means at a time of compulsory military service under the Selective Service laws.
2. The Commission has not considered the appropriate sanction for this offense when persons are being inducted during time of war or armed conflict.",

and inserting in lieu thereof:

- "1. Subsection (b)(1) does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. If the offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict, an upward departure may be warranted.";

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

Reason for Amendment: This amendment clarifies this guideline and deletes language that produced the anomalous result of a lower offense level for failure to register and evasion of military service in time of war or armed conflict than during a peacetime draft. In addition, the amendment makes a technical correction to the language of the guideline that enables the elimination of current Application Note 1.

Effective Date: The effective date of this amendment is November 1, 1990.

- 337. Amendment:** Section 2M5.2 is amended by deleting:

- "(a) Base Offense Level (Apply the greater):
 - (1) 22, if sophisticated weaponry was involved; or
 - (2) 14.",

and inserting in lieu thereof:

"(a) Base Offense Level:

- (1) 22, except as provided in subdivision (2) below;
- (2) 14, if the offense involved only non-fully-automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten."

The Commentary to §2M5.2 captioned "Statutory Provision" is amended by deleting "Provision" and inserting in lieu thereof "Provisions", and by deleting "§ 2778" and inserting in lieu thereof "§§ 2778, 2780".

The Commentary to §2M5.2 captioned "Application Notes" is amended in Note 1 by inserting, immediately before "In the case of a violation", the following:

"Under 22 U.S.C. § 2778, the President is authorized, through a licensing system administered by the Department of State, to control exports of defense articles and defense services that he deems critical to a security or foreign policy interest of the United States. The items subject to control constitute the United States Munitions List, which is set out in 22 C.F.R. Part 121.1. Included in this list are such things as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, vessels of war, explosives, military and space electronics, and certain firearms.

The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted."

The Commentary to §2M5.2 captioned "Application Notes" is amended in the first sentence of Note 2 by inserting "or foreign policy" immediately before "interest".

Reason for Amendment: This amendment revises this guideline to better distinguish the more and less serious forms of offense conduct covered.

Effective Date: The effective date of this amendment is November 1, 1990.

338. Amendment: Section 2N1.1 is amended by inserting the following additional subsection:

"(b) Cross Reference

- (1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above."

Reason for Amendment: This amendment adds a cross reference to ensure that in the case of an offense involving extortion, the offense level will not be lower than that under §2B3.2.

Effective Date: The effective date of this amendment is November 1, 1990.

339. Amendment: Section 2N1.2 is amended by deleting:

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

(1) 16;

(2) If the offense involved extortion, apply §2B3.2.",

and inserting in lieu thereof:

"(a) Base Offense Level: 16

(b) Cross Reference

(1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).".

The Commentary to §2N1.2 captioned "Application Notes" is amended by deleting Note 1 as follows:

"1. If the offense involved extortion, apply the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) rather than the guideline from this section.";

by renumbering Note 2 as Note 1; and in the caption by deleting "Notes" and inserting in lieu thereof "Note".

Reason for Amendment: This amendment conforms the structure of this guideline to that used in other guidelines. No substantive change results.

Effective Date: The effective date of this amendment is November 1, 1990.

340. Amendment: The Commentary to §2N2.1 captioned "Statutory Provisions" is amended by inserting "(a)(1), (a)(2), (b)" immediately after "333".

The Commentary to §2N2.1 captioned "Application Notes" is amended by inserting the following additional note:

"4. The Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving anabolic steroids).".

Reason for Amendment: This amendment provides that §2N2.1 does not apply to convictions under 21 U.S.C. § 333(e).

Effective Date: The effective date of this amendment is November 1, 1990.

341. Amendment: Section 2P1.1(b)(2) is amended by inserting the following at the end:

"Provided, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more."

Section 2P1.1(b) is amended by renumbering subdivision (3) as (4); and by inserting the following as subdivision (3):

"(3) If the defendant escaped from the non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility, and subsection (b)(2) is not applicable, decrease the offense level under subsection (a)(1) by 4 levels or the offense level under subsection (a)(2) by 2 levels. *Provided, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more."*

The Commentary to §2P1.1 captioned "Application Notes" is amended in Note 3 by deleting "§2P1.1(b)(3)" and inserting in lieu thereof "subsection (b)(4)".

The Commentary to §2P1.1 captioned "Application Notes" is amended by inserting the following additional note:

"5. Criminal history points under Chapter Four, Part A (Criminal History) are to be determined independently of the application of this guideline. For example, in the case of a defendant serving a one-year sentence of imprisonment at the time of the escape, criminal history points from §4A1.1(b) (for the sentence being served at the time of the escape), §4A1.1(d) (custody status), and §4A1.1(e) (recency) would be applicable."

Reason for Amendment: This amendment provides greater differentiation in the guideline offense levels for the various types of conduct covered by this guideline. In addition, it clarifies that, where the instant offense is escape, criminal history points from §4A1.1(d) or (e), or both, may be applicable and that the addition of such points does not constitute unintended double counting.

Effective Date: The effective date of this amendment is November 1, 1990.

342. Amendment: The Introductory Commentary to Chapter Two, Part S, is deleted in its entirety as follows:

"Introductory Commentary

Money laundering activities are essential to the operation of organized crime. Congress recently enacted new statutes prohibiting these activities and increased the maximum penalties.

The guidelines provide substantially increased punishments for these offenses. In fiscal year 1985, the time served by defendants convicted of felonies involving monetary transaction reporting under 31 U.S.C. §§ 5313, 5316, and 5322 averaged about ten months, and only a few defendants served as much as four to five years. However, courts have been imposing higher sentences as they come to appreciate the seriousness of this activity, and sentences as long as thirty-five years have been reported. Specifically, Congress made all reporting violations felonies in 1984, and enacted the Money Laundering Control Act of 1986 (18 U.S.C. §§ 1956, 1957), which creates new offenses and provides higher maximum sentences when knowledge, facilitation or concealment of serious criminal activity is proved."

Reason for Amendment: This amendment deletes the introductory commentary to this part as outdated, inconsistent with the commentaries to other sections, and better covered in the individual commentaries to the offenses contained in the part.

Effective Date: The effective date of this amendment is November 1, 1990.

343. Amendment: The Commentary to §2T1.1 captioned "Application Notes" is amended in Note 5 by deleting:

"'racketeering activity' as defined in 18 U.S.C. § 1961. If §2T1.1(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

The Commentary to §2T1.2 captioned "Application Notes" is amended in Note 1 by deleting:

"'racketeering activity' as defined in 18 U.S.C. § 1961. If §2T1.2(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

The Commentary to §2T1.3 captioned "Application Notes" is amended in Note 1 by deleting:

"'racketeering activity' as defined in 18 U.S.C. § 1961. If §2T1.3(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

The Commentary to §2T1.4 captioned "Application Notes" is amended in Note 1 by deleting the last sentence as follows:

"If this subsection applies, do not apply §4B1.3 (Criminal Livelihood) which is

substantially duplicative."

Reason for Amendment: This amendment deletes the portion of these application notes concerning application of §4B1.3 (Criminal Livelihood) because this commentary conflicts with the principle expressed in Application Note 5 of the Commentary to §1B1.1 (when two guideline provisions are equally applicable, the one producing the greater offense level controls). In addition, this amendment broadens the definition of "criminal activity" to cover any criminal violation of federal, state, or local law.

Effective Date: The effective date of this amendment is November 1, 1990.

- 344. Amendment:** The Introductory Commentary to Chapter Three, Part A is amended by deleting the second sentence as follows: "They are to be treated as specific offense characteristics."

The Commentary to §3A1.1 (Vulnerable Victim) captioned "Application Notes" is amended in Note 2 by inserting the following at the end:

"For example, where the offense guideline provides an enhancement for the age of the victim, this guideline should not be applied unless the victim was unusually vulnerable for reasons unrelated to age."

Reason for Amendment: This amendment clarifies the application of §3A1.1, and eliminates an unnecessary and confusing sentence in the introductory commentary to this part.

Effective Date: The effective date of this amendment is November 1, 1990.

- 345. Amendment:** The Introductory Commentary to Chapter Three, Part B, is amended by beginning a new paragraph with the second sentence; and by inserting, immediately after the first sentence, the following:

"The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction. However, where the defendant has received mitigation by virtue of being convicted of an offense significantly less serious than his actual criminal conduct, e.g., the defendant is convicted of unlawful possession of a controlled substance but his actual conduct involved drug trafficking, a further reduction in the offense level under §3B1.2 (Mitigating Role) ordinarily is not warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense."

Reason for Amendment: This amendment clarifies the conduct that is relevant to the determination of Chapter Three, Part B, and clarifies the operation of §3B1.2 in certain cases.

Effective Date: The effective date of this amendment is November 1, 1990.

- 346. Amendment:** Section 3B1.3 is amended in the second sentence by deleting "in addition to that provided for in §3B1.1, nor may it be employed" immediately following "may not be employed"; and by inserting the following additional sentence at the end:

"If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role)."

Reason for Amendment: This amendment provides that the enhancement for abuse of a position of trust may apply in addition to an enhancement for an aggravating role under §3B1.1.

Effective Date: The effective date of this amendment is November 1, 1990.

347. Amendment: Section 3C1.1 is amended in the title by deleting "Willfully Obstructing or Impeding Proceedings" and inserting in lieu thereof "Obstructing or Impeding the Administration of Justice".

Section 3C1.1 is amended by deleting "impeded or obstructed, or attempted to impede or obstruct" and inserting in lieu thereof "obstructed or impeded, or attempted to obstruct or impede,"; and by deleting "or prosecution" and inserting in lieu thereof ", prosecution, or sentencing".

The Commentary to §3C1.1 is amended by deleting the introductory paragraph immediately before "Application Notes" as follows:

" This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to willfully interfere with the disposition of criminal charges, in respect to the instant offense."

The Commentary to §3C1.1 captioned "Application Notes" is amended by deleting Notes 1-4 as follows:

- "1. The following conduct, while not exclusive, may provide a basis for applying this adjustment:
 - (a) destroying or concealing material evidence, or attempting to do so;
 - (b) directing or procuring another person to destroy or conceal material evidence, or attempting to do so;
 - (c) testifying untruthfully or suborning untruthful testimony concerning a material fact, or producing or attempting to produce an altered, forged, or counterfeit document or record during a preliminary or grand jury proceeding, trial, sentencing proceeding, or any other judicial proceeding;
 - (d) threatening, intimidating, or otherwise unlawfully attempting to influence a co-defendant, witness, or juror, directly or indirectly;
 - (e) furnishing material falsehoods to a probation officer in the course of a presentence or other investigation for the court.

2. In applying this provision, suspect testimony and statements should be evaluated in a light most favorable to the defendant.
3. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt is not a basis for application of this provision.
4. Where the defendant is convicted for an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury), §2J1.8 (Bribery of Witness), or §2J1.9 (Payment to Witness), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely-Related Counts). The offense level for that Group of Closely-Related Counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater."

and inserting in lieu thereof:

- "1. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision, the defendant's testimony and statements should be evaluated in a light most favorable to the defendant.
2. Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 3 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application Note 4 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 3 and 4 should assist the court in determining whether application of this enhancement is warranted in a particular case.
3. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:
 - (a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

- (b) committing, suborning, or attempting to suborn perjury;
- (c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;
- (d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;
- (e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;
- (f) providing materially false information to a judge or magistrate;
- (g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;
- (h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;
- (i) conduct prohibited by 18 U.S.C. §§ 1501-1516.

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

4. The following is a non-exhaustive list of examples of the types of conduct that, absent a separate count of conviction for such conduct, do not warrant application of this enhancement, but ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range:
 - (a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;
 - (b) making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies;

- (c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;
 - (d) avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight)).
5. 'Material' evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.
6. Where the defendant is convicted for an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of Perjury), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.8 (Bribery of Witness), or §2J1.9 (Payment to Witness), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation or prosecution of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely-Related Counts). The offense level for that group of closely-related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater."

Chapter Three, Part C, is amended by inserting an additional guideline with accompanying commentary as §3C1.2 (Reckless Endangerment During Flight).

Reason for Amendment: This amendment clarifies the operation of §3C1.1 and inserts an additional guideline to address reckless endangerment during flight. The Commission believes that reckless endangerment during flight is sufficiently different from other forms of obstructive conduct to warrant a separate enhancement.

Effective Date: The effective date of this amendment is November 1, 1990.

348. Amendment: Section 3D1.1 is amended by inserting "(a)" immediately before "When"; by deleting "(a)", "(b)", and "(c)", and inserting in lieu thereof "(1)", "(2)", and "(3)" respectively; and by inserting the following additional subsection:

- "(b) Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§3D1.2-3D1.5. Sentences for such counts are governed by the provisions of §5G1.2(a)."

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

"Certain offenses, e.g., 18 U.S.C. § 924(c) (use of a deadly or dangerous weapon in

relation to a crime of violence or drug trafficking) by law carry mandatory consecutive sentences. Such offenses are exempted from the operation of these rules. See §3D1.2.",

and inserting in lieu thereof:

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

Section 3D1.2 is amended by deleting the second sentence as follows:

"A count for which the statute mandates imposition of a consecutive sentence is excluded from such Groups for purposes of §§3D1.2-3D1.5."

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

"1. Counts for which the statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Convictions under such counts are excluded from the determination of the combined offense level. Convictions for 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence) provide a common example. Note that such a conviction usually does affect the offense level for other counts, however, in that in the event of such a conviction the specific offense characteristic for weapon use in the primary offense is to be disregarded. See Commentary to §2K2.4. Example: The defendant is convicted of one count of bank robbery in which he took \$5,000 and discharged a weapon causing permanent bodily injury (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together, but the offense level for the bank robbery count is 28 (18 + 4 + 6) rather than 31. The mandatory five year sentence on the weapon-use count runs consecutively, as required by law."

Reason for Amendment: This amendment consolidates the provisions dealing with statutorily required consecutive sentences in §3D1.1 for greater clarity.

Effective Date: The effective date of this amendment is November 1, 1990.

349. Amendment: Section 3D1.2(b) is amended by deleting, immediately following "common scheme or plan", the following:

" , including, but not limited to:

- (1) A count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation. 28 U.S.C. § 994(1)(2).
- (2) A count charging an attempt to commit an offense and a count charging the commission of the offense. 18 U.S.C. § 3584(a).
- (3) A count charging an offense based on a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition. 28 U.S.C. § 994(v)".

Section 3D1.2(d) is amended by deleting "Counts are grouped together if" and inserting in lieu thereof "When".

Section 3D1.2(d) is amended by deleting "specifically included" and inserting in lieu thereof "to be grouped".

Section 3D1.2(d) is amended in the second paragraph by inserting in the appropriate place: "§2K2.2;".

Section 3D1.2(d) is amended in the third paragraph by inserting "Chapter Two," immediately before "Part A".

The Commentary to §3D1.2 captioned "Application Notes" is amended by inserting the following as Note 1:

- "1. Subsections (a)-(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. See §3D1.1(b)".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 3 by inserting the following as the second paragraph:

"When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a).".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 4 in the first sentence of the first paragraph by deleting "states the principle" and inserting in lieu thereof "provides".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 4 by inserting the following sentence as the second sentence of the first paragraph:

"This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).";

and by inserting the following as the second paragraph:

"When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 6 by deleting the third sentence of the first paragraph as follows:

"The same general type of offense" is to be construed broadly, and would include, for example, larceny, embezzlement, forgery, and fraud.";

and by inserting the following as the second paragraph:

"Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; see §3D1.3(b). The 'same general type' of offense is to be construed broadly, and would include, for example, larceny, embezzlement, forgery, and fraud.".

Reason for Amendment: This amendment clarifies the operation of §3D1.2(b), makes editorial improvements in §3D1.2(d), makes the listing of offenses in §3D1.2(d) more comprehensive, clarifies the interaction of §§ 3D1.2(d) and 3D1.3(b), and clarifies the Commentary of §3D1.2 by making explicit that offenses such as multiple robberies do not fit within the parameters of §3D1.2(b).

Effective Date: The effective date of this amendment is November 1, 1990.

350. Amendment: Section 3D1.4 is amended in the fourth line of the Unit table by inserting "2 1/2-" immediately before "3" the first time "3" appears; and in the fifth line of the Unit table by deleting "4 or" and inserting in lieu thereof "3 1/2-".

Section 3D1.4 is amended by deleting:

"(d) Except when the total number of Units is 1 1/2, round up to the next large whole number.".

The Commentary to §3D1.4 captioned "Background" is amended in the first paragraph by deleting the fifth sentence as follows:

"When this approach produces a fraction in the total Units, other than 1 1/2, it is rounded up to the nearest whole number.".

The "Illustrations of the Operation of the Multiple-Count Rules" following §3D1.5 are amended in example 1 in the third sentence by deleting "18" and "4-" and inserting in lieu thereof "20" and "2-" respectively; and in the sixth sentence by deleting "(rounded up to 3)" immediately following "2 1/2 Units".

The "Illustrations of the Operation of the Multiple-Count Rules" following §3D1.5 are amended in example 3 in the sixth sentence by deleting "Obstruction" and inserting in lieu thereof "Obstructing or Impeding the Administration of Justice".

Reason for Amendment: This amendment simplifies the operation of §3D1.4. In addition, the amendment conforms the illustrations of the operation of the multiple-count rules.

Effective Date: The effective date of this amendment is November 1, 1990.

351. Amendment: The Commentary to §3E1.1 captioned "Application Notes" is amended by deleting:

- "2. Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).
3. A guilty plea may provide some evidence of the defendant's acceptance of responsibility. However, it does not, by itself, entitle a defendant to a reduced sentence under this section."

and inserting in lieu thereof:

- "2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.
3. Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility for the purposes of this section. However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility."

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 4 in the first sentence by deleting "Willfully Obstructing or Impeding Proceedings" and inserting in lieu thereof "Obstructing or Impeding the Administration of Justice".

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 5 in the second sentence by deleting "and should not be disturbed unless it is without foundation" immediately following "review".

The Commentary to §3E1.1 captioned "Background" is amended in the first paragraph in the second sentence by inserting "and related conduct" immediately before "by taking"; and in the third sentence by deleting "lesser sentence" and inserting in lieu thereof "lower offense level", and by deleting "sincere remorse" and inserting in lieu thereof "acceptance of responsibility".

The Commentary to §3E1.1 captioned "Background" is amended by deleting the second paragraph as follows:

" The availability of a reduction under §3E1.1 is not controlled by whether the conviction was by trial or plea of guilty. Although a guilty plea may show some evidence of acceptance of responsibility, it does not automatically entitle the defendant to a sentencing adjustment."

Reason for Amendment: This amendment clarifies the operation of this guideline and conforms the title of a reference to another guideline.

Effective Date: The effective date of this amendment is November 1, 1990.

352. Amendment: Section 4A1.2(a)(3) is amended by inserting "or execution" immediately following "imposition".

Section 4A1.2(c)(1) is amended by inserting in the appropriate place by alphabetical order:

"Careless or reckless driving",
"Insufficient funds check".

Section 4A1.2(c)(1) is amended by inserting "(excluding local ordinance violations that are also criminal offenses under state law)" immediately following "Local ordinance violations".

Section 4A1.2(c)(2) is amended by inserting "(e.g., speeding)" immediately following "minor traffic infractions".

The Commentary to §4A1.2 captioned "Application Notes" is amended by inserting the following additional notes:

"12. Local ordinance violations. A number of local jurisdictions have enacted ordinances covering certain offenses (e.g., larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (e.g., a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(1) and, therefore, sentences for such offenses are to be treated as if the defendant had

been convicted under state law.

13. **Insufficient funds check.** 'Insufficient funds check,' as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account."

Reason for Amendment: This amendment clarifies that, for the purpose of computing criminal history points, there is no difference between the suspension of the "imposition" and "execution" of a prior sentence. This amendment also makes the provisions of §4A1.2(c)(1) more comprehensive in respect to certain vehicular offenses and clarifies the application of §4A1.2(c)(1) in respect to certain offenses prosecuted in municipal courts. In addition, this amendment expands the coverage of §4A1.2(c)(1) to include a misdemeanor or petty offense conviction for an insufficient funds check.

Effective Date: The effective date of this amendment is November 1, 1990.

- 353. Amendment:** The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 6 by deleting:

"Any other sentence resulting in a valid conviction is to be counted in the criminal history score. Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score. Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score. Nonetheless, any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 if it provides reliable evidence of past criminal activity."

and inserting in lieu thereof:

"Also, sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted. Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Adequacy of Criminal History Category)."

The Commentary to §4A1.2 captioned "Application Notes" is amended in the caption of Note 6 by deleting "Invalid" and inserting in lieu thereof "Reversed, Vacated, or Invalidated".

The Commentary to §4A1.2 is amended by inserting at the end:

Background: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction."

Reason for Amendment: This amendment clarifies the circumstances under which prior sentences are excluded from the criminal history score. In particular, the amendment clarifies the Commission's intent regarding the counting of uncounseled misdemeanor convictions for

which counsel constitutionally is not required because the defendant was not imprisoned. Lack of clarity regarding whether these prior sentences are to be counted may result not only in considerable disparity in guideline application, but also in the criminal history score not adequately reflecting the defendant's failure to learn from the application of previous sanctions and his potential for recidivism. This amendment expressly states the Commission's position that such convictions are to be counted for the purposes of criminal history under Chapter Four, Part A.

Effective Date: The effective date of this amendment is November 1, 1990.

- 354. Amendment:** The Commentary to §4B1.3 captioned "Application Notes" is amended in Note 2 by deleting "(currently 2,000x the hourly minimum wage under federal law is \$6,700)" immediately following "then existing hourly minimum wage under federal law".

Reason for Amendment: This amendment deletes a reference to the federal minimum wage that is now outdated.

Effective Date: The effective date of this amendment is November 1, 1990.

- 355. Amendment:** Chapter Four, Part B, is amended by inserting an additional guideline with accompanying commentary as §4B1.4 (Armed Career Criminal).

Reason for Amendment: This amendment adds a new section to address cases subject to a sentence enhancement under 18 U.S.C. § 924(e).

Effective Date: The effective date of this amendment is November 1, 1990.

- 356. Amendment:** Section 5E1.2 is amended by deleting:

"(a) Except as provided in subsection (f) below, the court shall impose a fine in all cases.",

and inserting in lieu thereof:

"(a) The court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine."

Section 5E1.2(d)(2) is amended by deleting "the ability of the defendant" and inserting in lieu thereof "any evidence presented as to the defendant's ability".

The Commentary to §5E1.2 captioned "Application Notes" is amended in Note 3 by deleting the fourth sentence as follows:

"In many cases, circumstances will make it unnecessary to consider these standards other than in the most general terms.";

and by inserting the following additional paragraphs at the end:

"Where it is readily ascertainable that the defendant cannot, and is not likely to become

able to, pay a fine greater than the maximum fine set forth in Column B of the Fine Table in subsection (c)(3), calculation of the alternative maximum fines under subsections (c)(2)(B) (twice the gross pecuniary loss caused by the offense) and (c)(2)(C) (three times the gross pecuniary gain to all participants in the offense) is unnecessary. In such cases, a statement that 'the alternative maximums of the fine table were not calculated because it is readily ascertainable that the defendant cannot, and is not likely to become able to, pay a fine greater than the maximum set forth in the fine table' is recommended in lieu of such calculations.

The determination of the fine guideline range may be dispensed with entirely upon a court determination of present and future inability to pay any fine. The inability of a defendant to post bail bond (having otherwise been determined eligible for release) and the fact that a defendant is represented by (or was determined eligible for) assigned counsel are significant indicators of present inability to pay any fine. In conjunction with other factors, they may also indicate that the defendant is not likely to become able to pay any fine."

Reason for Amendment: This amendment clarifies the operation of this guideline.

Effective Date: The effective date of this amendment is November 1, 1990.

- 357. Amendment:** The Introductory Commentary to Chapter Five, Part H is amended by inserting the following additional paragraph at the end:

" In addition, 28 U.S.C. § 994(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."

Reason for Amendment: This amendment clarifies the relationship of 28 U.S.C. § 994(e) to certain of the policy statements contained in this part.

Effective Date: The effective date of this amendment is November 1, 1990.

- 358. Amendment:** Chapter Five, Part K, Subpart 2, is amended in the title by deleting "GENERAL PROVISIONS:" and inserting in lieu thereof "OTHER GROUNDS FOR DEPARTURE".

Section 5K2.0 is amended in the first sentence of the first paragraph by inserting a comma immediately following "degree", and by inserting "that should result in a sentence different from that described" immediately following "the guidelines"; in the third sentence of the first paragraph by deleting "court at the time of sentencing" and inserting in lieu thereof "courts"; in the fourth sentence of the first paragraph by deleting "the present section" and inserting in lieu thereof "this subpart", by deleting "fully" immediately before "take", by inserting "fully" immediately following "account", and by deleting "precise" and inserting in lieu thereof "the"; in the sixth sentence of the first paragraph by deleting "judge" and inserting in lieu thereof "court"; and in the seventh sentence of the first paragraph by deleting "listed elsewhere in the guidelines (e.g., as an adjustment or specific offense characteristic)" and inserting in lieu thereof "taken into consideration in the guidelines (e.g., as a specific offense characteristic or other

adjustment)".

Section 5K2.0 is amended in the first sentence of the second paragraph by inserting ", for example," immediately following "Where", by deleting "guidelines, specific offense characteristics," and inserting in lieu thereof "offense guideline", by deleting "part" and inserting in lieu thereof "subpart", by deleting "guideline" and inserting in lieu thereof "applicable guideline range", and by deleting "of conviction" immediately following "the offense"; in the second sentence of the second paragraph by deleting "offense of conviction" and inserting in lieu thereof "applicable offense guideline"; in the third sentence of the second paragraph by deleting "offense of conviction is theft" and inserting in lieu thereof "theft offense guideline is applicable", by deleting "when" immediately before "the theft", and by inserting "range" immediately before "more readily"; and in the fourth sentence of the second paragraph by deleting "offense of conviction is robbery" and inserting in lieu thereof "robbery offense guideline is applicable", and by deleting "sentence" immediately before "adjustment".

Section 5K2.0 is amended by deleting the fourth paragraph as follows:

"Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in §1B1.3."

Reason for Amendment: This amendment makes various editorial and clarifying changes. In addition, the last paragraph is deleted as unclear and overly restrictive.

Effective Date: The effective date of this amendment is November 1, 1990.

359. Amendment: Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

"7 U.S.C. § 1361	2Q1.2",
"18 U.S.C. § 34	2A1.1, 2A1.2, 2A1.3, 2A1.4",
"18 U.S.C. § 35(b)	2A6.1",
"18 U.S.C. § 219	2C1.3",
"18 U.S.C. § 281	2C1.3",
"18 U.S.C. § 332	2B1.1, 2F1.1",
"18 U.S.C. § 335	2F1.1",
"18 U.S.C. § 608	2H2.1",
"18 U.S.C. § 647	2B1.1",
"18 U.S.C. § 650	2B1.1",
"18 U.S.C. § 665(b)	2B3.3, 2C1.1",
"18 U.S.C. § 667	2B1.1, 2B1.2",
"18 U.S.C. § 712	2F1.1",
"18 U.S.C. § 753	2P1.1",
"18 U.S.C. § 915	2F1.1",
"18 U.S.C. § 917	2F1.1",
"18 U.S.C. § 970(a)	2B1.3, 2K1.4",
"18 U.S.C. § 1015	2F1.1, 2J1.3, 2L2.1, 2L2.2",
"18 U.S.C. § 1023	2B1.1, 2F1.1",
"18 U.S.C. § 1024	2B1.2",

"18 U.S.C. § 1031	2F1.1",
"18 U.S.C. § 1091	2H1.3",
"18 U.S.C. § 1115	2A1.4",
"18 U.S.C. § 1167	2B1.1",
"18 U.S.C. § 1168	2B1.1",
"18 U.S.C. § 1201(c), (d)	2X1.1",
"18 U.S.C. § 1364	2K1.4",
"18 U.S.C. § 1422	2C1.2, 2F1.1",
"18 U.S.C. § 1541	2L2.3",
"18 U.S.C. § 1716	2K3.2",
(felony provisions only)	
"18 U.S.C. § 1860	2R1.1",
"18 U.S.C. § 1861	2F1.1",
"18 U.S.C. § 1864	2Q1.6",
"18 U.S.C. § 1991	2A2.1, 2X1.1",
"18 U.S.C. § 1992	2A1.1, 2B1.3, 2K1.4, 2X1.1",
"18 U.S.C. § 2072	2F1.1",
"18 U.S.C. § 2118(d)	2X1.1",
"18 U.S.C. § 2197	2B5.2, 2F1.1",
"18 U.S.C. § 2232	2J1.2",
"18 U.S.C. § 2233	2B1.1, 2B3.1",
"18 U.S.C. § 2272	2F1.1",
"18 U.S.C. § 2276	2B1.3, 2B2.2",
"18 U.S.C. § 2331(a)	2A1.1, 2A1.2, 2A1.3, 2A1.4",
"18 U.S.C. § 2331(b)	2A2.1",
"18 U.S.C. § 2331(c)	2A2.2",
"22 U.S.C. § 2780	2M5.2",
"42 U.S.C. § 300i-1	2Q1.4, 2Q1.5",
"42 U.S.C. § 1973j(c)	2X1.1".

Appendix A is amended:

in the line beginning "8 U.S.C. § 1328" by deleting ", 2G2.1, 2G2.2";

in the line beginning "16 U.S.C. § 1029" by deleting ", 2Q2.2";

in the line beginning "16 U.S.C. § 1030" by deleting ", 2Q2.2";

in the line beginning "16 U.S.C. § 1857(2)" by deleting ", 2Q2.2" and inserting in lieu thereof "2Q2.1";

in the line beginning "16 U.S.C. § 1859" by deleting "2Q2.2" and inserting in lieu thereof "2Q2.1";

and in the line beginning "16 U.S.C. § 3373(d)" by deleting "2Q2.2" and inserting in lieu thereof "2Q2.1";

by deleting:

"18 U.S.C. § 32(a)(1)-(4)	2K1.4, 2B1.3
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18 U.S.C. § 32(b) 2A1.1-2A2.3, 2A4.1, 2A5.1-2A5.2,
2K1.4, 2B1.3",

and inserting in lieu thereof:

"18 U.S.C. § 32(a),(b) 2A1.1-2A2.3, 2A4.1, 2A5.1, 2A5.2, 2B1.3, 2K1.4";

in the line beginning "18 U.S.C. § 33" by inserting "2A2.1, 2A2.2," immediately before
"2B1.3";

in the line beginning "18 U.S.C. § 112(a)" by inserting "2A2.1," immediately before "2A2.2,"
and by inserting ", 2A4.1, 2B1.3, 2K1.4" immediately following "2A2.3";

in the line beginning "18 U.S.C. § 152" by deleting "2F1.1," and by inserting ", 2F1.1, 2J1.3"
immediately following "2B4.1";

in the line beginning "18 U.S.C. § 201(b)(1)" by deleting ", 2J1.3, 2J1.8, 2J1.9";

in the line beginning "18 U.S.C. § 241" by deleting "2H1.2,";

in the line beginning "18 U.S.C. § 351(d)" by deleting ", 2A2.1" and inserting in lieu thereof
"2A1.5";

in the line beginning "18 U.S.C. § 371" by deleting "2A2.1" and inserting in lieu thereof
"2A1.5";

in the line beginning "18 U.S.C. § 373" by deleting "2A2.1" and inserting in lieu thereof
"2A1.5";

in the line beginning "18 U.S.C. § 474" by inserting ", 2B5.2" immediately following "2B5.1";

in the line beginning "18 U.S.C. § 476" by inserting ", 2B5.2" immediately following "2B5.1";

in the line beginning "18 U.S.C. § 477" by inserting ", 2B5.2" immediately following "2B5.1";

in the line beginning "18 U.S.C. § 496" by deleting "2T3.1" and inserting in lieu thereof "2F1.1,
2T3.1";

in the line beginning "18 U.S.C. § 545" by deleting "2Q2.2" and inserting in lieu thereof
"2Q2.1";

in the line beginning "18 U.S.C. § 549" by inserting "2B1.1," immediately before "2T3.1", and
by inserting ", 2T3.2" immediately following "2T3.1";

in the line beginning "18 U.S.C. § 551" by inserting "2J1.2," immediately before "2T3.1";

in the line beginning "18 U.S.C. § 642" by inserting ", 2B5.2" immediately following "2B5.1";
by deleting:

"18 U.S.C. § 666(a) 2B1.1, 2C1.1, 2C1.2, 2F1.1",

and inserting in lieu thereof:

"18 U.S.C. § 666(a)(1)(A)	2B1.1, 2F1.1
18 U.S.C. § 666(a)(1)(B)	2C1.1, 2C1.2
18 U.S.C. § 666(a)(1)(C)	2C1.1, 2C1.2";

in the line beginning "18 U.S.C. § 755" by deleting ", 2X2.1";

in the line beginning "18 U.S.C. § 756" by deleting ", 2X2.1";

in the line beginning "18 U.S.C. § 757" by deleting "2X2.1" and inserting in lieu thereof "2X3.1";

in the line beginning "18 U.S.C. § 793(d), (e)" by inserting "2M3.2," immediately before "2M3.3";

in the line beginning "18 U.S.C. § 842(a)" by deleting ",(h),(i)" by inserting in lieu thereof "-(i)";

in the line beginning "18 U.S.C. § 844(f)" by inserting ", 2X1.1" immediately following "2K1.4";

by deleting:

"18 U.S.C. § 922(a)(1)-(5)	2K2.3
18 U.S.C. § 922(a)(6)	2K2.1
18 U.S.C. § 922(b)(1)-(3)	2K2.3
18 U.S.C. § 922(d)	2K2.3
18 U.S.C. § 922(g)	2K2.1
18 U.S.C. § 922(h)	2K2.1
18 U.S.C. § 922(i)	2B1.2, 2K2.3
18 U.S.C. § 922(j)	2B1.2, 2K2.3
18 U.S.C. § 922(k)	2K2.3
18 U.S.C. § 922(l)	2K2.3
18 U.S.C. § 922(n)	2K2.1
18 U.S.C. § 923	2K2.3
18 U.S.C. § 924(c)	2K2.4",

and inserting in lieu thereof:

"18 U.S.C. § 922(a)(1)	2K2.1,2K2.2
18 U.S.C. § 922(a)(2)	2K2.2
18 U.S.C. § 922(a)(3)	2K2.1
18 U.S.C. § 922(a)(4)	2K2.1
18 U.S.C. § 922(a)(5)	2K2.2
18 U.S.C. § 922(a)(6)	2K2.1
18 U.S.C. § 922(b)-(d)	2K2.2
18 U.S.C. § 922(e)	2K2.1, 2K2.2
18 U.S.C. § 922(f)	2K2.1, 2K2.2

18 U.S.C. § 922(g)	2K2.1
18 U.S.C. § 922(h)	2K2.1
18 U.S.C. § 922(i)-(l)	2K2.1, 2K2.2
18 U.S.C. § 922(m)	2K2.2
18 U.S.C. § 922(n)	2K2.1
18 U.S.C. § 922(o)	2K2.1, 2K2.2
18 U.S.C. § 923(a)	2K2.2
18 U.S.C. § 924(a)(1)(A)	2K2.2
18 U.S.C. § 924(a)(1)(C)	2K2.1, 2K2.2
18 U.S.C. § 924(a)(3)(A)	2K2.2
18 U.S.C. § 924(b)	2K2.3
18 U.S.C. § 924(c)	2K2.4
18 U.S.C. § 924(f)	2K2.3
18 U.S.C. § 924(g)	2K2.3";

in the line beginning "18 U.S.C. § 1012" by inserting "2C1.3," immediately before "2F1.1";

in the line beginning "18 U.S.C. § 1028" by inserting ", 2L2.4 " immediately following "2L2.3";

in the line beginning "18 U.S.C. § 1113" by inserting ", 2A2.2" immediately following "2A2.1";

in the line beginning "18 U.S.C. § 1117" by deleting "2A2.1" and inserting in lieu thereof "2A1.5";

in the line beginning "18 U.S.C. § 1362" by inserting ", 2K1.4" immediately following "2B1.3";

in the line beginning "18 U.S.C. § "1363" by inserting ", 2K1.4" immediately following "2B1.3";

in the line beginning "18 U.S.C. § 1426" by inserting ", 2L2.2" immediately following "2L2.1";

in the line beginning "18 U.S.C. § 1460" by inserting "2G2.2," immediately before "2G3.1";

in the line beginning "18 U.S.C. § 1512(a)" by inserting "2A1.3," immediately following "2A1.2,";

in the line beginning "18 U.S.C. § 1512(b) by inserting "2A1.2," immediately before "2A2.2";

in the line beginning "18 U.S.C. § 1704" by inserting ", 2F1.1" immediately following "2B5.2";

in the line beginning "18 U.S.C. § 1751(c)" by inserting ", 2X1.1" immediately following "2A4.1";

in the line beginning "18 U.S.C. § 1751(d)" by deleting "2A2.1" and inserting in lieu thereof "2A1.5", and by inserting ", 2X1.1" immediately following "2A4.1";

in the line beginning "18 U.S.C. § 1909" by inserting "2C1.3," immediately before "2C1.4";

in the line beginning "18 U.S.C. § 1951" by deleting "2B3.1, 2B3.2, 2C1.1,";

in the line beginning "18 U.S.C. § 1952A" by deleting "2A2.1,";

in the line beginning "18 U.S.C. § 1958" by deleting "2A2.1,";

by deleting:

"18 U.S.C. § 2251 2G2.1",

and inserting in lieu thereof:

"18 U.S.C. § 2251(a), (b) 2G2.1
18 U.S.C. § 2251(c)(1)(A) 2G2.2
18 U.S.C. § 2251(c)(1)(B) 2G2.1";

in the line beginning "18 U.S.C. § 2271" by deleting "2F1.1,";

in the line beginning "18 U.S.C. § 2421" by inserting ", 2G1.2" immediately following "2G1.1";

in the line beginning "18 U.S.C. § 2422" by inserting ", 2G1.2" immediately following "2G1.1";

by deleting "18 U.S.C. § 4082(d) 2P1.1";

by deleting:

"21 U.S.C. § 333 2N2.1",

and inserting in lieu thereof:

"21 U.S.C. § 333(a)(1) 2N2.1
21 U.S.C. § 333(a)(2) 2F1.1, 2N2.1
21 U.S.C. § 333(b) 2N2.1";

by deleting:

"26 U.S.C. § 5861(a) 2K2.3
26 U.S.C. § 5861(b)-(l) 2K2.2",

and inserting in lieu thereof:

"26 U.S.C. § 5861(a) 2K2.2
26 U.S.C. § 5861(b) 2K2.1
26 U.S.C. § 5861(c) 2K2.1
26 U.S.C. § 5861(d) 2K2.1
26 U.S.C. § 5861(e) 2K2.2
26 U.S.C. § 5861(f) 2K2.2
26 U.S.C. § 5861(g) 2K2.2
26 U.S.C. § 5861(h) 2K2.1

26 U.S.C. § 5861(i)	2K2.1
26 U.S.C. § 5861(j)	2K2.1, 2K2.2
26 U.S.C. § 5861(k)	2K2.1
26 U.S.C. § 5861(l)	2K2.2";

in the line beginning "26 U.S.C. § 5871" by deleting "2K2.2, 2K2.3" and inserting in lieu thereof "2K2.1, 2K2.2";

by deleting:

"33 U.S.C. § 1319 2Q1.1, 2Q1.2, 2Q1.3",

and inserting in lieu thereof:

"33 U.S.C. § 1319(c)(1),	
(c)(2), (c)(4)	2Q1.2, 2Q1.3
33 U.S.C. § 1319(c)(3)	2Q1.1";

and in the line beginning "42 U.S.C. § 3631" by deleting ", 2H1.5".

The Commentary to §2D3.4 captioned "Statutory Provisions" is amended by deleting "Provision" and inserting in lieu thereof "Provisions"; and by deleting "§ 842" and inserting in lieu thereof "§§ 954, 961".

The Commentary to §2M6.2 is amended by inserting between "Commentary" and "Background" the following:

"Statutory Provision: 42 U.S.C. § 2273".

The Commentary to §2T2.2 captioned "Statutory Provisions" is amended by deleting "5601-5605, 5607, 5608" and inserting in lieu thereof "5601, 5603-5605"; and by deleting "5691," immediately before "5762".

The Commentary to §2X2.1 captioned "Statutory Provisions" is amended by deleting "Provisions" and inserting in lieu thereof "Provision"; and by deleting "§§ 2, 755-757" and inserting in lieu thereof "§ 2".

Reason for Amendment: This amendment makes the statutory index more comprehensive, conforms it to amended guidelines, and corrects erroneous references. In addition, this amendment conforms the statutory provisions of §§ 2D3.4, 2T2.2, 2X2.1 to the statutory index, and inserts additional Commentary in §2M6.2 referencing a statutory provision contained in Appendix A (Statutory Index) to conform the format of this guideline to the format of other offense guidelines.

Effective Date: The effective date of this amendment is November 1, 1990.

360. Amendment: Section 1B1.10(d) is amended by deleting "and 269" and inserting in lieu thereof "269, 329, and 341".

Reason for Amendment: This amendment implements the directive in 28 U.S.C. § 994(u) in respect to the guideline amendments effective November 1, 1990.

Effective Date: The effective date of this amendment is November 1, 1990.

361. Amendment: The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional subdivision at the end:

"(k) 'Destructive device' means any article described in 18 U.S.C. § 921(a)(4) (including an explosive, incendiary, or poison gas - (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the proceeding clauses).".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 1 by deleting "and 'firearm'" and inserting in lieu thereof ", 'firearm,' and 'destructive device'", and by deleting the last sentence as follows: "'Destructive device' is defined in the Commentary to §2K1.4 (Arson: Property Damage by Use of Explosives).".

The Commentary to §2B1.2 captioned "Application Notes" is amended in Note 1 by deleting "and 'firearm'" and inserting in lieu thereof ", 'firearm,' and 'destructive device'", and by deleting the last sentence as follows: "'Destructive device' is defined in the Commentary to §2K1.4 (Arson: Property Damage by Use of Explosives).".

The Commentary to §2B2.1 captioned "Application Notes" is amended in Note 1 by inserting "'destructive device,'" immediately before "and 'dangerous weapon'", and by deleting the last sentence as follows: "'Destructive device' is defined in the Commentary to §2K1.4 (Arson: Property Damage by Use of Explosives).".

The Commentary to §2B2.2 captioned "Application Notes" is amended in Note 1 by deleting "and 'firearm'" and inserting in lieu thereof ", 'firearm,' 'destructive device,' and 'dangerous weapon'", and by deleting the last sentence as follows: "'Destructive device' is defined in the Commentary to §2K1.4 (Arson: Property Damage by Use of Explosives).".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 1 by inserting "'destructive device,'" immediately before "'dangerous weapon,'".

Reason for Amendment: This amendment inserts the definition of a destructive device, formerly in the Commentary to §2K1.4, in the Commentary to §1B1.1, with minor revisions to the examples of the articles prohibited by 18 U.S.C. § 921(a)(4) to better reflect the statutory provision. This amendment also conforms the commentary of various offense guidelines to reference the definitions set forth in Application Note 1 of the Commentary to §1B1.1.

Effective Date: The effective date of this amendment is November 1, 1990.

362. Amendment: Chapter Seven is deleted in its entirety as follows:

"CHAPTER SEVEN - VIOLATIONS OF PROBATION AND
SUPERVISED RELEASE

§7A1.1. Reporting of Violations of Probation and Supervised Release (Policy Statement)

- (a) The Probation Officer shall promptly report to the court any alleged violation of a condition of probation or supervised release that constitutes new criminal conduct, other than conduct that would constitute a petty offense.
- (b) The Probation Officer shall promptly report to the court any other alleged violation of a condition of probation or supervised release, unless the officer determines: (1) that such violation is minor, not part of a continuing pattern of violation, and not indicative of a serious adjustment problem; and (2) that non-reporting will not present an undue risk to the public or be inconsistent with any directive of the court relative to the reporting of violations.

Commentary

This policy statement addresses the reporting of violations of probation and supervised release. It is the Commission's intent that significant violations be promptly reported to the court. At the same time, the Commission realizes that it would neither be practical nor desirable to require such reporting for every minor violation.

§7A1.2. Revocation of Probation (Policy Statement)

- (a) Upon a finding of a violation of probation involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke probation.
- (b) Upon a finding of a violation of probation involving conduct other than conduct under subsection (a), the court may: (1) revoke probation; or (2) extend the term of probation and/or modify the conditions of probation.

Commentary

This policy statement expresses a presumption that probation is to be revoked in the case of new criminal conduct other than a petty offense. For lesser violations, the policy statements provide that the court may revoke probation, extend the term of supervision, or modify the conditions of supervision.

§7A1.3. Revocation of Supervised Release (Policy Statement)

- (a) Upon a finding of a violation of supervised release involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke supervised release.
- (b) Upon a finding of a violation of supervised release involving conduct other than conduct under subsection (a), the court may: (1) revoke supervised release; or (2) extend the term of supervised release and/or modify the conditions of supervised release.

Commentary

This policy statement expresses a presumption that supervised release is to be revoked in the case of new criminal conduct other than a petty offense. For lesser violations, the policy statements provide that the court may revoke supervised release, extend the term of supervision, or modify the conditions of supervision.

§7A1.4. No Credit for Time Under Supervision (Policy Statement)

- (a) Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.
- (b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.

Commentary

This policy statement provides that time served on probation or supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation."

A replacement chapter containing policy statements with accompanying commentary is inserted as Chapter Seven (Violations of Probation and Supervised Release).

Reason for Amendment: This amendment replaces Chapter Seven with a set of more detailed policy statements applicable to violations of probation and supervised release. Under 28 U.S.C. § 994(a)(3), the Sentencing Commission is required to issue guidelines or policy statements applicable to the revocation of probation and supervised release. At this time, the Commission has chosen to promulgate policy statements only. These policy statements will provide guidance while allowing for the identification of any substantive or procedural issues that require further review. The Commission views these policy statements as evolutionary and will review relevant data and materials concerning revocation determinations under these policy statements. Revocation guidelines will be issued after federal judges, probation officers, practitioners, and others have the opportunity to evaluate and comment on these policy statements.

Effective Date: The effective date of this amendment is November 1, 1990.

363. Amendment: Section 2A4.1(b) is amended by deleting:

"(5) If the victim was kidnapped, abducted, or unlawfully restrained to facilitate the commission of another offense: (A) increase by 4 levels; or (B) if the result of applying this guideline is less than that resulting from application of the guideline for such other offense, apply the guideline for such other offense.",

and inserting in lieu thereof:

"(5) If the victim was sexually exploited, increase by 3 levels.

(6) If the victim is a minor and, in exchange for money or other consideration, was placed in the care or custody of another person who had no legal right to such care or custody of the victim, increase by 3 levels.

(7) If the victim was kidnapped, abducted, or unlawfully restrained during the commission of, or in connection with, another offense or escape therefrom; or if another offense was committed during the kidnapping, abduction, or unlawful restraint, increase to --

(A) the offense level from the Chapter Two offense guideline applicable to that other offense if such offense guideline includes an adjustment for kidnapping, abduction, or unlawful restraint, or otherwise takes such conduct into account; or

(B) 4 plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level 43, in any other case,

if the resulting offense level is greater than that determined above.

(c) Cross Reference

(1) If the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder)."

The Commentary to §2A4.1 captioned "Application Notes" is amended by inserting the following additional note:

"4. 'Sexually exploited' includes offenses set forth in 18 U.S.C. §§ 2241-2244, 2251, and 2421-2423."

The Commentary to §2A4.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

" Section 401 of Public Law 101-647 amended 18 U.S.C. § 1201 to require that

courts take into account certain specific offense characteristics in cases involving a victim under eighteen years of age and directed the Commission to include those specific offense characteristics within the guidelines. Where the guidelines did not already take into account the conduct identified by the Act, additional specific offense characteristics have been provided."

Reason for Amendment: This amendment implements the instructions in Section 401 of the Crime Control Act of 1990 (Public Law 101-647), in some cases with a broader scope, by adding specific offense characteristics at subsections (b)(5) and (b)(6). With respect to the portion of the Congressional instruction pertaining to aiders or abettors, no amendment was required because §1B1.3 (Relevant Conduct) provides an offense level greater than that required by the Congressional instruction. A separate amendment (amendment 388) clarifies that maltreatment to a life threatening degree constitutes life-threatening bodily injury. In addition, this amendment replaces the current subsection (b)(5) with a revised subsection (b)(7) that addresses other offenses connected with kidnapping, abduction, or unlawful restraint in a manner that more appropriately reflects the combined seriousness of such offenses, and inserts a cross reference to address the case in which the victim was murdered.

Effective Date: The effective date of this amendment is November 1, 1991.

364. Amendment: Section 2B1.1(b)(7) is amended by inserting "-- (A)" immediately before "substantially"; and by deleting the comma immediately following "institution" and inserting in lieu thereof "; or (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,".

The Commentary to §2B1.1 captioned "Statutory Provisions" is amended by inserting "225," immediately before "641".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 9 by deleting "215" and inserting in lieu thereof "20"; and by deleting "1008, 1014, and 1344" and inserting in lieu thereof "1007, and 1014".

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 10 by deleting:

"as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations",

and inserting in lieu thereof:

" , 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".

The Commentary to §2B1.1 captioned "Application Notes" is amended by inserting the following additional notes:

- "11. '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).
12. 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.'
13. 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 §2B1.1 captioned "Background" is amended in the seventh paragraph by deleting "(b)(7)" and inserting in lieu thereof "(b)(7)(A)", and by deleting "statutory directive" and inserting in lieu thereof "instruction"; and by inserting the following additional paragraph at the end:

" Subsection (b)(7)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647."

Section 2B4.1(b)(2) is amended by inserting "-- (A)" immediately before "substantially"; and by deleting the comma immediately following "institution" and inserting in lieu thereof "; or (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,".

The Commentary to §2B4.1 captioned "Statutory Provisions" is amended by inserting ", 225" immediately following "224".

The Commentary to §2B4.1 captioned "Application Notes" is amended in Note 2 by deleting "Bribery" and inserting in lieu thereof "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right".

The Commentary to §2B4.1 captioned "Application Notes" is amended in Note 3 by deleting "215" and inserting in lieu thereof "20"; and by deleting "1008, 1014, and 1344" and inserting in lieu thereof "1007, and 1014".

The Commentary to §2B4.1 captioned "Application Notes" is amended in Note 4 by deleting:

"as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations",

and inserting in lieu thereof:

", 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".

The Commentary to §2B4.1 captioned "Application Notes" is amended by inserting the following additional notes:

5. 'The defendant derived more than \$1,000,000 in gross receipts from the offense,' as used in subsection (b)(2)(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).
6. 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.'"

The Commentary to §2B4.1 captioned "Background" is amended in the second paragraph by deleting the second sentence as follows:

"As is the case for most other offenses covered by this guideline, the maximum term of imprisonment authorized is five years.";

in the seventh paragraph by deleting "(b)(2)" and inserting in lieu thereof "(b)(2)(A)", and by deleting "statutory directive" and inserting in lieu thereof "instruction"; and by inserting the following additional paragraph at the end:

" Subsection (b)(2)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647."

Section 2F1.1(b)(6) is amended by inserting "-- (A)" immediately before "substantially"; and by deleting the comma immediately following "institution" and inserting in lieu thereof "; or (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,".

The Commentary to §2F1.1 captioned "Statutory Provisions" is amended by inserting "225," immediately before "285".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 14 by deleting "215" and inserting in lieu thereof "20"; and by deleting "1008, 1014, and 1344" and inserting in lieu thereof "1007, and 1014".

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 15 by deleting:

"as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations",

and inserting in lieu thereof:

", 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".

The Commentary to §2F1.1 captioned "Application Notes" is amended by inserting the following additional notes:

16. 'The defendant derived more than \$1,000,000 in gross receipts from the offense,' as used in subsection (b)(6)(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).
17. 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.'
18. If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved 'more than minimal planning.'

The Commentary to §2F1.1 captioned "Background" is amended in the sixth paragraph by deleting "(b)(6)" and inserting in lieu thereof "(b)(6)(A)", and by deleting "statutory directive" and inserting in lieu thereof "instruction"; and by inserting the following additional paragraph at the end:

" Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647."

Reason for Amendment: This amendment implements the instruction to the Commission in Section 2507 of the Crime Control Act of 1990 (Public Law 101-647). It also reflects the new offense relating to a continuing financial crimes enterprise created by Section 2510 of the Crime Control Act of 1990. In addition, it revises the Commentary to §§2B1.1, 2B4.1, and 2F1.1 with respect to the definition of "substantially jeopardized the safety and soundness of a financial

institution" so that the commentary is read to include cases in which the offense created a substantial risk of any of the harms described in addition to cases in which such harm actually occurred.

Effective Date: The effective date of this amendment is November 1, 1991.

365. Amendment: Section 2B3.1(b) is amended by deleting:

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

and inserting in lieu thereof:

"(2) (A) If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; (C) if a firearm was brandished, displayed, or possessed, increase by 5 levels; (D) if a dangerous weapon was otherwise used, increase by 4 levels; (E) if a dangerous weapon was brandished, displayed, or possessed, increase by 3 levels; or (F) if an express threat of death was made, increase by 2 levels."

Section 2B3.1 (b)(3) is amended by deleting "9" and inserting in lieu thereof "11".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 1 by inserting "'bodily injury,' 'serious bodily injury,' 'permanent or life-threatening bodily injury,'" immediately before "'abducted'".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 2 by deleting "(b)(2)(C)" and inserting in lieu thereof "(b)(2)(E)".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 4 by deleting "9" and inserting in lieu thereof "11".

The Commentary to §2B3.1 captioned "Application Notes" is amended in Note 7 by deleting "(b)(2)(D)" and inserting in lieu thereof "(b)(2)(F)".

Reason for Amendment: This amendment increases the offense levels for use or possession of a firearm by 2 levels to better reflect the seriousness of such offenses and to reduce the disparity resulting from the exercise of prosecutorial discretion in the charging of an offense under 18 U.S.C. § 924(c) or § 929(a). In addition, this amendment revises the commentary to make the reference to the terms defined in §1B1.1 more comprehensive.

Effective Date: The effective date of this amendment is November 1, 1991.

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

"(1) If the greater of the amount obtained or demanded exceeded \$2,500, increase by the corresponding number of levels from the table in §2B2.1(b)(2).

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

by renumbering subdivisions (3) and (4) as (4) and (5) respectively; by inserting the following as subdivisions (1)-(3):

- "(1) If the offense involved an express or implied threat of death, bodily injury, or kidnapping, increase by 2 levels.
- (2) If the greater of the amount demanded or the loss to the victim exceeded \$10,000, increase by the corresponding number of levels from the table in §2B3.1(b)(6).
- (3) (A)(i) If a firearm was discharged, increase by 7 levels; (ii) if a firearm was otherwise used, increase by 6 levels; (iii) if a firearm was brandished, displayed, or possessed, increase by 5 levels; (iv) if a dangerous weapon was otherwise used, increase by 4 levels; or (v) if a dangerous weapon was brandished, displayed, or possessed, increase by 3 levels; or
- (B) If the offense involved preparation to carry out a threat of (i) death, (ii) serious bodily injury, (iii) kidnapping, or (iv) product tampering; or if the participant(s) otherwise demonstrated the ability to carry out such threat, increase by 3 levels.";

and in the last sentence of the renumbered subdivision (4) (formerly (3)) by deleting "(2)", "(3)" and "9", and inserting in lieu thereof "(3)", "(4)", and "11", respectively.

Section 2B3.2 is amended by inserting the following additional subsection:

- "(c) Cross Reference
- (1) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above."

The Commentary to §2B3.2 captioned "Application Notes" is amended in Note 1 by inserting "'bodily injury,' 'serious bodily injury,' 'permanent or life-threatening bodily injury,'" immediately before "abducted"; and in Note 4 by deleting "9" and inserting in lieu thereof "11".

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

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

and inserting in lieu thereof:

- "5. 'Loss to the victim,' as used in subsection (b)(2), means any demand paid plus any additional consequential loss from the offense (e.g., the cost of defensive measures taken in direct response to the offense).
6. In certain cases, an extortionate demand may be accompanied by conduct that does not qualify as a display of a dangerous weapon under subsection (b)(3)(A)(v) but is nonetheless similar in seriousness, demonstrating the defendant's preparation or ability to carry out the threatened harm (e.g., an extortionate demand containing a threat to tamper with a consumer product accompanied by a workable plan showing how the product's tamper-resistant seals could be defeated, or a threat to kidnap a person accompanied by information showing study of that person's daily routine). Subsection (b)(3)(B) addresses such cases.
7. If the offense involved the threat of death or serious bodily injury to numerous victims (e.g., in the case of a plan to derail a passenger train or poison consumer products), an upward departure may be warranted.
8. If the offense involved organized criminal activity, or a threat to a family member of the victim, an upward departure may be warranted."

The Commentary to §2B3.2 captioned "Background" is amended in the last sentence by deleting "§ 877" and inserting in lieu thereof "18 U.S.C. § 877".

Reason for Amendment: This amendment provides a specific offense characteristic to distinguish the greater seriousness of offenses that involve an express or implied threat of death, bodily injury, or kidnapping; conforms the loss table to that used in the robbery guideline to reflect that the typical case under the amended guideline will have an offense level that is more closely comparable to robbery; increases the offense levels for offenses involving use or possession of a firearm to conform to an amendment being made to the robbery guideline; adds a subdivision to the specific offense characteristic dealing with use or possession of a dangerous weapon to address cases in which the conduct is tantamount in seriousness to the brandishing, display, or possession of a dangerous weapon, but does not qualify under the current specific offense characteristic for weapon enhancement; modifies subsection (b)(1) to provide that the greater of the amount demanded or the loss to the victim is used; adds a cross reference to §2A2.1 to address cases in which the conduct was tantamount to attempted murder; and sets forth commentary describing certain aggravating factors that may warrant an upward departure.

Effective Date: The effective date of this amendment is November 1, 1991.

367. Amendment: Section 2C1.1(b)(1) is amended by inserting "or extortion" immediately following "bribe".

Section 2C1.1(b)(2)(A) is amended by deleting "bribe or the benefit received, or to be received, in return for the bribe" and inserting in lieu thereof "payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest,".

Section 2C1.1(b)(2)(B) is amended by deleting "bribe" and inserting in lieu thereof "payment".

Section 2C1.1(c) is amended by deleting:

- "(1) If the bribe was for the purpose of concealing or facilitating another criminal offense, or for obstructing justice in respect to another criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to such other criminal offense if the resulting offense level is greater than that determined above.";

by renumbering subsection (c)(2) as (c)(3); and by inserting the following as subsections (c)(1) and (2):

- "(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above.
- (2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense if the resulting offense level is greater than that determined above."

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

- "2. 'Value of the bribe or the benefit received, or to be received, in return for the bribe' means the greater of the value of the bribe or the value of the benefit received, or to be received, in return for the bribe. The 'value of the benefit received or to be received' means the net value of such benefit. For example, if a \$150,000 contract on which \$20,000 profit was made was awarded in return for a bribe, the value of the benefit received in return is \$20,000."

and inserting in lieu thereof:

- "2. 'Loss' is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and includes both actual and intended loss. The value of 'the benefit received or to be received' means the net value of such benefit. Examples: (1) A government employee, in return for a \$500 bribe, reduces the price of a piece of surplus property offered for sale by the government from \$10,000 to \$2,000; the value of the benefit received is \$8,000. (2) A \$150,000 contract on which \$20,000 profit was made was awarded in return for a bribe; the value of the benefit received is \$20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the above examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.";

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 3 by deleting "§2C1.1(c)(1) or (2)." and inserting in lieu thereof "§2C1.1(c)(1), (2), or (3). In such cases, an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply."

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 4 by deleting "bribe" and inserting in lieu thereof "unlawful payment"; and by deleting "and (2)" and inserting in lieu thereof ", (2), and (3)".

The Commentary to §2C1.1 captioned "Application Notes" is amended in Note 6 by inserting the following as the first sentence:

"Subsection (b)(1) provides an adjustment for offenses involving more than one incident of either bribery or extortion.";

by deleting "bribe" the first time it occurs and inserting in lieu thereof "incident of bribery or extortion"; and by inserting "or extortion" immediately before ", even if charged".

The Commentary to §2C1.1 captioned "Background" is amended by deleting the third paragraph as follows:

" The amount of the bribe is used as a factor in the guideline not because it directly measures harm to society, but because it is improbable that a large bribe would be given for a favor of little consequence. Moreover, for deterrence purposes, the punishment should be commensurate with the gain.",

and inserting in lieu thereof:

" In determining the net value of the benefit received or to be received, the value of the bribe is not deducted from the gross value of such benefit; the harm is the same regardless of value of the bribe paid to receive the benefit. Where the value of the bribe exceeds the value of the benefit or the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher."

The Commentary to §2C1.1 captioned "Background" is amended in the fourth paragraph by deleting "bribe is" and inserting in lieu thereof "payment was".

The Commentary to §2C1.1 captioned "Background" is amended by deleting the fifth, sixth, and seventh paragraphs as follows:

"Under §2C1.1(c)(1), if the purpose of the bribe involved the facilitation of another criminal offense or the obstruction of justice in respect to another criminal offense, the guideline for §2X3.1 (Accessory After the Fact) in respect to that criminal offense will be applied, if the result is greater than that determined above. For example, if a bribe was given for the purpose of facilitating or covering up the offense of espionage, the guideline for accessory after the fact to espionage would be applied.

Under §2C1.1(c)(2), if the offense involved forcible extortion, the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) will apply if the result is greater than that determined above.

Note that, when applying 2C1.1(c)(1) or (2), an adjustment from Chapter Three, Part B (Role in the Offense) will also apply. This normally will result in an increase of at least 2 levels.",

and inserting in lieu thereof:

" Under §2C1.1(c)(1), if the payment was to facilitate the commission of another criminal offense, the guideline applicable to a conspiracy to commit that other offense will apply if the result is greater than that determined above. For example, if a bribe was given to a law enforcement officer to allow the smuggling of a quantity of cocaine, the guideline for conspiracy to import cocaine would be applied if it resulted in a greater offense level.

Under §2C1.1(c)(2), if the payment was to conceal another criminal offense or obstruct justice in respect to another criminal offense, the guideline from §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, will apply if the result is greater than that determined above. For example, if a bribe was given for the purpose of concealing the offense of espionage, the guideline for accessory after the fact to espionage would be applied.

Under §2C1.1(c)(3), if the offense involved forcible extortion, the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) will apply if the result is greater than that determined above.

When the offense level is determined under §2C1.1(c)(1), (2), or (3), an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply."

Reason for Amendment: This amendment adds an additional factor in subsection (b)(2)(A) to take into account loss to the government from the offense; expands subsection (c) to distinguish an offense committed for the purpose of facilitating the commission of another offense from an offense committed to cover up or obstruct justice in respect to another offense; clarifies the term "value of the benefit received"; and substitutes "payment" for "bribe" and adds "or extortion" where necessary to reflect that this guideline covers both bribery and extortion under color of official right.

Effective Date: The effective date of this amendment is November 1, 1991.

368. Amendment: Chapter Two, Part C, is amended by inserting an additional guideline with accompanying commentary as §2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).

Reason for Amendment: This amendment provides an additional guideline to cover certain offenses that involve public corruption but do not fall within the guidelines of Chapter Two, Part C (Official Corruption) as currently written. In some cases, the statutes covered are used to prosecute offenses more appropriately covered under §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), §2C1.2 (Offering, Giving,

Soliciting, or Receiving a Gratuity), or §2C1.3 (Conflict of Interest). A cross reference is provided to address such cases.

Effective Date: The effective date of this amendment is November 1, 1991.

369. Amendment: Section 2D1.1(c)(12) is amended by deleting the period immediately after "Schedule III substances" and inserting in lieu thereof "(except anabolic steroids);", and by inserting the following additional subdivision at the end:

"40,000 or more units of anabolic steroids."

Section 2D1.1(c)(13) is amended by deleting the period immediately after "Schedule III substances" and inserting in lieu thereof "(except anabolic steroids);", and by inserting the following additional subdivision at the end:

"At least 20,000 but less than 40,000 units of anabolic steroids."

Section 2D1.1(c)(14) is amended by deleting the period immediately after "Schedule III substances" and inserting in lieu thereof "(except anabolic steroids);", and by inserting the following additional subdivision at the end:

"At least 10,000 but less than 20,000 units of anabolic steroids."

Section 2D1.1(c)(15) is amended by deleting the period immediately after "Schedule III substances" and inserting in lieu thereof "(except anabolic steroids);", and by inserting the following additional subdivision at the end:

"At least 5,000 but less than 10,000 units of anabolic steroids."

Section 2D1.1(c)(16) is amended by inserting "(except anabolic steroids)" immediately after "Schedule III substances", and by inserting the following additional subdivision after the next to last subdivision:

"At least 2,500 but less than 5,000 units of anabolic steroids;".

Section 2D1.1(c)(17) is amended by inserting "(except anabolic steroids)" immediately after "Schedule III substances", and by inserting the following additional subdivision after the next to last subdivision:

"At least 1,000 but less than 2,500 units of anabolic steroids;".

Section 2D1.1(c)(18) is amended by inserting "(except anabolic steroids)" immediately after "Schedule III substances", and by inserting the following additional subdivision after the fourth subdivision:

"At least 250 but less than 1,000 units of anabolic steroids;".

Section 2D1.1(c)(19) is amended by inserting "(except anabolic steroids)" immediately after "Schedule III substances", and by inserting the following additional subdivision after the fourth subdivision:

"Less than 250 units of anabolic steroids;"

Section 2D1.1(c) is amended in the note following subdivision (19) by inserting the following additional paragraph at the end:

"In the case of anabolic steroids, one 'unit' means a 10 cc vial of an injectable steroid or fifty tablets. All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials (e.g., one 50 cc vial is to be counted as five 10 cc vials)."

Reason for Amendment: This amendment adds offenses involving anabolic steroids to §2D1.1 to reflect that Title XIX of the Crime Control Act of 1990 (Public Law 101-647) reclassified anabolic steroids as Schedule III controlled substances under 21 U.S.C. § 812(c). Because of the variety of substances involved, the Commission has determined that a measure based on quantity unit, rather than weight, provides the most appropriate measure of the scale of the offense.

Effective Date: The effective date of this amendment is November 1, 1991.

370. Amendment: Section 2D1.1(c) is amended in subdivision (1) by inserting ", or 30 KG or more of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (2) by inserting ", or at least 10 KG but less than 30 KG of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (3) by inserting ", or at least 3 KG but less than 10 KG of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (4) by inserting ", or at least 1 KG but less than 3 KG of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (5) by inserting ", or at least 300 G but less than 1 KG of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (6) by inserting ", or at least 100 G but less than 300 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (7) by inserting ", or at least 70 G but less than 100 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (8) by inserting ", or at least 40 G but less than 70 G of 'Ice'" immediately following "Pure Methamphetamine"; subdivision (9) by inserting ", or at least 10 G but less than 40 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (10) by inserting ", or at least 8 G but less than 10 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (11) by inserting ", or at least 6 G but less than 8 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (12) by inserting ", or at least 4 G but less than 6 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (13) by inserting ", or at least 2 G but less than 4 G of 'Ice'" immediately following "Pure Methamphetamine"; subdivision (14) by inserting ", or at least 1 G but less than 2 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (15) by inserting ", or at least 500 MG but less than 1 G of 'Ice'" immediately following "Pure Methamphetamine"; in subdivision (16) by inserting ", or less than 500 MG of 'Ice'" immediately following "Pure Methamphetamine"; and in the note following subdivision (19) by inserting the following as the second paragraph:

"'Ice,' for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity."

Reason for Amendment: This amendment implements the instruction to the Commission in Section 2701 of the Crime Control Act of 1990 (Public Law 101-647) in a form compatible with the structure of the guidelines.

Effective Date: The effective date of this amendment is November 1, 1991.

371. Amendment: Chapter Two, Part D, Subpart 1, is amended by inserting additional guidelines with accompanying commentary as §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical), §2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment), and §2D1.13 (Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical).

Chapter Two, Part D, Subpart 3 is amended by inserting an additional guideline with accompanying commentary as §2D3.5 (Violation of Recordkeeping or Reporting Requirements for Listed Chemicals and Certain Machines).

The Commentary to §2D1.1 captioned "Statutory Provisions" is amended by deleting "841, 960" and inserting in lieu thereof "841(a), (b)(1)-(3), 960(a), (b)".

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

"14. D-lysergic acid, which is generally used to make LSD, is classified as a Schedule III controlled substance (to which §2D1.1 applies) and as a listed precursor (to which §2D1.11 applies). Where the defendant is convicted under 21 U.S.C. §§ 841(b)(1)(D) or 860(b)(4) of an offense involving d-lysergic acid, apply §2D1.1 or §2D1.11, whichever results in the greater offense level. See Application Note 5 in the Commentary to §1B1.1 (Application Instructions). Where the defendant is accountable for an offense involving the manufacture of LSD, see Application Note 12 above pertaining to the determination of the scale of the offense."

Reason for Amendment: This amendment makes Chapter Two, Part D more comprehensive by providing additional guidelines to address violations involving listed chemicals, flasks, and certain machines that are used in the manufacture of controlled substances. Conforming changes are made to the Commentary to §2D1.1.

Effective Date: The effective date of this amendment is November 1, 1991.

372. Amendment: Chapter Two, Part G, Subpart 2 is amended by inserting additional guidelines with accompanying commentary as §2G2.4 (Receipt or Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct) and §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials).

Section 2G2.2 is amended in the title by deleting "Transporting, Receiving, or"; and by inserting at the end "; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic".

The Commentary to §2G2.2 captioned "Statutory Provisions" is amended by deleting "1460,".

Section 2G3.1(c)(1) is amended by deleting "(Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor)" and inserting in lieu thereof "(Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) or §2G2.4 (Receipt or Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), as appropriate".

Reason for Amendment: This amendment inserts an additional guideline at §2G2.4 to address offenses involving receipt or possession of materials depicting a minor engaged in sexually explicit conduct, as distinguished from offenses involving trafficking in such material, which continue to be covered under §2G2.2. Offenses involving receipt or transportation of such material for the purpose of trafficking are referenced to §2G2.2 on the basis of the underlying conduct (subsection (c)(2)). Similarly, offenses in which the underlying conduct is more appropriately addressed as sexual exploitation of a minor are referenced to that guideline (subsection (c)(1)). Among the offenses covered by this guideline is a new offense created by Section 323 of the Crime Control Act of 1990 (Public Law 101-647). In addition, this amendment inserts an additional guideline at §2G2.5 to address a recordkeeping offense created by Section 311 of the Crime Control Act of 1990 (Public Law 101-647).

Effective Date: The effective date of this amendment is November 1, 1991.

373. Amendment: Chapter Two, Part K, Subpart 1 is amended by deleting §§2K1.3 and 2K1.6 in their entirety as follows:

"§2K1.3. Unlawfully Trafficking In, Receiving, or Transporting Explosives

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristics

If more than one applies, use the greatest:

- (1) If the defendant's conduct involved any written or oral false or fictitious statement, false record, or misrepresented identification, increase by 4 levels.
- (2) If the offense involved explosives that the defendant knew or had reason to believe were stolen, increase by 6 levels.
- (3) If the defendant knowingly distributed explosives to a person under twenty-one years of age, to a person prohibited by state law or ordinance from receiving such

explosives at the place of distribution, or to a person the defendant had reason to believe intended to transport such materials into a state in violation of the law of that state, increase by 4 levels.

- (4) If the defendant was a person prohibited from receiving explosives under 18 U.S.C. § 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under 18 U.S.C. § 842(i), increase by 10 levels.
- (5) If a recordkeeping offense reflected an effort to conceal a substantive offense involving explosives, apply the guideline for the substantive offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a), (h), (i), 844(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. 'A person prohibited from receiving explosives under 18 U.S.C. § 842(i)' is anyone who is under indictment for or has been convicted of a crime punishable by imprisonment for more than one year; who is a fugitive from justice; who is an unlawful user of or addicted to marihuana, any depressant or stimulant or narcotic drug; or who has been adjudicated as a mental defective or has been committed to a mental institution.

Background: This section applies to conduct ranging from violations of a regulatory nature pertaining to licensees or persons otherwise lawfully involved in explosives commerce to more serious violations that involve substantial danger to public safety."

"§2K1.6. Shipping, Transporting, or Receiving Explosives with Felonious Intent or Knowledge; Using or Carrying Explosives in Certain Crimes

- (a) Base Offense Level (Apply the greatest):
 - (1) 18; or
 - (2) If the defendant committed the offense with intent to commit another offense against a person or property, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to such other offense; or
 - (3) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).

Commentary

Statutory Provisions: 18 U.S.C. § 844(d); 26 U.S.C. § 5685. For additional statutory provision(s), see Appendix A (Statutory Index)."

A replacement guideline with accompanying commentary is inserted as §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials).

Chapter Two, Part K, Subpart 1 is amended by inserting an additional guideline with accompanying commentary as §2K1.6 (Licensee Recordkeeping Violations Involving Explosive Materials).

Reason for Amendment: This amendment consolidates two guidelines, and revises the offense levels and characteristics to more adequately reflect the seriousness of such offenses, including enhancements for defendants previously convicted of felony crimes of violence or controlled substance offenses. In addition, the amendment inserts an additional guideline to cover certain recordkeeping offenses.

Effective Date: The effective date of this amendment is November 1, 1991.

374. Amendment: Chapter Two, Part K, Subpart 2 is amended by deleting §§2K2.1, 2K2.2, and 2K2.3 in their entirety as follows:

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

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

- (1) 18, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861; or
- (2) 12, if the defendant is convicted under 18 U.S.C. § 922(g), (h), or (n); or if the defendant, at the time of the offense, had been convicted in any court of an offense punishable by imprisonment for a term exceeding one year; or
- (3) 6, otherwise.

(b) Specific Offense Characteristics

- (1) If the defendant obtained or possessed the firearm or ammunition, other than a firearm covered in 26 U.S.C. § 5845(a), solely for lawful sporting purposes or collection, decrease the offense level determined above to level 6.
- (2) If the firearm was stolen or had an altered or obliterated serial number, increase by 2 levels.

(c) Cross References

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

Commentary

Statutory Provisions: 18 U.S.C. § 922(a)(1), (a)(3), (a)(4), (a)(6), (e), (f), (g), (h), (i), (j), (k), (l), (n), and (o); 26 U.S.C. § 5861(b), (c), (d), (h), (i), (j), and (k). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

Background: Under pre-guidelines practice, there was substantial sentencing variation for these crimes. From the Commission’s investigations, it appeared that the variation

was attributable primarily to the wide variety of circumstances under which these offenses occur. Apart from the nature of the defendant's criminal history, his actual or intended use of the firearm was probably the most important factor in determining the sentence.

Statistics showed that pre-guidelines sentences averaged two to three months lower if the firearm involved was a rifle or an unaltered shotgun. This may reflect the fact that these weapons tend to be more suitable than others for recreational activities. However, some rifles or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm. Intended lawful use, as determined by the surrounding circumstances, is a mitigating factor.

Available pre-guidelines data were not sufficient to determine the effect a stolen firearm had on the average sentence. However, reviews of pre-guidelines cases suggested that this factor tended to result in more severe sentences. Independent studies show that stolen firearms are used disproportionately in the commission of crimes.

The firearm statutes often are used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. For example, a convicted felon may be prosecuted for possessing a firearm if he used the firearm to rob a gasoline station. In pre-guidelines practice, such prosecutions resulted in high sentences because of the true nature of the underlying conduct. The cross reference at §2K2.1(c)(2) deals with such cases.

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

(a) Base Offense Level:

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

(b) Specific Offense Characteristics

- (1) If the offense involved distribution of a firearm, or possession with intent to distribute, and the number of firearms unlawfully distributed, or to be distributed, exceeded two, increase as follows:

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

- (F) 50 or more add 6.
- (2) If any of the firearms was stolen or had an altered or obliterated serial number, increase by 2 levels.
- (3) If more than one of the following applies, use the greater:
- (A) If the defendant is convicted under 18 U.S.C. § 922(d), increase by 6 levels; or
- (B) If the defendant is convicted under 18 U.S.C. § 922(b)(1) or (b)(2), increase by 1 level.
- (c) Cross Reference
- (1) If the defendant, at the time of the offense, had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, apply §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 922(a)(1), (a)(2), (a)(5), (b), (c), (d), (e), (f), (i), (j), (k), (l), (m), (o); 26 U.S.C. § 5861(a), (e), (f), (g), (j), and (l). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The definition of ‘firearm’ used in this section is that set forth in 18 U.S.C. § 921(a)(3) (if the defendant is convicted under 18 U.S.C. § 922) and 26 U.S.C. § 5845(a) (if the defendant is convicted under 26 U.S.C. § 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to §1B1.1 (Application Instructions). Under 18 U.S.C. § 921(a)(3), the term ‘firearm’ means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. § 5845(a), the term ‘firearm’ includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon made from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.
2. If the number of weapons involved exceeded fifty, an upward departure may be warranted. An upward departure especially may be warranted in the case of large

numbers of military type weapons (e.g., machine guns, automatic weapons, assault rifles).

Background: This guideline applies to a variety of offenses involving firearms, ranging from unlawful distribution of silencers, machine guns, sawed-off shotguns and destructive devices, to essentially technical violations.

§2K2.3. Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense

- (a) Base Offense Level (Apply the greatest):
- (1) The offense level from §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the offense that the defendant intended or knew was to be committed with the firearm; or
 - (2) The offense level from §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), or §2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms), as applicable; or
 - (3) 12.

Commentary

Statutory Provisions: 18 U.S.C. § 924(b), (f), (g).".

A replacement guideline with accompanying commentary is inserted as §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition).

Chapter Two, Part K, Subpart 2 is amended by deleting §2K2.5 in its entirety as follows:

"§2K2.5. Possession of Firearms and Dangerous Weapons in Federal Facilities

- (a) Base Offense Level: 6
- (b) Cross Reference
- (1) If the defendant possessed the firearm or other dangerous weapon with intent to use it in the commission of another offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. § 930."

A replacement guideline with accompanying commentary is inserted as §2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone).

Reason for Amendment: This amendment consolidates three firearms guidelines and revises the adjustments and offense levels to more adequately reflect the seriousness of such conduct, including enhancements for defendants previously convicted of felony crimes of violence or controlled substance offenses. In addition, §2K1.5 is amended to address offenses committed within a school zone or federal court facility.

Effective Date: The effective date of this amendment is November 1, 1991.

375. Amendment: Section 2L1.1(a) is amended by deleting "9" and inserting in lieu thereof:

- "(1) 20, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony;
or
- (2) 9, otherwise."

Section 2L1.1(b)(1) is amended by inserting "and the base offense level is determined under subsection (a)(2)," immediately before "decrease".

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

- "9. 'Aggravated felony' is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States)."

Section 2L1.2(b) is amended by deleting "Specific Offense Characteristic" and inserting in lieu thereof:

"Specific Offense Characteristics

If more than one applies, use the greater:".

Section 2L1.2(b)(1) is amended by deleting "sustaining" immediately before "a conviction"; and by inserting the following additional subdivision:

- "(2) If the defendant previously was deported after a conviction for an aggravated felony, increase by 16 levels."

The Commentary to §2L1.2 captioned "Statutory Provisions" is amended by deleting "1325" and inserting in lieu thereof "1325(a)".

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

"First offenses under 8 U.S.C. § 1325 are petty offenses for which no guideline has been promulgated.",

and inserting in lieu thereof:

"A first offense under 8 U.S.C. § 1325(a) is a Class B misdemeanor for which no guideline has been promulgated. A prior sentence for such offense, however, is to be considered under the provisions of Chapter Four, Part A (Criminal History)."

The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 3 by deleting "sustaining" immediately before "a conviction"; and by deleting the last sentence as follows:

"In the case of a defendant previously deported after sustaining a conviction for an aggravated felony as defined in 8 U.S.C. § 1101(a), or for any other violent felony, an upward departure may be warranted."

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

"4. The adjustment under §2L1.2(b)(1) is in addition to any criminal history points added for such conviction in Chapter 4, Part A (Criminal History).",

and inserting in lieu thereof:

"4. A 16-level increase is provided under subsection (b)(2) in the case of a defendant who was previously deported after a conviction for an aggravated felony.

5. An adjustment under subsection (b)(1) or (b)(2) for a prior felony conviction applies in addition to any criminal history points added for such conviction in Chapter Four, Part A (Criminal History).

6. 'Deported after a conviction,' as used in subsections (b)(1) and (b)(2), means that the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction.

7. 'Aggravated felony,' as used in subsection (b)(2), means murder; any illicit trafficking in any controlled substance (as defined in 21 U.S.C. § 802), including any drug trafficking crime as defined in 18 U.S.C. § 924(c)(2); any illicit trafficking in any firearms or destructive devices as defined in 18 U.S.C. § 921; any offense described in 18 U.S.C. § 1956 (relating to laundering of monetary instruments); any crime of violence (as defined in 18 U.S.C. § 16, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least five years; or any attempt or conspiracy to commit any such act. The term 'aggravated felony' applies to offenses described in the previous sentence whether in violation of federal or state law and also applies to offenses described in the previous sentence in violation of foreign law for which the term of imprisonment was completed within the previous 15 years. See 8 U.S.C. § 1101(a)(43)."

Reason for Amendment: This amendment adds a specific offense characteristic providing an increase of 16 levels above the base offense level under §2L1.2 for defendants who reenter the United States after having been deported subsequent to a conviction for an aggravated felony. Previously, such cases were addressed by a recommendation for consideration of an upward departure. This amendment also modifies §2L1.1 to provide a base offense level of 20 for a defendant who is convicted under 8 U.S.C. § 1327 for an offense involving the smuggling, transporting, or harboring of an alien who was deported after a conviction for an aggravated felony. The Commission has determined that these increased offense levels are appropriate to reflect the serious nature of these offenses. In addition, this amendment revises the Commentary to §2L1.2 to make the statutory reference more precise, and to clarify the operation of the guidelines in respect to prior criminal history.

Effective Date: The effective date of this amendment is November 1, 1991.

376. Amendment: Section 2N1.1 is amended in the title by deleting "Serious" and inserting in lieu thereof "Bodily".

Section 2N1.1 is amended by deleting:

"(b) Cross Reference

- (1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.",

and inserting in lieu thereof:

"(b) Specific Offense Characteristic

- (1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if any victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(c) Cross References

- (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) in any other case.
- (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above.
- (3) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instruction

- (1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim."

The Commentary to §2N1.1 captioned "Application Note" is amended by deleting:

- "1. If death, bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).",

and inserting in lieu thereof:

- "1. The base offense level reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. Where the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property damage or monetary loss, an upward departure may be warranted. In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.
2. The special instruction in subsection (d)(1) applies whether the offense level is determined under subsection (b)(1) or by use of a cross reference in subsection (c).";

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

The Commentary to §2N1.1 captioned "Background" is deleted in its entirety as follows:

"Background: The base offense level reflects the risk of death or serious injury posed to significant numbers of people by this type of product tampering."

Reason for Amendment: This amendment adds a specific offense characteristic for permanent, life-threatening, or serious bodily injury, and adds cross references for cases in which the offense resulted in death or was tantamount to attempted murder. In addition, a special instruction is added to address certain conduct involving multiple victims. Finally, the title of this guideline is revised to reflect more accurately the coverage of the guideline, and the background commentary is revised to clarify the "heartland" conduct to which the guideline applies.

Effective Date: The effective date of this amendment is November 1, 1991.

377. Amendment: Section 2R1.1(a) is amended by deleting "9" and inserting in lieu thereof "10".

Section 2R1.1(b)(2) is amended by deleting "less than \$1,000,000 or more than \$4,000,000" and inserting in lieu thereof "more than \$400,000"; and by deleting:

"(A)	Less than \$1,000,000	subtract 1
(B)	\$1,000,000 - \$4,000,000	no adjustment
(C)	More than \$4,000,000	add 1
(D)	More than \$15,000,000	add 2
(E)	More than \$50,000,000	add 3",

and inserting in lieu thereof:

"(A)	More than \$400,000	add 1
(B)	More than \$1,000,000	add 2
(C)	More than \$2,500,000	add 3
(D)	More than \$6,250,000	add 4
(E)	More than \$15,000,000	add 5
(F)	More than \$37,500,000	add 6
(G)	More than \$100,000,000	add 7."

Section 2R1.1 is amended by deleting:

"(c) Fines

A fine shall be imposed in addition to any term of imprisonment. The guideline fine range for an individual conspirator is from 4 to 10 percent of the volume of commerce, but not less than \$20,000. The fine range for an organization is from 20 to 50 percent of the volume of commerce, but not less than \$100,000."

and inserting in lieu thereof:

"(c) Special Instruction for Fines

(1) For an individual, the guideline fine range shall be from one to five percent of the volume of commerce, but not less than \$20,000."

The Commentary to §2R1.1 captioned "Application Notes" is amended by deleting:

"1. Because the guideline sentences depend on the volume of commerce done by each firm, role in the offense is implicitly taken into account. Accordingly, the provisions of §3B1.1 (Aggravating Role) are to be applied only in unusual circumstances. An increase for role under §3B1.1 might be appropriate only where a defendant actually coerced others into participating in a conspiracy -- an unusual circumstance. Conversely, a decrease for role under §3B1.2 (Mitigating Role) would not be appropriate merely because an individual defendant or his firm did not profit substantially from the violation. An individual defendant should be considered for a downward adjustment for a mitigating role in the offense only if he was responsible in some minor way for his firm's participation in the conspiracy. A complementary bidder who did not win a bid would not for that reason qualify for a downward adjustment, but a low-level employee who participated in only one of several agreements constituting a conspiracy would."

and inserting in lieu thereof:

- "1. The provisions of §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role) should be applied to an individual defendant as appropriate to reflect the individual's role in committing the offense. For example, if a sales manager organizes or leads the price-fixing activity of five or more participants, a 4-level increase is called for under §3B1.1. An individual defendant should be considered for a downward adjustment under §3B1.2 for a mitigating role in the offense only if he was responsible in some minor way for his firm's participation in the conspiracy."

The Commentary to §2R1.1 captioned "Background" is amended in the third paragraph by deleting "four" and inserting in lieu thereof "six".

The Commentary to §2R1.1 captioned "Background" is amended by deleting the fourth paragraph as follows:

" The guideline imprisonment terms represent a substantial change from pre-guidelines practice. Under pre-guidelines practice, approximately 39 percent of all individuals convicted of antitrust violations were imprisoned. Considering all defendants sentenced, the average time served under pre-guidelines practice was only forty-five days. The guideline prison terms are, however, consistent with the parole guidelines. The fines specified in the guideline represent substantial increases over pre-guidelines practice. Under pre-guidelines practice, the average fine for individuals was only approximately \$27,000; for corporations, it was approximately \$160,000."

Reason for Amendment: This amendment increases the offense levels for antitrust violations to make them more comparable to the offense levels for fraud with similar amounts of loss. The base offense level for antitrust violations starts higher than the base offense level for fraud violations to reflect the serious nature of and the difficulty of detecting such violations, but the offense levels for antitrust offenses based on volume of commerce increase less rapidly than the offense levels for fraud, in part, because, on the average, the level of mark-up from an antitrust violation may tend to decline with the volume of commerce involved. This amendment also reduces the minimum guideline fine level based on the volume of commerce to reflect a marginal shift from fines to imprisonment as the more effective means to deter antitrust offenses. The provision addressing fines for organizational defendants in the current guideline is deleted. Such fines are addressed by the provisions pertaining to the sentencing of organizational defendants that are added by a separate amendment (amendment 422).

Effective Date: The effective date of this amendment is November 1, 1991.

- 378. Amendment:** Section 2S1.1(a)(1) is amended by deleting "or (a)(2)(A)" and inserting in lieu thereof
", (a)(2)(A), or (a)(3)(A)".

Section 2S1.1(b)(1) is amended by inserting "or believed" immediately following "knew".

The Commentary to §2S1.1 captioned "Background" is amended in the third paragraph by deleting "or (a)(2)(A)" and inserting in lieu thereof ", (a)(2)(A), or (a)(3)(A)"; and by deleting "did not merely conceal a serious crime that had already taken place, but" immediately before "encouraged".

Reason for Amendment: This amendment revises this guideline to reflect the enactment of subsection (a)(3) of 18 U.S.C. § 1956 that authorizes undercover "sting" operations in money laundering cases. Such cases differ from those prosecuted under subsection (a)(1) in that the money being laundered is not actually criminal proceeds, but is government "sting" money that an undercover officer represents to be criminal proceeds. In all other respects, subsections (a)(1) and (a)(3) are the same.

Effective Date: The effective date of this amendment is November 1, 1991.

379. Amendment: Section 2S1.3(a)(1) is amended by deleting:

- "(B) made false statements to conceal or disguise the evasion of reporting requirements; or
- (C) reasonably should have believed that the funds were criminally derived property;"

and inserting in lieu thereof:

- "(B) knowingly filed, or caused another to file, a report containing materially false statements; or".

Section 2S1.3(b)(1) is amended by deleting "5 levels." and inserting in lieu thereof "4 levels. If the resulting offense level is less than level 13, increase to level 13."

The Commentary to §2S1.3 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. § 1005;"; and by deleting "5316," immediately before "5322".

The Commentary to §2S1.3 captioned "Application Notes" is amended by deleting:

- "2. Subsection (a)(1)(C) applies where a reasonable person would have believed from the circumstances that the funds were criminally derived property. Subsection (b)(1) applies if the defendant knew or believed the funds were criminally derived property. Subsection (b)(1) applies in addition to, and not in lieu of, subsection (a)(1)(C). Where subsection (b)(1) applies, subsection (a)(1)(C) also will apply. It is possible that a defendant 'believed' or 'reasonably should have believed' that the funds were criminally derived property even if, in fact, the funds were not so derived (e.g., in a 'sting' operation where the defendant is told the funds were derived from the unlawful sale of controlled substances).";

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

The Commentary to §2S1.3 captioned "Background" is amended by deleting the second and third paragraphs as follows:

- " A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements, made false statements to conceal or disguise the activity, or reasonably should have believed that the funds

were criminally derived property. A lower alternative base offense level of 5 is provided in all other cases. The Commission anticipates that such cases will involve simple recordkeeping or other more minor technical violations of the regulatory scheme governing certain monetary transactions committed by defendants who reasonably believe that the funds at issue emanated from legitimate sources.

Where the defendant actually knew or believed that the funds were criminally derived property, subsection (b)(1) provides for a 5 level increase in the offense level.",

and inserting in lieu thereof:

" A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements or knowingly filed, or caused another to file, a report containing materially false statements. A lower alternative base offense level of 5 is provided in all other cases.

Where the defendant actually knew or believed that the funds were criminally derived property, subsection (b)(1) provides for the greater of a 4-level increase or an increase to level 13."

Chapter Two, Part S is amended by inserting an additional guideline with accompanying commentary as §2S1.4 (Failure to File Currency and Monetary Instrument Report).

Reason for Amendment: This amendment clarifies the scope of the specific offense characteristics in §2S1.3 and modifies subsection (b)(1) so that it does not produce a result that exceeds the comparable offense level under §2S1.2. In addition, this amendment creates an additional offense guideline (§2S1.4) for offenses involving Currency and Monetary Instrument Reports (CMIR). Currently, such offenses are covered by §2S1.3, which deals with all currency transaction reporting requirements. CMIR violations are committed by individuals who, when entering or leaving the country, knowingly conceal \$10,000 or more in cash or bearer instruments on their persons or in their personal effects and knowingly fail to file the report required by the U.S. Customs Service. Such criminal conduct is sufficiently different from the other offenses covered by §2S1.3 to merit treatment in a separate guideline.

Effective Date: The effective date of this amendment is November 1, 1991.

380. Amendment: Section 2X3.1(a) is amended by inserting the following additional sentence at the end:

"Provided, that where the conduct is limited to harboring a fugitive, the offense level shall not be more than level 20."

Reason for Amendment: This amendment distinguishes harboring a fugitive from other forms of accessory after the fact by providing a lower maximum offense level for such cases reflective, in part, of the lower statutory maximum provided for such offenses.

Effective Date: The effective date of this amendment is November 1, 1991.

381. Amendment: The Commentary to §4A1.1 captioned "Application Notes" is amended by inserting the following additional sentence as the second sentence of Note 4 and the third sentence of Note 5:

"Failure to report for service of a sentence of imprisonment is to be treated as an escape from such sentence. See §4A1.2(n).".

The Commentary to §4A1.1 captioned "Application Notes" is amended in the third (formerly second) sentence of Note 4 by inserting the following immediately before the period at the end of the sentence:

"having a custodial or supervisory component, although active supervision is not required for this item to apply. For example, a term of unsupervised probation would be included; but a sentence to pay a fine, by itself, would not be included. A defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence for the purposes of this provision if that sentence is otherwise countable, even if that sentence would have expired absent such warrant. See §4A1.2(m)".

Section 4A1.2(a) is amended by inserting the following additional subdivision:

"(4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense set forth in §4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.

'Convicted of an offense,' for the purposes of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere."

Section 4A1.2(k)(2) is amended by deleting the last sentence as follows:

"It may also affect the time period under which certain sentences are counted as provided in §4A1.2(e)(1).";

by inserting "(A)" immediately after "(2)"; and by inserting the following additional subdivision:

"(B) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (i) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (see §4A1.2(e)(1)); (ii) in the case of any other confinement sentence for an offense committed prior to the defendant's eighteenth birthday, the date of the defendant's last release from confinement on

such sentence (see §4A1.2(d)(2)(A)); and (iii) in any other case, the date of the original sentence (see §4A1.2(d)(2)(B) and (e)(2)).".

Section 4A1.2 is amended by inserting the following additional subsections:

"(l) Sentences on Appeal

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and (f) shall apply as if the execution of such sentence had not been stayed; §4A1.1(e) shall not apply.

(m) Effect of a Violation Warrant

For the purposes of §4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) Failure to Report for Service of Sentence of Imprisonment

For the purposes of §4A1.1(d) and (e), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

(o) Felony Offense

For the purposes of §4A1.2(c), a 'felony offense' means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed."

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 1 by inserting the following additional paragraph:

"Under §4A1.2(a)(4), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.1(c) if a sentence resulting from such conviction otherwise would have been counted. In the case of an offense set forth in §4A1.2(c)(1) (which lists certain misdemeanor and petty offenses), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.2(a)(4) only where the offense is similar to the instant offense (because sentences for other offenses set forth in §4A1.2(c)(1) are counted only if they are of a specified type and length).".

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 2 by inserting, immediately after "stated maximum", the following:

"(e.g., in the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years,

the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant's twenty-first birthday, the stated maximum is the amount of time in pre-trial detention plus the amount of time between the date of sentence and the defendant's twenty-first birthday)".

The Commentary to §4A1.2 is amended in Note 11 by inserting the following additional paragraph at the end:

"Where a revocation applies to multiple sentences, and such sentences are counted separately under §4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. Example: A defendant was serving two probationary sentences, each counted separately under §4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a 'straight' probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under §4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under §4A1.1(c) (for the other probationary sentence)."

Section 4A1.3(d) is amended by deleting ", sentencing, or appeal" and inserting in lieu thereof "or sentencing".

Reason for Amendment: This amendment clarifies the meaning of the term "under a criminal justice sentence" as used in §4A1.1; inserts a new subdivision in §4A1.2(a) to address the case in which the defendant has been convicted of a prior offense, but has not yet been sentenced for that offense; inserts an additional subdivision in §4A1.2(k) to clarify the determination of the applicable time periods in revocation cases; inserts additional subsections in §4A1.2 to address the counting of sentences stayed pending appeal, the effect of a violation warrant on the counting of points under §4A1.1(d), the counting of a failure to report for service of sentence under §4A1.1(d) and (e), and the definition of a felony offense as used in §4A1.2(c); adds an example to Application Note 2 in the Commentary to §4A1.2 to illustrate the meaning of "stated maximum" sentence; adds an additional application note in the Commentary to §4A1.2 addressing the counting of points in complex revocation cases; and conforms the Commentary of §4A1.3 to the addition of §4A1.2(l).

Effective Date: The effective date of this amendment is November 1, 1991.

382. Amendment: Section 4A1.1 is amended by inserting the following additional subsection:

"(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion."

Section 4A1.1 is amended in the first sentence by deleting "(e)" and inserting in lieu thereof "(f)".

Section 4A1.1(c) is amended by deleting "included" and inserting in lieu thereof "counted".

The Commentary to §4A1.1 captioned "Application Notes" is amended by inserting the following additional note:

- "6. §4A1.1(f). Where the defendant received two or more prior sentences as a result of convictions for crimes of violence that are treated as related cases but did not arise from the same occasion (*i.e.*, offenses committed on different occasions that were part of a single common scheme or plan or were consolidated for trial or sentencing; *see* Application Note 3 of the Commentary to §4A1.2), one point is added under §4A1.1(f) for each such sentence that did not result in any additional points under §4A1.1(a), (b), or (c). A total of up to 3 points may be added under §4A1.1(f). 'Crime of violence' is defined in §4B1.2(1); *see* §4A1.2(p).

For example, a defendant's criminal history includes two robbery convictions for offenses committed on different occasions that were consolidated for sentencing and therefore are treated as related. If the defendant received a five-year sentence of imprisonment for one robbery and a four-year sentence of imprisonment for the other robbery (consecutively or concurrently), a total of 3 points is added under §4A1.1(a). An additional point is added under §4A1.1(f) because the second sentence did not result in any additional point(s) (under §4A1.1(a), (b), or (c)). In contrast, if the defendant received a one-year sentence of imprisonment for one robbery and a nine-month consecutive sentence of imprisonment for the other robbery, a total of 3 points also is added under §4A1.1(a) (a one-year sentence of imprisonment and a consecutive nine-month sentence of imprisonment are treated as a combined one-year-nine-month sentence of imprisonment). But no additional point is added under §4A1.1(f) because the sentence for the second robbery already resulted in an additional point under §4A1.1(a). Without the second sentence, the defendant would only have received two points under §4A1.1(b) for the one-year sentence of imprisonment."

Section 4A1.2(a)(2) is amended by deleting "the criminal history" and inserting in lieu thereof "§4A1.1(a), (b), and (c)".

Section 4A1.2 is amended by inserting the following additional subsection:

"(p) Crime of Violence Defined

For the purposes of §4A1.1(f), the definition of 'crime of violence' is that set forth in §4B1.2(1)."

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 3 by deleting:

"Cases are considered related if they (1) occurred on a single occasion,"

and inserting in lieu thereof:

"Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion,";

and by deleting:

"For example, if the defendant commits a number of offenses on independent occasions separated by arrests, and the resulting criminal cases are consolidated and result in a combined sentence of eight years, counting merely three points for this factor will not adequately reflect either the seriousness of the defendant's criminal history or the frequency with which he commits crimes. In such circumstances, the court should consider whether departure is warranted. See §4A1.3.";

and inserting in lieu thereof:

"For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as related because the cases were consolidated for sentencing, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which he has committed crimes. In such circumstances, an upward departure may be warranted. Note that the above example refers to serious non-violent offenses. Where prior related sentences result from convictions of crimes of violence, §4A1.1(f) will apply.";

Reason for Amendment: This amendment provides for a specific enhancement under §4A1.2(f) in certain cases having prior convictions of crimes of violence not arising from the same incident that otherwise would be treated as related under §4A1.2. In addition, the definition of related cases in Application Note 3 in the Commentary to §4A1.2 is amended to provide that cases separated by an intervening arrest for one of the offenses are not treated as related cases.

Effective Date: The effective date of this amendment is November 1, 1991.

383. Amendment: Section 5E1.1 is amended by redesignating subsections (b) and (c) as (c) and (d), respectively; and by deleting:

"(a) Restitution shall be ordered for convictions under Title 18 of the United States Code or under 49 U.S.C. § 1472(h), (i), (j) or (n) in accordance with 18 U.S.C. § 3663(d), and may be ordered as a condition of probation or supervised release in any other case.";

and inserting in lieu thereof:

"(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."

The Commentary to §5E1.1 captioned "Background" is amended in the first paragraph by deleting the last sentence as follows:

"An order of restitution may be appropriate in offenses not specifically referenced in 18 U.S.C. § 3663 where victims require relief more promptly than the civil justice system provides."

The Commentary to §5E1.1 captioned "Background" is amended in the second paragraph by deleting "5E1.1 requires the court to order restitution for offenses under Title 18, or 49 U.S.C. § 1472(h), (i), (j) or (n), unless" and inserting in lieu thereof "(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 Commentary to §5E1.1 captioned "Background" is amended in the sixth paragraph by deleting "how and to whom" and by inserting in lieu thereof "the manner in which, and the persons to whom,".

The Commentary to §5E1.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

" 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)."

Reason for Amendment: This amendment expands §5E1.1 to require restitution as a condition of probation or supervised release for offenses not set forth in Title 18 and 49 U.S.C. § 1472(h), (i), (j), and (n). Currently, §5E1.1 permits, but does not require, restitution to be ordered 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), and (n).

Effective Date: The effective date of this amendment is November 1, 1991.

384. Amendment: Section 5E1.2(c) is amended by deleting:

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

and inserting in lieu thereof:

- "(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."

The Commentary to §5E1.2 captioned "Application Notes" is amended in Note 3 by deleting the first two paragraphs as follows:

"Alternative fine limits are provided in subsection (c). The terms 'pecuniary gain' and 'pecuniary loss' are taken from 18 U.S.C. § 3571(d). The Commission does not intend precise or detailed calculation of the gain or loss in using the alternative fine limits.

Where it is readily ascertainable that the defendant cannot, and is not likely to become able to, pay a fine greater than the maximum fine set forth in Column B of the Fine Table in subsection (c)(3), calculation of the alternative maximum fines under subsections (c)(2)(B) (twice the gross pecuniary loss caused by the offense) and (c)(2)(C) (three times the gross pecuniary gain to all participants in the offense) is unnecessary. In such cases, a statement that 'the alternative maximums of the fine table were not calculated because it is readily ascertainable that the defendant cannot, and is not likely to become able to, pay a fine greater than the maximum set forth in the fine table' is recommended in lieu of such calculations."

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

- "4. 'Restitution made or ordered' refers to restitution for the instant offense made before or at the time of sentencing, as well as any restitution ordered at the time of sentencing for the instant offense."

and inserting in lieu thereof:

- "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."

The Commentary to §5E1.2 captioned "Background" is deleted in its entirety as follows:

"Background: These guidelines permit a relatively wide range of fines. The Commission may promulgate more detailed guidelines for the imposition of fines after analyzing practice under these initial guidelines.

Recent legislation provides for substantial increases in fines. 18 U.S.C. § 3571(b). With few restrictions, 42 U.S.C. § 10601(b), and (c) authorize fine payments up to \$100 million to be deposited in the Crime Victims Fund in the United States Treasury. With vigorous enforcement, higher fines should be effective punitive and deterrent sanctions.

A larger multiple of the gain than of the loss is used in subsection (c)(2) because most offenses result in losses to society that exceed the gain to the participants. In addition, in many such cases restitution will not be feasible. These larger fines authorized under subsection (c)(2) are, of course, subject to the absolute limits on fines that are imposed by statute.

The Commission has not attempted to define gain or loss precisely. It is expected that the terms will be used flexibly and consistently with their use in the criminal code, including former 18 U.S.C. § 3623(c)(1)."

Reason for Amendment: This amendment is designed to simplify the operation of this guideline and conserve probation and court resources by eliminating the need for the determination of loss and gain under this section in most cases. Experience has shown that for the vast majority of defendants, the amount from the fine table in subsection (c)(3) or the amount from subsection (c)(4), as applicable, is more than twice the gain or loss from the offense. This amendment provides that the guideline fine range is to be determined from subsection (c)(3) or (c)(4), as applicable. In the unusual case in which twice the defendant's gain from the offense or twice the loss caused by the offense exceeds the maximum of the guideline range, an upward departure may be considered.

Effective Date: The effective date of this amendment is November 1, 1991.

385. Amendment: Chapter Five, Part G is amended by deleting §5G1.3 in its entirety as follows:

"§5G1.3. Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment

If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status), the sentence for the instant offense shall be imposed to run consecutively to the unexpired term of imprisonment.

Commentary

Under this guideline, the court shall impose a consecutive sentence where the instant offense (or any part thereof) was committed while the defendant was serving an unexpired term of imprisonment.

Where the defendant is serving an unexpired term of imprisonment, but did not commit the instant offense while serving that term of imprisonment, the sentence for the instant offense may be imposed to run consecutively or concurrently with the unexpired term of imprisonment. The court may consider imposing a sentence for the instant offense that results in a combined sentence that approximates the total punishment that would have been imposed under §5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time. Where the defendant is serving a term of imprisonment for a state offense, the information available may permit only a rough estimate of the total punishment that would have been imposed under the guidelines. It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process."

A replacement guideline with accompanying commentary is inserted as §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment).

Reason for Amendment: This amendment provides additional structure and guidance for the decision to impose a consecutive or concurrent sentence upon a defendant subject to an undischarged term of imprisonment to reduce the potential for unwarranted disparity in such determinations.

Effective Date: The effective date of this amendment is November 1, 1991.

386. Amendment: The Introductory Commentary to Chapter Five, Part H is amended by deleting:

" Congress has directed the Commission 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 relevant by the Commission. 28 U.S.C. § 994(d).",

and inserting in lieu thereof:

" 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)."

Section 5H1.1 is amended by deleting:

"Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. Age may be a reason to go below the guidelines when the offender is elderly and infirm and where a form of punishment (e.g., home confinement) might be equally efficient as and less costly than incarceration. If, independent of the consideration of age, a defendant is sentenced to probation or supervised release, age may be relevant in the determination of the length and conditions of supervision.",

and inserting in lieu thereof:

"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."

Section 5H1.2 is amended by deleting:

"Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the guidelines, 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). Neither are education and vocational skills relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. If, independent of

consideration of education and vocational skills, a defendant is sentenced to probation or supervised release, these considerations may be relevant in the determination of the length and conditions of supervision for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the type or length of community service.",

and by inserting in lieu thereof:

"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."

Section 5H1.3 is amended by deleting:

"Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the guidelines, except as provided in the general provisions in Chapter Five. Mental and emotional conditions, whether mitigating or aggravating, may be relevant in determining the length and conditions of probation or supervised release."

and inserting in lieu thereof:

"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))."

Section 5H1.4 is amended by deleting:

"Physical Condition, Including Drug Dependence and Alcohol Abuse (Policy Statement)

Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. However, an extraordinary physical impairment may be a reason to impose a sentence other than imprisonment.

Drug dependence or alcohol 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. 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.

This provision would also apply in cases where the defendant received a sentence of probation. The substance abuse condition is strongly recommended and the length of probation should be adjusted accordingly. Failure to comply would normally result in revocation of probation.",

and inserting in lieu thereof:

"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))."

Section 5H1.5 is amended by deleting:

"Employment record is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. Employment record may be relevant in determining the type of sentence to be imposed when the guidelines provide for sentencing options. If, independent of the consideration of employment record, a defendant is sentenced to probation or supervised release, considerations of employment record may be relevant in the determination of the length and conditions of supervision."

and inserting in lieu thereof:

"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)."

Section 5H1.6 is amended by deleting:

"Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines. Family responsibilities that are complied with are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and responsibilities that are met may be relevant in the determination of the length and conditions of supervision.",

and inserting in lieu thereof:

"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."

Chapter Five, Part H is amended by inserting an additional policy statement as §5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)).

Reason for Amendment: This amendment expresses the Commission's intent that the factors set forth in this part are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range; but that, unless expressly stated, these policy statements do not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range. The language within these sections is revised for clarity and consistency. In addition, this amendment adds language that expressly states that the guidelines do not apply to defendants sentenced as juvenile delinquents; and sets forth the Commission's position that physical appearance, including physique, military, civic, charitable, or public service, employment-related contributions, and record of prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Effective Date: The effective date of this amendment is November 1, 1991.

387. Amendment: The Commentary to §6A1.3 is amended by inserting the following additional paragraph as the third paragraph:

"The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."

Reason for Amendment: This amendment expresses the Commission's approval of the use of a preponderance of the evidence standard in resolving disputes regarding application of the guidelines to the facts of a case.

Effective Date: The effective date of this amendment is November 1, 1991.

388. Amendment: The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1 in the first sentence by inserting immediately before the colon:

"and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement)".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 2 by deleting the first two sentences as follows:

"Definitions or explanations of terms may also appear within the commentary to specific guidelines. Such commentary is not of general applicability.",

and inserting in lieu thereof:

"Definitions of terms also may appear in other sections. Such definitions are not designed for general applicability; therefore, their applicability to sections other than those expressly referenced must be determined on a case by case basis.";

and by beginning a new paragraph with the third sentence.

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

"'Firearm' means any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive.",

and inserting in lieu thereof:

"'Firearm' means (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device.";

and by inserting "a" immediately before "'BB' or pellet gun".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note (1)(f) by inserting ", other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies." immediately following "conceal the offense".

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(h) by inserting the following additional sentence at the end:

"In the case of a kidnapping, for example, maltreatment to a life-threatening degree (e.g., by denial of food or medical care) would constitute life-threatening bodily injury."

The Commentary to §1B1.1 captioned "Application Notes" is amended in Note 1(k) by deleting "18 U.S.C. § 921(a)(4)" and inserting in lieu thereof "26 U.S.C. § 5845(f)"; and by deleting "proceeding" and inserting in lieu thereof "preceding".

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

"(l) 'Offense' means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context."

Reason for Amendment: This amendment revises the definition of firearm in Note 1(e) to track more closely the definition of firearm in 18 U.S.C. § 921; clarifies Note 1(f) to prevent inappropriate "double counting;" clarifies in Note 1(h) that maltreatment to a life-threatening degree constitutes life-threatening bodily injury; conforms the statutory reference in Note 1(k) to conform to that used in §2K2.1; and inserts an additional subdivision in Note 1 (subdivision (l)) that describes how the term "offense" is used in the guidelines. In addition, this amendment correct clerical errors and makes editorial improvements.

Effective Date: The effective date of this amendment is November 1, 1991.

389. Amendment: The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 2 in the first sentence by inserting "that were part of the same course of conduct or common scheme or plan as the offense of conviction" immediately following "Such acts and omissions"; and by inserting ", that were part of the same course of conduct or common scheme or plan as the offense of conviction" immediately following "otherwise accountable".

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

"As noted above, subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level."

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 4 by inserting "; Property Damage by Use of Explosives" immediately following "Arson".

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 5 by deleting:

"E.g., in §2K2.2, a base offense level of 16 is used 'if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861.'",

and inserting in lieu thereof:

"For example, in §2K1.5, subsection (b)(1) applies 'If the defendant is convicted under 49 U.S.C. § 1472(1)(2).'";

by deleting:

"Examples of this usage are found in §2K1.3(b)(4) ('If the defendant was a person prohibited from receiving explosives under 18 U.S.C. § 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under 18 U.S.C. § 842(i), increase by 10 levels'); and",

and inserting in lieu thereof "An example of this usage is found in"; and by inserting the following additional paragraph at the end:

"An express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, §2K1.5(b)(1) (which is applicable only if the defendant is convicted under 49 U.S.C. § 1472(1)(2)) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 49 U.S.C. § 1472(1)(2)."

The Commentary to §1B1.3 captioned "Application Notes" is amended by inserting the following additional notes:

6. In the case of a partially completed offense (e.g., an offense involving an attempted theft of \$800,000 and a completed theft of \$30,000), the offense level is to be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to §2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under §2X1.1(c)(1).
7. For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.

Examples: (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; see §4A1.2(a)(1).

Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2)."

The Commentary to §1B1.3 captioned "Background" is amended by deleting the last paragraph as follows:

"This guideline and §1B1.4 clarify the intent underlying §1B1.3 as originally promulgated."

Reason for Amendment: This amendment makes editorial improvements in Application Notes 1 and 2; inserts an additional paragraph in Application Note 2 to clarify that "offenses of a character for which §3D1.2(d) would require grouping of multiple counts" is not limited to offenses proscribed by the same statutory provision; conforms a reference in Application Note 4 to the correct title of the guideline; conforms examples in Application Note 5 to amended guidelines and clarifies how a direction to apply a particular factor only if the defendant is convicted of a particular statute applies to the offenses of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, and misprision of felony; inserts an additional application note (Note 6) that highlights the provision in §2X1.1 dealing with cases of partially completed conduct; inserts an additional application note (Note 7) that clarifies the treatment of conduct for which the defendant has previously been sentenced; and deletes a surplus sentence of Background Commentary more appropriately contained in Appendix C in the paragraph describing the reason for amendment 3.

Effective Date: The effective date of this amendment is November 1, 1991.

390. Amendment: The Commentary to §1B1.8 captioned "Application Notes" is amended by inserting the following additional notes:

- "5. This guideline limits the use of certain incriminating information furnished by a defendant in the context of a defendant-government agreement for the defendant to provide information concerning the unlawful activities of other persons. The guideline operates as a limitation on the use of such incriminating information in determining the applicable guideline range, and not merely as a restriction of the government's presentation of such information (e.g., where the defendant, subsequent to having entered into a cooperation agreement, repeats such information to the probation officer preparing the presentence report, the use of such information remains protected by this section).
6. Unless the cooperation agreement relates to the provision of information concerning the unlawful activities of others, this guideline does not apply (i.e., an agreement by the defendant simply to detail the extent of his own unlawful activities, not involving an agreement to provide information concerning the unlawful activity of another person, is not covered by this guideline)."

Reason for Amendment: This amendment clarifies the operation of this guideline.

Effective Date: The effective date of this amendment is November 1, 1991.

391. Amendment: The Commentary to §2A2.1 captioned "Application Notes" is amended by inserting the following additional note:

- "3. If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted."

Reason for Amendment: This amendment adds commentary to address the case in which an attempted murder results in a substantial risk of death or serious bodily injury to more than one person.

Effective Date: The effective date of this amendment is November 1, 1991.

392. Amendment: The Commentary to §2A3.1 captioned "Application Notes" is amended by inserting the following additional note:

- "3. If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill)."

Section 2A3.2(b)(1) is amended by deleting "1 level" and inserting in lieu thereof "2 levels".

The Commentary to §2A3.2 captioned "Application Note" is amended by inserting the following additional note:

- "2. If the adjustment in subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).";

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

Section 2A3.4(b) is amended by inserting the following additional subdivision:

- "(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels."

The Commentary to §2A3.4 captioned "Application Notes" is amended by inserting the following additional note:

- "3. If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill)."

Reason for Amendment: This amendment provides for consistency among §§2A3.1, 2A3.2, and 2A3.4 with respect to an adjustment for a victim in the custody, care, or supervisory control of the defendant. In addition, the amendment adds an application note clarifying that when this adjustment applies, an adjustment from §3B1.3 will not apply.

Effective Date: The effective date of this amendment is November 1, 1991.

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

"In cases of partially completed conduct, the loss is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy). E.g., in the case of the theft of a government check or money order, loss refers to the loss level that would have occurred if the check or money order had been cashed. Similarly, if a defendant is apprehended in the process of taking a vehicle, the loss refers to the value of the vehicle even if the vehicle is recovered immediately.",

and inserting in lieu thereof:

"Examples: (1) In the case of a theft of a check or money order, the loss is the loss that would have occurred if the check or money order had been cashed. (2) In the case of a defendant apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately.

In the case of a partially completed offense (e.g., an offense involving a completed theft that is part of a larger, attempted theft), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1."

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 4 by deleting "Attempts" and inserting in lieu thereof "Attempt, Solicitation, or Conspiracy"; and by inserting "and Deceit" immediately following "Fraud".

The Commentary to §2F1.1 is amended by deleting Notes 7 and 8 as follows:

- "7. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). In keeping with the Commission's policy on attempts, if a probable or intended loss that the defendant was attempting to inflict can be determined, that figure would be used if it was larger

than the actual loss. For example, if the fraud consisted of attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the 'loss' would be treated as \$40,000 for purposes of this guideline.

8. The amount of loss need not be precise. The court is not expected to identify each victim and the loss he suffered to arrive at an exact figure. The court need only make a reasonable estimate of the range of loss, given the available information. The estimate may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. Estimates based upon aggregate 'market loss' (e.g., the aggregate decline in market value of a stock resulting from disclosure of information that was wrongfully withheld or misrepresented) are especially appropriate for securities cases. The offender's gross gain from committing the fraud is an alternative estimate that ordinarily will understate the loss.";

by deleting Note 10 as follows:

- "10. In a few instances, the total dollar loss that results from the offense may overstate its seriousness. Such situations typically occur when a misrepresentation is of limited materiality or is not the sole cause of the loss. Examples would include understating debts to a limited degree in order to obtain a substantial loan which the defendant genuinely expected to repay; attempting to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it; and making a misrepresentation in a securities offering that enabled the securities to be sold at inflated prices, but where the value of the securities subsequently declined in substantial part for other reasons. In such instances, a downward departure may be warranted.";

by renumbering Note 9 as Note 10; by inserting the following as Notes 7, 8 and 9:

- "7. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). Consistent with the provisions of §2X1.1 (Attempt, Solicitation or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the loss would be \$40,000. There are, however, instances where additional factors are to be considered in determining the loss or intended loss:

- (a) Fraud Involving Misrepresentation of the Value of an Item or Product Substitution

A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth

\$40,000 and the stock is worth only \$10,000, the loss is the amount by which the stock was overvalued (*i.e.*, \$30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

(b) Fraudulent Loan Application and Contract Procurement Cases

In fraudulent loan application cases and contract procurement cases where the defendant's capabilities are fraudulently represented, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan.

In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, a defendant may understate his debts to a limited degree to obtain a loan (*e.g.*, to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (*e.g.*, an embargo imposed on grain exports) which would have caused a default in any event. In such a case, the loss determined above may overstate the seriousness of the defendant's conduct.

(c) Consequential Damages in Procurement Fraud and Product Substitution Cases

In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation

of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

(d) Diversion of Government Program Benefits

In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.

(e) Davis-Bacon Act Cases

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.

8. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.
9. In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.";

and in the renumbered Note 10 (formerly Note 9) by deleting:

"Dollar loss often does not fully capture the harmfulness and seriousness of the conduct. In such instances, an upward departure may be warranted."

and inserting in lieu thereof:

"In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted.";

by deleting subdivision (f) as follows:

"(f) completion of the offense was prevented, or the offense was interrupted before it caused serious harm.";

by deleting the semicolon at the end of subdivision (e) and inserting in lieu thereof a period; and by inserting the following additional paragraph at the end:

"In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it."

Reason for Amendment: This amendment provides a more precise reference in the commentary of these guidelines to the discussion in §2X1.1 that applies in the case of a partially completed offense. In addition, the amendment reorders the material in these notes, and divides them into separate paragraphs for greater clarity. The amendment also conforms the wording of Application Note 7 of the Commentary to §2F1.1 to Application Note 2 of the Commentary to §2B1.1 to make clear that the treatment of attempts in cases of fraud and theft is identical. Finally, this amendment provides additional guidance with respect to the determination of loss, and makes editorial improvements.

Effective Date: The effective date of this amendment is November 1, 1991.

- 394. Amendment:** Section 2D1.1(b)(1) is amended by deleting "during commission of the offense" immediately after "possessed".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 3 by deleting ". The adjustment is to be applied even if several counts are involved and the weapon was present in any of them." and inserting in lieu thereof ", 2D1.6, 2D1.7(b)(1).".

Section 2D1.8(b)(1) is amended by deleting "during commission of the offense" immediately after "possessed".

Reason for Amendment: This amendment clarifies that the provisions of §1B1.3(a)(2) apply to the adjustments in §§2D1.1(b)(1) and 2D1.8(b)(1), and updates the list of referenced offense guidelines in Application Note 3 of the Commentary to §2D1.1.

Effective Date: The effective date of this amendment is November 1, 1991.

- 395. Amendment:** Section 2D1.1(c) is amended in the Drug Quantity Table by deleting "Pure PCP" wherever it appears and inserting in lieu thereof "PCP (actual)"; and by deleting "Pure Methamphetamine" wherever it appears and inserting in lieu thereof "Methamphetamine (actual)".

Section 2D1.1(c) is amended in the note designated by a single asterisk by inserting the following additional sentences as the third and fourth sentences of the first paragraph:

"The terms 'PCP (actual)' and 'Methamphetamine (actual)' refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual).";

and in the last sentence of the first paragraph by deleting "pure PCP or methamphetamine" and inserting in lieu thereof "PCP (actual) or methamphetamine (actual)".

Section 2D1.1(c) is amended by deleting "Schedule I or II Depressants" wherever it appears and inserting in lieu thereof "Secobarbital (or the equivalent amount of other Schedule I or II Depressants)".

Reason for Amendment: This amendment clarifies the operation of the guideline in cases involving methamphetamine or PCP by replacing the terms "Pure PCP" and "pure methamphetamine" with "PCP (actual)" and "methamphetamine (actual)," and by providing an example of their application. This amendment also clarifies the interaction of the guideline and drug equivalency tables with respect to Schedule I and II Depressants by using Secobarbital as the referenced substance.

Effective Date: The effective date of this amendment is November 1, 1991.

396. Amendment: The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the first paragraph by deleting "grams of a substance containing heroin" and inserting in lieu thereof "kilograms of marihuana"; in the second paragraph by deleting:

"If all the drugs are 'equivalents' of the same drug, e.g., stimulants that are grouped with cocaine, convert them to that drug. In other cases, convert each of the drugs to either the heroin or marihuana equivalents, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level. Use the marihuana equivalents when the only substances involved are 'Schedule I Marihuana,' 'Schedule III Substances,' 'Schedule IV Substances,' 'Schedule V Substances' or 'Schedule I or II Depressants.' Otherwise, use the heroin equivalents.",

and inserting in lieu thereof:

"In each case, convert each of the drugs to its marihuana equivalent, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.";

in the first example by deleting:

"a. The defendant is convicted of selling seventy grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). Both PCP and LSD are grouped together in the Drug Equivalency Tables under the heading 'LSD, PCP, and Other Schedule I and II Hallucinogens,' which provide PCP equivalencies. The 250 milligrams of LSD is equivalent to twenty-five grams of PCP. The total is therefore ninety-five grams of PCP, for which the Drug Quantity Table provides an offense level of 24.",

and inserting in lieu thereof:

"a. The defendant is convicted of selling 70 grams of a substance containing PCP (Level 22) and 250 milligrams of a substance containing LSD (Level 18). The PCP converts to 70 kilograms of marihuana; the LSD converts to 25 kilograms of marihuana. The total is therefore equivalent to 95 kilograms of marihuana, for which the Drug Quantity Table provides an offense level of 24.";

and in the third example by deleting:

- "c. The defendant is convicted of selling eighty grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to sixteen grams of heroin; the marihuana, to five grams of heroin. The total equivalent is twenty-one grams of heroin, which has an offense level of 18 in the Drug Quantity Table.",

and inserting in lieu thereof:

- "c. The defendant is convicted of selling 80 grams of cocaine (Level 16) and five kilograms of marihuana (Level 14). The cocaine is equivalent to 16 kilograms of marihuana. The total is therefore equivalent to 21 kilograms of marihuana, which has an offense level of 18 in the Drug Quantity Table."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by inserting the following additional paragraph as the third paragraph:

"For certain types of controlled substances, the marihuana equivalencies in the Drug Equivalency Tables are 'capped' at specified amounts (e.g., the combined equivalent weight of all Schedule V controlled substances shall not exceed 999 grams of marihuana). Where there are controlled substances from more than one schedule (e.g., a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalencies to determine the combined marihuana equivalency (subject to the cap, if any, applicable to the combined amounts)."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 by inserting the following additional example immediately after example (c):

- "d. The defendant is convicted of selling 28 kilograms of a Schedule III substance, 50 kilograms of a Schedule IV substance, and 100 kilograms of a Schedule V substance. The marihuana equivalency for the Schedule III substance is 56 kilograms of marihuana (below the cap of 59.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule III substances). The marihuana equivalency for the Schedule IV substance is subject to a cap of 4.99 kilograms of marihuana set forth as the maximum equivalent weight for Schedule IV substances (without the cap it would have been 6.25 kilograms). The marihuana equivalency for the Schedule V substance is subject to the cap of 999 grams of marihuana set forth as the maximum equivalent weight for Schedule V substances (without the cap it would have been 1.25 kilograms). The combined equivalent weight, determined by adding together the above amounts, is subject to the cap of 59.99 kilograms of marihuana set forth as the maximum combined equivalent weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent weight would have been 61.99 (56 + 4.99 + .999) kilograms."

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

"DRUG EQUIVALENCY TABLES"

Schedule I or II Opiates

1 gm of Alpha-Methylfentanyl =	10 gm of heroin
1 gm of Dextromoramide =	0.67 gm of heroin
1 gm of Dipipanone =	0.25 gm of heroin
1 gm of 3-Methylfentanyl =	10 gm of heroin
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	0.7 gm of heroin
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	0.7 gm of heroin
1 gm of Alphaprodine =	0.1 gm of heroin
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 gm of heroin
1 gm of Hydromorphone/Dihydromorphinone =	2.5 gm of heroin
1 gm of Levorphanol =	2.5 gm of heroin
1 gm of Meperidine/Pethidine =	0.05 gm of heroin
1 gm of Methadone =	0.5 gm of heroin
1 gm of 6-Monoacetylmorphine =	1 gm of heroin
1 gm of Morphine =	0.5 gm of heroin
1 gm of Oxycodone =	0.5 gm of heroin
1 gm of Oxymorphone =	5 gm of heroin
1 gm of Racemorphan =	0.8 gm of heroin
1 gm of Codeine =	0.08 gm of heroin
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	0.05 gm of heroin
1 gm of Ethylmorphine =	0.165 gm of heroin
1 gm of Hydrocodone/Dihydrocodeinone =	0.5 gm of heroin
1 gm of Mixed Alkaloids of Opium/Papaveretum =	0.25 gm of heroin
1 gm of Opium =	0.05 gm of heroin

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)

1 gm of Cocaine =	0.2 gm of heroin
1 gm of N-Ethylamphetamine =	0.4 gm of cocaine/0.08 gm of heroin
1 gm of Fenethylamine =	0.2 gm of cocaine/0.04 gm of heroin
1 gm of Amphetamine =	1.0 gm of cocaine/0.2 gm of heroin
1 gm of Dextroamphetamine =	1.0 gm of cocaine/0.2 gm of heroin
1 gm of Methamphetamine =	5.0 gm of cocaine/1.0 gm of heroin
1 gm of Methamphetamine (Pure) =	50 gm of cocaine/10 gm of heroin
1 gm of L-Methamphetamine/Levo-methamphetamine/ L-Desoxyephedrine=	0.2 gm of cocaine/0.04 gm of heroin
1 gm of 4-Methylaminorex ("Euphoria")=	0.5 gm of cocaine/0.1 gm of heroin
1 gm of Methylphenidate (Ritalin)=	0.5 gm of cocaine/0.1 gm of heroin
1 gm of Phenmetrazine =	0.4 gm of cocaine/0.08 gm of heroin
1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	2.08 gm of cocaine/0.416 gm of heroin
1 gm Phenylacetone/P ₂ P (in any other case) =	0.375 gm of cocaine/0.075 gm of heroin
1 gm of Cocaine Base ("Crack") =	100 gm of cocaine/20 gm of heroin

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)

1 gm of Bufotenine =	0.07 gm of heroin or PCP
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 gm of heroin or PCP
1 gm of Diethyltryptamine/DET =	0.08 gm of heroin or PCP
1 gm of Dimethyltryptamine/DMT =	0.1 gm of heroin or PCP
1 gm of Mescaline =	0.01 gm of heroin or PCP
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	0.001 gm of heroin or PCP
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.0001 gm of heroin or PCP
1 gm of Peyote (Dry) =	0.0005 gm of heroin or PCP
1 gm of Peyote (Wet) =	0.00005 gm of heroin or PCP
1 gm of Phencyclidine/PCP =	1 gm of heroin
1 gm of Phencyclidine (Pure PCP) =	10 gm of heroin or PCP
1 gm of Psilocin =	0.5 gm of heroin or PCP
1 gm of Psilocybin =	0.5 gm of heroin or PCP
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 gm of heroin or PCP
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 gm of heroin or PCP
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 gm of heroin or PCP
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 gm of heroin or PCP

1 gm of 3,4-Methylenedioxyamphetamine/MDA =	0.05 gm of heroin or PCP
1 gm of 3,4-Methylenedioxymethamphetamine/MDMA =	0.035 gm of heroin or PCP
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA=	0.03 gm of heroin or PCP
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	0.68 gm of heroin or PCP

Schedule I Marihuana

1 gm of Marihuana/Cannabis =	1 mg of heroin
1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 mg of heroin/1 gm of marihuana
1 gm of Hashish Oil =	0.05 gm of heroin/50 gm of marihuana
1 gm of Cannabis Resin or Hashish =	5 mg of heroin/5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	0.167 gm of heroin/167 gm of marihuana
1 gm of Tetrahydrocannabinol, Synthetic =	0.167 gm of heroin/167 gm of marihuana

Schedule I or II Depressants

1 gm of Methaqualone =	0.7 mg of heroin/700 mg of marihuana
1 gm of Amobarbital =	2 mg of heroin/2 gm of marihuana
1 gm of Pentobarbital =	2 mg of heroin/2 gm of marihuana
1 gm of Secobarbital =	2 mg of heroin/2 gm of marihuana

Schedule III Substances

1 gm of Allobarbital =	2 mg of heroin/2 gm of marihuana
1 gm of Aprobarbital =	2 mg of heroin/2 gm of marihuana
1 gm of Barbiturate =	2 mg of heroin/2 gm of marihuana
1 gm of Benzphetamine=	4 mg of heroin/4 gm of marihuana
1 gm of Butabarbital =	2 mg of heroin/2 gm of marihuana
1 gm of Butalbital =	2 mg of heroin/2 gm of marihuana
1 gm of Butobarbital/butethal =	2 mg of heroin/2 gm of marihuana
1 gm of Cyclobarbital =	2 mg of heroin/2 gm of marihuana
1 gm of Cyclopentobarbital =	2 mg of heroin/2 gm of marihuana
1 gm of Glutethimide =	0.4 mg of heroin/0.4 gm of marihuana
1 gm of Heptabarbital =	2 mg of heroin/2 gm of marihuana
1 gm of Hexethal =	2 mg of heroin/2 gm of marihuana
1 gm of Hexobarbital =	2 mg of heroin/2 gm of marihuana
1 gm of Metharbital =	2 mg of heroin/2 gm of marihuana
1 gm of Talbutal =	2 mg of heroin/2 gm of marihuana
1 gm of Thiobarbital =	2 mg of heroin/2 gm of marihuana
1 gm of Thiopental =	2 mg of heroin/2 gm of marihuana
1 gm of Vinbarbital =	2 mg of heroin/2 gm of marihuana
1 gm of Vinylbital =	2 mg of heroin/2 gm of marihuana
1 gm of Phendimetrazine =	2 mg of heroin/2 gm of marihuana
1 ml of Paregoric=	0.25 mg of heroin/0.25 gm of marihuana
1 ml of Hydrocodone Cough Syrup=	1 mg of heroin/1 gm of marihuana

Schedule IV Substances

1 gm of Phentermine =	0.125 mg of heroin/0.125 gm of marihuana
1 gm of Pentazocine =	0.125 mg of heroin/0.125 gm of marihuana
1 gm of Barbital =	0.125 mg of heroin/0.125 gm of marihuana
1 gm of Diazepam =	0.125 mg of heroin/0.125 gm of marihuana
1 gm of Phenobarbital =	0.125 mg of heroin/0.125 gm of marihuana
1 gm of Methohexital =	0.125 mg of heroin/0.125 gm of marihuana
1 gm of Methylphenobarbital/Mephobarbital =	0.125 mg of heroin/0.125 gm of marihuana
1 gm of Nitrazepam =	0.125 mg of heroin/0.125 gm of marihuana

Schedule V Substances

1 gm of codeine cough syrup = marihuana.",	0.0125 mg of heroin/12.5 mg of
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and inserting in lieu thereof:

"DRUG EQUIVALENCY TABLESSchedule I or II Opiates

1 gm of Heroin =	1 kg of marihuana
1 gm of Alpha-Methylfentanyl =	10 kg of marihuana
1 gm of Dextromoramide =	670 gm of marihuana
1 gm of Dipipanone =	250 gm of marihuana
1 gm of 3-Methylfentanyl =	10 kg of marihuana
1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =	700 gm of marihuana
1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =	700 gm of marihuana
1 gm of Alphaprodine =	100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) =	2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphinone =	2.5 kg of marihuana
1 gm of Levorphanol =	2.5 kg of marihuana
1 gm of Meperidine/Pethidine =	50 gm of marihuana
1 gm of Methadone =	500 gm of marihuana
1 gm of 6-Monoacetylmorphine =	1 kg of marihuana
1 gm of Morphine =	500 gm of marihuana
1 gm of Oxycodone =	500 gm of marihuana
1 gm of Oxymorphone =	5 kg of marihuana
1 gm of Racemorphan =	800 gm of marihuana
1 gm of Codeine =	80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk =	50 gm of marihuana
1 gm of Ethylmorphine =	165 gm of marihuana
1 gm of Hydrocodone/Dihydrocodeinone =	500 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum =	250 gm of marihuana
1 gm of Opium =	50 gm of marihuana

Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)

1 gm of Cocaine =	200 gm of marihuana
1 gm of N-Ethylamphetamine =	80 gm of marihuana
1 gm of Fenethylamine =	40 gm of marihuana
1 gm of Amphetamine =	200 gm of marihuana
1 gm of Dextroamphetamine =	200 gm of marihuana
1 gm of Methamphetamine =	1 kg of marihuana
1 gm of Methamphetamine (Actual) =	10 kg of marihuana
1 gm of "Ice" =	10 kg of marihuana
1 gm of L-Methamphetamine/Levo-methamphetamine/L-Desoxyephedrine =	40 gm of marihuana
1 gm of 4-Methylaminorex ("Euphoria") =	100 gm of marihuana
1 gm of Methylphenidate (Ritalin) =	100 gm of marihuana
1 gm of Phenmetrazine =	80 gm of marihuana
1 gm Phenylacetone/P ₂ P (when possessed for the purpose of manufacturing methamphetamine) =	416 gm of marihuana
1 gm Phenylacetone/P ₂ P (in any other case) =	75 gm of marihuana
1 gm of Cocaine Base ("Crack") =	20 kg of marihuana

LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)

1 gm of Bufotenine =	70 gm of marihuana
1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =	100 kg of marihuana
1 gm of Diethyltryptamine/DET =	80 gm of marihuana
1 gm of Dimethyltryptamine/DMT =	100 gm of marihuana
1 gm of Mescaline =	10 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =	1 gm of marihuana
1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =	0.1 gm of marihuana
1 gm of Peyote (Dry) =	0.5 gm of marihuana
1 gm of Peyote (Wet) =	0.05 gm of marihuana
1 gm of Phencyclidine/PCP =	1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) =	10 kg of marihuana
1 gm of Psilocin =	500 gm of marihuana
1 gm of Psilocybin =	500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP =	1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP =	1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB =	2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DOM =	1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA =	50 gm of marihuana
1 gm of 3,4-Methylenedioxy-methamphetamine/MDMA =	35 gm of marihuana
1 gm of 3,4-Methylenedioxy-N-ethylamphetamine/MDEA =	30 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC =	680 gm of marihuana

Schedule I Marihuana

1 gm of Marihuana/Cannabis, granulated, powdered, etc. =	1 gm of marihuana
1 gm of Hashish Oil =	50 gm of marihuana
1 gm of Cannabis Resin or Hashish =	5 gm of marihuana
1 gm of Tetrahydrocannabinol, Organic =	167 gm of marihuana
1 gm of Tetrahydrocannabinol, Synthetic =	167 gm of marihuana

Secobarbital and Other Schedule I or II Depressants*

1 gm of Amobarbital =	2 gm of marihuana
1 gm of Glutethimide =	0.4 gm of marihuana
1 gm of Methaqualone =	0.7 gm of marihuana
1 gm of Pentobarbital =	2 gm of marihuana
1 gm of Secobarbital =	2 gm of marihuana

**Provided*, that the combined equivalent weight of all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule III Substances**

1 gm of a Schedule III Substance (except anabolic steroids) =	2 gm of marihuana
1 unit of anabolic steroids =	1 gm of marihuana

***Provided*, that the combined equivalent weight of all Schedule III substances, Schedule I or II depressants, Schedule IV substances, and Schedule V substances shall not exceed 59.99 kilograms of marihuana.

Schedule IV Substances***

1 gm of a Schedule IV Substance =	0.125 gm of marihuana
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****Provided*, that the combined equivalent weight of all Schedule IV and V substances shall not exceed 4.99 kilograms of marihuana.

Schedule V Substances****

1 gm of a Schedule V Substance =	0.0125 gm of marihuana
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*****Provided*, that the combined equivalent weight of Schedule V substances shall not exceed 999 grams of marihuana.".

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

" In cases involving fifty or more marihuana plants, an equivalency of one plant to one kilogram of marihuana is derived from the statutory penalty provisions of 21 U.S.C. § 841(b)(1)(A), (B), and (D). In cases involving fewer than fifty plants, the statute is silent as to the equivalency. For cases involving fewer than fifty plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt (see §2D1.4). Consequently, the Commission adopted the policy that, in the case of fewer than fifty marihuana plants, each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.".

Reason for Amendment: This amendment substitutes a single conversion for Schedule III substances (1 gm of a Schedule III substance = 2 gms of marihuana) that will simplify application of the guidelines as well as address currently unlisted Schedule III substances. Because the equivalencies for Schedule III substances are not statutorily based, nor are the pharmacological equivalencies as clear as with Schedule I or II Substances, a generic listing was deemed appropriate. For the same reasons, the amendment provides a single conversion

for Schedule IV substances (1 gm of a Schedule IV substance = 0.125 gm of marihuana) and Schedule V substances (1 gm of a Schedule V substance = 0.0125 gm of marihuana). The amendment also adds a conversion for anabolic steroids consistent with their treatment in the Drug Quantity Table. In addition, the amendment adds footnotes to the Drug Equivalency Tables for Schedule I or II depressants and Schedule III, IV, and V substances to remove an ambiguity in guideline application by expressly limiting the combined equivalent weight of such substances to the marihuana amount consistent with the highest offense level for such substances provided in the Drug Quantity Table. See United States v. Gurgliolo, 894 F.2d 56 (3d Cir. 1990). The amendment inserts an additional listing under "Secobarbital and Other Schedule I and II Depressants" to reflect that glutethimide has been changed from a Schedule III to a Schedule II controlled substance under 21 C.F.R. §1308.12. In addition, the amendment simplifies the application of the Drug Equivalency Table by referencing the conversions to one substance (marihuana) rather than to four substances; the use of one referent rather than four makes no substantive change but will make the required computations easier and reduce the likelihood of computational error. Finally, the amendment sets forth the rationale for the Commission's treatment of fewer than fifty marihuana plants.

Effective Date: The effective date of this amendment is November 1, 1991.

- 397. Amendment:** Section 2D1.7 is amended in the title by deleting "Interstate Sale and Transporting" and inserting in lieu thereof "Sale or Transportation".

Section 2D1.7 is amended by inserting the following additional subsection:

"(b) Cross Reference

- (1) If the offense involved a controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) or §2D2.1 (Unlawful Possession), as appropriate, if the resulting offense level is greater than that determined above."

The Commentary to §2D1.7 captioned "Statutory Provision" is amended by deleting "21 U.S.C. § 857" and inserting in lieu thereof "21 U.S.C. § 863 (formerly 21 U.S.C. § 857)".

The Commentary to §2D1.7 is amended by inserting the following at the end:

"Application Note:

1. The typical case addressed by this guideline involves small-scale trafficking in drug paraphernalia (generally from a retail establishment that also sells items that are not unlawful). In a case involving a large-scale dealer, distributor, or manufacturer, an upward departure may be warranted. Conversely, where the offense was not committed for pecuniary gain (e.g., transportation for the defendant's personal use), a downward departure may be warranted."

Reason for Amendment: This amendment revises the title of the guideline to address the expanded coverage of the underlying statute, as amended by Section 2401 of the Crime Control Act of 1990 (Public Law 101-647), adds a cross reference to address cases in which the

underlying conduct involves a controlled substance offense, and adds an application note to specify the "heartland" types of cases addressed by the offense level set forth in the guideline.

Effective Date: The effective date of this amendment is November 1, 1991.

- 398. Amendment:** Section 2E2.1 is amended in the title by deleting ", Financing, or Collecting an Extortionate Extension of Credit" and inserting in lieu thereof "or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means".

Section 2E2.1(b)(3)(A) is amended by deleting "the commission of the offense or an escape from the scene of the crime" and inserting in lieu thereof "commission of the offense or to facilitate escape".

Reason for Amendment: This amendment corrects an error in the title of this section, and conforms the wording in subsection (b)(3)(A) with the wording used in subsection (b)(3)(B) and other guidelines.

Effective Date: The effective date of this amendment is November 1, 1991.

- 399. Amendment:** The Commentary to §2E5.2 captioned "Application Notes" is amended in Note 1 by deleting "had a fiduciary obligation under the Employee Retirement Income Security Act" and inserting in lieu thereof "was a fiduciary of the benefit plan"; and by deleting "would" and inserting in lieu thereof "will".

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

- "2. 'Fiduciary of the benefit plan' is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.";

by inserting the text of former Note 2 as the last sentence of Note 1; and, in the caption, by deleting "Notes" and inserting in lieu thereof "Note".

Reason for Amendment: This amendment makes an editorial improvement in the language of this commentary.

Effective Date: The effective date of this amendment is November 1, 1991.

- 400. Amendment:** Section 2G1.2(b) is amended by inserting the following additional subdivision:

- "(4) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels."

Sections 2G1.2(c) and (d) are transposed and redesignated accordingly.

Section 2G1.2(c) (formerly §2G1.2(d)) is amended in the caption by deleting "Reference" and inserting in lieu thereof "References"; and by inserting the following additional subsections:

- "(2) If the offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply §2A3.1 (Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse).
- (3) If neither subsection (c)(1) nor (c)(2) is applicable, and the offense did not involve transportation for the purpose of prostitution, apply §2A3.2 (Criminal Sexual Abuse of a Minor or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate."

Section 2G1.2(c)(1) (formerly §2G1.2(d)(1)) is amended by deleting "the defendant" immediately before "causing".

The Commentary to §2G1.2 captioned "Application Notes" is amended by renumbering Note 5 as Note 7, and by inserting the following additional notes:

- "5. Subsection (b)(4) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.
6. If the adjustment in subsection (b)(4) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill)."

The commentary to §2G1.2 captioned "Application Notes" is amended in Note 1 by deleting "(c)(1)" and inserting in lieu thereof "(d)(1)"; and in Note 7 (formerly Note 5) by deleting "(d)(1)" and inserting in lieu thereof "subsection (c)(1)".

The Commentary to §2G2.1 captioned "Application Notes" is amended in Note 2 by deleting "Specific offense characteristic" and inserting in lieu thereof "Subsection".

The Commentary to §2G2.1 captioned "Application Notes" is amended by deleting:

- "3. If specific offense characteristic (b)(2) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill)."

and inserting in lieu thereof:

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

Reason for Amendment: This amendment adds a specific offense characteristic and commentary to provide consistent treatment for similar conduct among the guidelines in this part, conforms the language used in §2G1.2(c)(1) (formerly §2G1.2(d)(1)) with the language used elsewhere in the guidelines, and makes editorial changes to improve clarity. In addition, as statutes referenced to §2G1.2 may be used as "jurisdictional" statutes in some cases to prosecute conduct that is more appropriately covered under other guidelines (§§2A3.1, 2A3.2, and 2A3.4), this amendment inserts cross references as §2G1.2(c)(2) and (3) to provide consistent offense levels in such cases.

Effective Date: The effective date of this amendment is November 1, 1991.

401. Amendment: The Commentary to §2J1.2 captioned "Application Notes" is amended in Note 1 by deleting:

" , an indictment or verdict based upon perjury, false testimony, or other false evidence,"

and inserting in lieu thereof:

"; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence;"

The Commentary to §2J1.2 captioned "Application Notes" is amended by inserting the following additional note:

"5. The inclusion of 'property damage' under subsection (b)(1) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (e.g., to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry."

The Commentary to §2J1.2 captioned "Background" is amended in the second paragraph by deleting:

"assist another person to escape punishment for a crime he has committed, an alternative reference to the guideline for accessory after the fact is made",

and inserting in lieu thereof:

"avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person".

The Commentary to §2J1.3 captioned "Application Notes" is amended in Note 1 by deleting:

" , an indictment or verdict based upon perjury, false testimony, or other false evidence,"

and inserting in lieu thereof:

"; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence;"

The Commentary to §2J1.5 captioned "Application Notes" is amended in Note 1 by deleting:

", an indictment or verdict based upon perjury, false testimony, or other false evidence,"

and inserting in lieu thereof:

"; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence;"

The Commentary to §2J1.8 captioned "Application Notes" is amended in Note 1 by deleting:

", an indictment or verdict based upon perjury, false testimony, or other false evidence,"

and inserting in lieu thereof:

"; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence;"

Reason for Amendment: This amendment clarifies the types of circumstances to which §§2J1.2(b)(1) and 2J1.2(c)(1) apply. This amendment also clarifies the scope of the enhancement for "substantial interference with the administration of justice" in §§2J1.2, 2J1.3, 2J1.5, and 2J1.8.

Effective Date: The effective date of this amendment is November 1, 1991.

402. Amendment: Section 2J1.3 is amended by inserting the following additional subsection:

"(d) Special Instruction

- (1) In the case of counts of perjury or subornation of perjury arising from testimony given, or to be given, in separate proceedings, do not group the counts together under §3D1.2 (Groups of Closely-Related Counts)."

The Commentary to §2J1.3 captioned "Application Notes" is amended by inserting the following additional note:

- "5. 'Separate proceedings,' as used in subsection (d)(1), includes different proceedings in the same case or matter (e.g., a grand jury proceeding and a trial, or a trial and retrial), and proceedings in separate cases or matters (e.g., separate trials of codefendants), but does not include multiple grand jury proceedings in the same case."

Reason for Amendment: This amendment provides a special instruction addressing the appropriate treatment of multiple instances of perjury under Chapter Three, Part D (Multiple Counts).

Effective Date: The effective date of this amendment is November 1, 1991.

403. Amendment: The Commentary to §2J1.6 captioned "Application Notes" is amended by deleting:

"2. By statute, a term of imprisonment imposed for this offense runs consecutively to any other term of imprisonment imposed. 18 U.S.C. § 3146(b)(1).";

by renumbering Note 3 as Note 2; and by inserting the following additional notes:

"3. In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. See §5G1.3(a). The guideline range for the failure to appear count is to be determined independently and the grouping rules of §§ 3D1.2-3D1.5 do not apply.

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.

4. In some cases, the defendant may be sentenced on the underlying offense (the offense in respect to which the defendant failed to appear) before being sentenced on the failure to appear offense. In such cases, criminal history points for the sentence imposed on the underlying offense are to be counted in determining the guideline range on the failure to appear offense only where the offense level is determined under subsection (a)(1) (i.e., where the offense constituted a failure to report for service of sentence).".

Reason for Amendment: This amendment inserts an application note (Note 3) to clarify the interaction of §§2J1.6, 3C1.1, 5G1.2, and 5G1.3; and inserts an application note (Note 4) to clarify the interaction of §§2J1.6 and 4A1.1.

Effective Date: The effective date of this amendment is November 1, 1991.

- 404. Amendment:** Section 2K1.1 is amended in the title by deleting "Explosives" and inserting in lieu thereof "Explosive Materials".

Section 2K1.2 is amended in the title by deleting "Explosives" and inserting in lieu thereof "Explosive Materials".

The Commentary to §2K1.4 captioned "Application Notes" is amended by inserting the following additional note:

- "3. 'Explosives,' as used in the title of this guideline, includes any explosive, explosive material, or destructive device."

Section 2K1.5(c)(1) is amended by inserting "or possessed" immediately following "used"; and by inserting ", as appropriate," immediately before "if the".

Reason for Amendment: This amendment revises the titles of §2K1.1 and §2K1.2, and the Commentary to §2K1.4 to clarify that the term explosives, as used in those guidelines, includes explosives materials. In addition, this amendment clarifies the application of the cross reference in §2K1.5(c)(1).

Effective Date: The effective date of this amendment is November 1, 1991.

- 405. Amendment:** The Commentary to §2K2.4 captioned "Application Notes" is amended in Note 2 by deleting "§2B3.1(b)(2)" and inserting in lieu thereof "§2B3.1(b)(2)(A)-(F)"; and by inserting the following additional paragraphs at the end:

Provided, that where the maximum of the guideline range from Chapter Five, Part A (Sentencing Table) determined by an offense level adjusted under the procedure described in the preceding paragraph, plus the term of imprisonment required under 18 U.S.C. § 924(c) or § 929(a), is less than the maximum of the guideline range that would apply to the underlying offense absent such adjustment, the procedure described in the preceding paragraph does not apply. Instead, the guideline range applicable to the underlying offense absent such adjustment is to be used after subtracting the term of imprisonment imposed under 18 U.S.C. § 924(c) or § 929(a) from both the minimum and maximum of such range.

Example: A defendant, is to be sentenced under the robbery guideline; his unadjusted offense level from §2B3.1 is 30, including a 7-level enhancement for discharging a firearm; no Chapter Three adjustments are applicable; and his criminal history category is Category IV. His unadjusted guideline range from Chapter Five, Part A (Sentencing Table) is 135-168 months. This defendant has also been convicted under 18 U.S.C. § 924(c) arising from the possession of a weapon during the robbery, and therefore must be sentenced to an additional consecutive five-year term of imprisonment. The

defendant's adjusted guideline range, which takes into account the conviction under 18 U.S.C. § 924(c) by eliminating the 7-level weapon enhancement, is 70-87 months. Because the maximum of the defendant's adjusted guideline range plus the five year consecutive sentence (87 months + 60 months = 147 months) is less than the maximum of the defendant's unadjusted guideline range (168 months), the defendant is to be sentenced using the unadjusted guideline range after subtracting the 60 month sentence to be imposed under 18 U.S.C. § 924(c) from both the minimum and maximum of the unadjusted range (e.g., 135 months - 60 months = 75 months; 168 months - 60 months = 108 months). A sentence imposed for the underlying offense using the guideline range determined in this manner (75-108 months) when combined with the consecutive sentence imposed under 18 U.S.C. § 924(c) or § 929(a), will produce the appropriate total term of imprisonment."

Reason for Amendment: This amendment provides an additional instruction for the determination of the offense level in cases in which the defendant is convicted under 18 U.S.C. § 924(c) or §929(a) in addition to a count for the offense in respect to which the firearm was used or possessed. The amendment is designed to prevent the anomalous result of the total punishment being less when there are convictions on both such counts than if the defendant was convicted only of the offense in respect to which the weapon was used or possessed.

Effective Date: The effective date of this amendment is November 1, 1991.

406. Amendment: The Commentary to §2P1.1 captioned "Application Notes" is amended by inserting the following additional note:

"6. If the adjustment in subsection (b)(1) applies as a result of conduct that involves an official victim, do not apply §3A1.2 (Official Victim)."

Reason for Amendment: This amendment addresses the issue raised in United States v. Dugan, 912 F.2d 942 (8th Cir. 1990) concerning the interaction between §2P1.1(b)(1) and §3A1.2 by expressly providing that where an enhancement from subsection (b)(1) applies, §3A1.2 does not apply.

Effective Date: The effective date of this amendment is November 1, 1991.

407. Amendment: Section 2Q2.1(b)(3)(A) is amended by deleting "specially protected" immediately before "fish".

Reason for Amendment: This amendment removes language inadvertently retained when this guideline was consolidated with the former §2Q2.2.

Effective Date: The effective date of this amendment is November 1, 1991.

408. Amendment: The Commentary to §2T1.2 captioned "Background" is amended in the third paragraph by deleting:

"difficulty of computing the tax loss, which may become the subject of protracted civil litigation. It is expected that the measure used will generally understate the tax due, and

will not call for a sentence approaching the maximum unless very large incomes are involved. Thus, the burden will remain on the prosecution to provide a more accurate estimate of the tax loss if it seeks enhanced punishment",

and inserting in lieu thereof:

"potential difficulty of determining the amount of tax the taxpayer owed. It is expected that this alternative measure generally will understate the amount of tax owed".

Reason for Amendment: This amendment clarifies the meaning of the commentary and deletes surplus material.

Effective Date: The effective date of this amendment is November 1, 1991.

409. Amendment: Section 2T1.6 is amended by inserting the following additional subsection:

"(b) Cross Reference

- (1) Where the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it, apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) if the resulting offense level is greater than that determined above."

The Commentary to §2T1.6 captioned "Application Note" is amended in Note 1 by deleting "In such instances, an upward departure may be warranted" and inserting in lieu thereof "Subsection (b)(1) addresses such cases".

Reason for Amendment: This amendment replaces the recommendation in the commentary of this guideline concerning consideration of an upward departure where the court finds that the offense involved embezzlement of an employee's funds with a cross reference that provides for the application of §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) in such cases where that guideline results in the greater offense level.

Effective Date: The effective date of this amendment is November 1, 1991.

410. Amendment: Section 2T3.1(a) is amended by deleting "Level from §2T4.1 (Tax Table) corresponding to the tax loss." and inserting in lieu thereof:

- "(1) The level from §2T4.1 (Tax Table) corresponding to the tax loss, if the tax loss exceeded \$1,000; or
- (2) 5, if the tax loss exceeded \$100 but did not exceed \$1,000; or
- (3) 4, if the tax loss did not exceed \$100."

Section 2T3.1 is amended by inserting the following additional subsection:

"(b) Specific Offense Characteristic

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

Section 2T3.2(a) is amended by deleting "Level from §2T4.1 (Tax Table) corresponding to the tax loss." and inserting in lieu thereof:

- "(1) The level from §2T4.1 (Tax Table) corresponding to the tax loss, if the tax loss exceeded \$1,000; or
- (2) 5, if the tax loss exceeded \$100 but did not exceed \$1,000; or
- (3) 4, if the tax loss did not exceed \$100."

Section 2T3.2 is amended by inserting the following additional subsection:

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

Reason for Amendment: This amendment lowers the offense level for the least serious offenses (evasion of import duty of \$1,000 or less without use of sophisticated means) to provide an offense level equal to the offense level for theft of the same amount without more than minimal planning. In addition, it adds an adjustment for "sophisticated means" to conform with other tax evasion guidelines (e.g., §2T1.1).

Effective Date: The effective date of this amendment is November 1, 1991.

411. Amendment: Section 2X1.1(a) and (b)(3) are amended by deleting "object" wherever it appears and inserting in lieu thereof in each instance "substantive".

Section 2X1.1(b)(1) is amended by inserting "substantive" immediately before "offense".

Section 2X1.1(b)(2) is amended by inserting "substantive" immediately before "offense".

Section 2X1.1(b)(3) is amended by deleting "the offense" the first two times it appears and inserting in lieu thereof in each instance "the substantive offense".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 2 by deleting:

"Under §2X1.1(a) the base offense level will be the same as that for the object offense which the defendant solicited, or conspired or attempted to commit.",

and inserting in lieu thereof:

"'Substantive offense,' as used in this guideline, means the offense that the defendant was convicted of soliciting, attempting, or conspiring to commit. Under §2X1.1(a), the base offense level will be the same as that for the substantive offense."

The Commentary to §2X1.1 is amended by deleting "object" wherever it appears and inserting in lieu thereof "substantive".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 4 in the second paragraph by deleting "or (2)" and inserting in lieu thereof ", (b)(2), or (b)(3)(A)".

The Commentary to §2X1.1 captioned "Background" is amended by deleting "necessary acts of" and inserting in lieu thereof "acts necessary for".

Reason for Amendment: This amendment replaces the term "object offense" with the more commonly used term "substantive offense," and makes clarifying and editorial changes.

Effective Date: The effective date of this amendment is November 1, 1991.

412. Amendment: Section 2X5.1 is amended by inserting, immediately before the period at the end of the second sentence, the following:

", except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable".

The Commentary to §2X5.1 is amended by inserting, immediately after "Commentary", the following:

"Application Note:

1. Guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline include: §5B1.3 (Conditions of Probation); §5B1.4 (Recommended Conditions of Probation and Supervised Release); §5D1.1 (Imposition of a Term of Supervised Release); §5D1.2 (Term of Supervised Release); §5D1.3 (Conditions of Supervised Release); §5E1.1 (Restitution); §5E1.3 (Special Assessments); §5E1.4 (Forfeiture); Chapter Five, Part F (Sentencing Options); §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment); Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements)."

The Commentary to §2X5.1 captioned "Background" is amended by inserting the following additional paragraph:

" The sentencing guidelines apply to convictions under 18 U.S.C. § 13 (Assimilative Crimes Act) and 18 U.S.C. § 1153 (Indian Major Crimes Act); see 18 U.S.C. § 3551(a), as amended by section 1602 of Public Law 101-647."

Reason for Amendment: This amendment inserts an application note to clarify that, in the case of an offense for which there is no sufficiently analogous offense guideline, any guidelines and policy statements that can be meaningfully applied in the absence of a Chapter Two offense guideline remain applicable. This amendment also clarifies the applicability of the sentencing guidelines to convictions under 18 U.S.C. §§ 13 (Assimilative Crimes Act) and 1153 (Indian

Major Crimes Act). Section 1602 of the Crime Control Act of 1990 (Public Law 101-647) resolved this issue by amending 18 U.S.C. § 3551(a) to provide expressly that Chapter 227 of Title 18, United States Code (including the sentencing guidelines) applies to convictions under these statutes.

Effective Date: The effective date of this amendment is November 1, 1991.

413. Amendment: The Commentary to §3A1.3 captioned "Application Notes" is amended by deleting:

"2. This adjustment applies to any offense in which a victim was physically restrained in the course of the offense, except where such restraint is an element of the offense, specifically incorporated into the base offense level, or listed as a specific offense characteristic."

and inserting in lieu thereof:

"2. Do not apply this adjustment where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself (e.g., this adjustment does not apply to offenses covered by §2A4.1 (Kidnapping, Abduction, Unlawful Restraint))."

Reason for Amendment: This amendment clarifies the application of this guideline.

Effective Date: The effective date of this amendment is November 1, 1991.

414. Amendment: The Commentary to §3B1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional sentence at the end:

"A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant."

Reason for Amendment: This amendment clarifies the operation of this guideline in accord with the holding in United States v. Carroll, 893 F.2d 1502 (6th Cir. 1990).

Effective Date: The effective date of this amendment is November 1, 1991.

415. Amendment: The Commentary to §3C1.1 captioned "Application Notes" is amended in Note 1 in the last sentence by deleting ", the defendant's testimony and" and inserting in lieu thereof "in respect to alleged false testimony or statements by the defendant, such testimony or".

Reason for Amendment: This amendment more precisely states the meaning of this commentary.

Effective Date: The effective date of this amendment is November 1, 1991.

416. Amendment: The Commentary to §3C1.2 captioned "Application Notes" is amended by redesignating note 3 as note 4; and by inserting the following additional note:

- "3. 'During flight' is to be construed broadly and includes preparation for flight. Therefore, this adjustment also is applicable where the conduct occurs in the course of resisting arrest."

Reason for Amendment: This amendment clarifies that reckless endangerment in the course of resisting arrest that does not receive a 3-level enhancement under §3A1.2 (Official Victim) may be considered under this section.

Effective Date: The effective date of this amendment is November 1, 1991.

- 417. Amendment:** Section 3D1.2(d) is amended in the second paragraph by inserting ", 2C1.7" immediately following "2C1.2"; by inserting ", 2D1.11, 2D1.13" immediately following "2D1.5"; and by deleting "2K2.2" and inserting in lieu thereof "2K2.1".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 2 by inserting the following immediately after the second sentence:

"For offenses in which there are no identifiable victims (e.g., drug or immigration offenses, where society at large is the victim), the 'victim' for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related. Where one count, for example, involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the sale of controlled substances and the other involves an immigration law violation, the counts are not grouped together because different societal interests are harmed.";

and by deleting the last sentence as follows:

"Thus, for so-called 'victimless' crimes (crimes in which society at large is the victim), the grouping decision must be based primarily upon the nature of the interest invaded by each offense."

The Commentary to §3D1.2 captioned "Application Notes" is amended by deleting Note 8, inserting the text of deleted Note 8 as the second paragraph of Note 5, and by renumbering Note 9 as Note 8.

The Commentary to §3D1.2 captioned "Application Notes" is amended in the third (formerly second) paragraph of Note 5 by deleting "accessory after the fact for" and inserting in lieu thereof "a conspiracy to commit".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 6 by inserting the following additional paragraph as the second paragraph:

"A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d)."

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 1 by deleting "gun was discharged" and inserting in lieu thereof "firearm was displayed".

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 2 by deleting:

"The base offense level is 6, and there is an aggravator of 1 level for property value. However, because the conduct involved repeated acts with some planning, the offense level is raised to 8 (§2F1.1(b)(2)(B)). The combined offense level therefore is 8.",

and inserting in lieu thereof:

"The base offense level is 6; 1 level is added because of the value of the property (§2F1.1(b)(1)); and 2 levels are added because the conduct involved repeated acts with some planning (§2F1.1(b)(2)(A)). The resulting offense level is 9."

The Commentary following §3D1.5 captioned "Illustrations of the Operation of the Multiple-Count Rules" is amended in example 4 by deleting "§2B4.1 (Commercial Bribery)" and inserting in lieu thereof "§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery)".

Reason for Amendment: This amendment revises §3D1.2(d) to reflect amendments to the offense guidelines of Chapter Two; clarifies the commentary in Note 1 to expressly state that a conspiracy, attempt, or solicitation to commit an offense covered under subsection (d) is also covered under subsection (d); clarifies the commentary in Note 2 with respect to the meaning of the term "victim" where society at large is the victim; merges former Note 8 with Note 5 for greater clarity; conforms two illustrations of the operation of the guidelines to the guidelines, as amended; corrects an inaccurate illustration; and corrects a reference to the title of an offense guideline.

Effective Date: The effective date of this amendment is November 1, 1991.

418. Amendment: The Commentary to Chapter Five, Part A (Sentencing Table) captioned "Application Notes" is amended in Note 3 by inserting ", except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal)" immediately before the period at the end of the first sentence.

Reason for Amendment: This amendment conforms the commentary of this section to the provisions concerning the determination of the criminal history category set forth in §§4B1.1 and 4B1.4. No substantive change results.

Effective Date: The effective date of this amendment is November 1, 1991.

419. Amendment: Section 5F1.3 is amended by deleting:

"If the defendant was convicted of a felony and sentenced to probation, the court must order one or more of the following sanctions: a fine, restitution, or community service. 18 U.S.C. § 3563(a)(2)."

Reason for Amendment: This amendment deletes a sentence in this guideline that is unnecessary and no longer accurate because of a change in the statute. The correct reference is found at §5B1.3(a).

Effective Date: The effective date of this amendment is November 1, 1991.

420. Amendment: Chapter Five, Part K, Subpart 2 is amended by inserting an additional policy statement as §5K2.16 (Voluntary Disclosure of Offense (Policy Statement)).

Reason for Amendment: This amendment sets forth an additional policy statement regarding a mitigating factor that may warrant a downward departure.

Effective Date: The effective date of this amendment is November 1, 1991.

421. Amendment: Appendix A (Statutory Index) is amended by inserting, in the appropriate place by title and section, the following:

"8 U.S.C. § 1160(b)(7)(A)	2L2.1, 2L2.2";
"18 U.S.C. § 225	2B1.1, 2B4.1, 2F1.1";
"18 U.S.C. § 403	2J1.1";
"18 U.S.C. § 1032	2B4.1, 2F1.1";
"18 U.S.C. § 1346	2C1.7";
"18 U.S.C. § 1517	2J1.2";
"18 U.S.C. § 2257	2G2.5";
"21 U.S.C. § 841(g)(1)	2D1.11, 2D1.13";
"21 U.S.C. § 843(a)(4)(B)	2D1.13";
"21 U.S.C. § 843(a)(6), (7)	2D1.12";
"21 U.S.C. § 843(a)(8)	2D1.13";
"21 U.S.C. § 859	2D1.2";
"21 U.S.C. § 860	2D1.2";
"21 U.S.C. § 861	2D1.2";
"21 U.S.C. § 863	2D1.7";
"42 U.S.C. § 1320a-7b	2B1.1, 2B4.1, 2F1.1".

Appendix A (Statutory Index) is amended in the line beginning "18 U.S.C. § 371" by inserting "2C1.7," immediately before "2D1.4";

by deleting:

"18 U.S.C. § 842(a)-(i)	2K1.3",
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and inserting in lieu thereof:

"18 U.S.C. § 842(a)-(e)	2K1.3
18 U.S.C. § 842(f)	2K1.6
18 U.S.C. § 842(g)	2K1.6
18 U.S.C. § 842(h), (i)	2K1.3";

by deleting:

"18 U.S.C. § 844(a)	2K1.3
18 U.S.C. § 844(b)	2K1.1, 2K1.2, 2K1.3";

in the line beginning "18 U.S.C. § 844(d)" by deleting "§2K1.6" and inserting in lieu thereof "§2K1.3";

by deleting:

"18 U.S.C. § 922(a)(1)	2K2.1, 2K2.2
18 U.S.C. § 922(a)(2)	2K2.2
18 U.S.C. § 922(a)(3)	2K2.1
18 U.S.C. § 922(a)(4)	2K2.1
18 U.S.C. § 922(a)(5)	2K2.2
18 U.S.C. § 922(a)(6)	2K2.1
18 U.S.C. § 922(b)-(d)	2K2.2
18 U.S.C. § 922(e)	2K2.1, 2K2.2
18 U.S.C. § 922(f)	2K2.1, 2K2.2
18 U.S.C. § 922(g)	2K2.1
18 U.S.C. § 922(h)	2K2.1
18 U.S.C. § 922(i)-(l)	2K2.1, 2K2.2
18 U.S.C. § 922(m)	2K2.2
18 U.S.C. § 922(n)	2K2.1
18 U.S.C. § 922(o)	2K2.1, 2K2.2
18 U.S.C. § 923(a)	2K2.2
18 U.S.C. § 924(a)(1)(A)	2K2.2
18 U.S.C. § 924(a)(1)(C)	2K2.1, 2K2.2
18 U.S.C. § 924(a)(3)(A)	2K2.2
18 U.S.C. § 924(b)	2K2.3",

and inserting in lieu thereof:

"18 U.S.C. § 922(a)-(p)	2K2.1
18 U.S.C. § 922(q)	2K2.5
18 U.S.C. § 922(r)	2K2.1
18 U.S.C. § 923	2K2.1
18 U.S.C. § 924(a)	2K2.1
18 U.S.C. § 924(b)	2K2.1";

by deleting:

"18 U.S.C. § 924(f)	2K2.3
18 U.S.C. § 924(g)	2K2.3",

and inserting in lieu thereof:

"18 U.S.C. § 924(e)	2K2.1 (<u>see</u> also 4B1.4)
18 U.S.C. § 924(f)	2K2.1

18 U.S.C. § 924(g) 2K2.1";

in the line beginning "18 U.S.C. § 1005" by deleting ", 2S1.3";

in the line beginning "18 U.S.C. § 1341" by inserting "2C1.7," immediately before "2F1.1";

in the line beginning "18 U.S.C. § 1342" by inserting "2C1.7," immediately before "2F1.1";

in the line beginning "18 U.S.C. § 1343" by inserting "2C1.7," immediately before "2F1.1";

in the line beginning "18 U.S.C. § 1460" by deleting "2G2.2,";

in the line beginning "18 U.S.C. § 1543" by inserting "2L2.3," immediately before "2L2.4";

in the line beginning "18 U.S.C. § 1716" by inserting "2K1.3," immediately before "2K3.2";

in the line beginning "18 U.S.C. § 2252" by inserting ", 2G2.4" immediately following "2G2.2";

by deleting:

"21 U.S.C. § 841(d) 2D1.1",

and inserting in lieu thereof:

"21 U.S.C. § 841(d)(1), (2) 2D1.11
21 U.S.C. § 841(d)(3) 2D1.13";

by deleting:

"21 U.S.C. § 842(a) 2D3.1, 2D3.2, 2D3.3",

and inserting in lieu thereof:

"21 U.S.C. § 842(a)(1) 2D3.1
21 U.S.C. § 842(a)(2) 2D3.3
21 U.S.C. § 842(a)(9), (10) 2D3.5";

in the line beginning "21 U.S.C. § 843(a)(1), (2), (4)" by deleting ", (1), (2), (4)" and inserting in lieu thereof "(1), (2)";

by deleting:

"21 U.S.C. § 960 2D1.1",

and inserting in lieu thereof:

"21 U.S.C. § 960(a), (b) 2D1.1
21 U.S.C. § 960(d)(1), (2) 2D1.11";

in the line beginning 26 U.S.C. § 5685 by deleting "2K1.6," and by deleting "2K2.2" and inserting in lieu thereof "2K2.1";

by deleting:

"26 U.S.C. § 5861(a)	2K2.2
26 U.S.C. § 5861(b)	2K2.1
26 U.S.C. § 5861(c)	2K2.1
26 U.S.C. § 5861(d)	2K2.1
26 U.S.C. § 5861(e)	2K2.2
26 U.S.C. § 5861(f)	2K2.2
26 U.S.C. § 5861(g)	2K2.2
26 U.S.C. § 5861(h)	2K2.1
26 U.S.C. § 5861(i)	2K2.1
26 U.S.C. § 5861(j)	2K2.1, 2K2.2
26 U.S.C. § 5861(k)	2K2.1
26 U.S.C. § 5861(l)	2K2.2
26 U.S.C. § 5871	2K2.1, 2K2.2",

and inserting in lieu thereof:

"26 U.S.C. § 5861(a)-(l)	2K2.1
26 U.S.C. § 5871	2K2.1";

by deleting:

"31 U.S.C. § 5316(a)	2S1.3",
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and inserting in lieu thereof:

"31 U.S.C. § 5316	2S1.4";
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by deleting:

"46 U.S.C. § App. 1903	2D1.1",
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and inserting in lieu thereof:

"46 U.S.C. App. § 1903(a)	2D1.1
46 U.S.C. App. § 1903(g)	2D1.1
46 U.S.C. App. § 1903(j)	2D1.4"; and

in the line beginning "47 U.S.C. § 605" by inserting "2B5.3," immediately before "2H3.1".

The Commentary to §2D1.2 captioned "Statutory Provisions" is amended by deleting "21 U.S.C. §§ 845, 845a, 845b" and inserting in lieu thereof "21 U.S.C. §§ 859 (formerly 21 U.S.C. § 845), 860 (formerly 21 U.S.C. § 845a), 861 (formerly 21 U.S.C. § 845b)".

The Commentary to §2D3.1 captioned "Statutory Provision" is amended by deleting "843(a). For additional statutory provision(s), see Appendix A (Statutory Index)." and inserting in lieu thereof "842(a)(1), 843(a)(1), (2)."; and by deleting "Provision" and inserting in lieu thereof "Provisions".

The Commentary to §2D3.2 captioned "Statutory Provision" is amended by deleting "842" and inserting in lieu thereof "842(b), 843(a)(3)"; and by deleting "Provision" and inserting in lieu thereof "Provisions".

The Commentary to §2D3.3 captioned "Statutory Provision" is amended by deleting "842" and inserting in lieu thereof "842(a)(2)".

Reason for Amendment: This amendment makes the statutory index more comprehensive, and conforms it to the offense guidelines, as amended.

Effective Date: The effective date of this amendment is November 1, 1991.

422. Amendment: The Guidelines Manual is amended by inserting an additional chapter containing guidelines, policy statements, and accompanying commentary as Chapter Eight (Sentencing of Organizations).

Section 2B4.1 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment."

Section 2C1.1 is amended by inserting the following additional subsection:

"(d) Special Instruction for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment."

Section 2C1.2 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the value of the unlawful payment."

Section 2E5.1 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) if a bribe, the value of the benefit received or to be received in return for the unlawful payment; or (C) if a bribe, the consequential damages resulting from the unlawful payment."

Section 2E5.6 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) if a bribe, the value of the benefit received or to be received in return for the unlawful payment; or (C) if a bribe, the consequential damages resulting from the unlawful payment."

Section 2R1.1 is amended by inserting the following additional subsection:

"(d) Special Instructions for Fines - Organizations

- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use 20 percent of the volume of affected commerce.
- (2) When applying §8C2.6 (Minimum and Maximum Multipliers), neither the minimum nor maximum multiplier shall be less than 0.75.
- (3) In a bid-rigging case in which the organization submitted one or more complementary bids, use as the organization's volume of commerce the greater of (A) the volume of commerce done by the organization in the goods or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy."

The Commentary to §2R1.1 captioned "Application Notes" is amended by deleting:

- "3. In setting the fine for an organization, the court should consider whether the organization encouraged or took steps to prevent the violation, whether high-level management was aware of the violation, and whether the organization previously engaged in antitrust violations."

and inserting in lieu thereof:

- "3. The fine for an organization is determined by applying Chapter Eight (Sentencing of Organizations). In selecting a fine for an organization within the guideline fine range, the court should consider both the gain to the organization from the

offense and the loss caused by the organization. It is estimated that the average gain from price-fixing is 10 percent of the selling price. The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices. Because the loss from price-fixing exceeds the gain, subsection (d)(1) provides that 20 percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under §8C2.4(a)(3). The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss. In cases in which the actual monopoly overcharge appears to be either substantially more or substantially less than 10 percent, this factor should be considered in setting the fine within the guideline fine range."

The Commentary to §2R1.1 captioned "Background" is amended by deleting the last paragraph as follows:

" Substantial fines are an essential part of the sanction. It is estimated that the average additional profit attributable to price fixing is 10 percent of the selling price. The Commission has specified that a fine from two to five times that amount be imposed on organizational defendants as a deterrent because of the difficulty in identifying violators. Additional monetary penalties can be provided through private treble damage actions. A lower fine is specified for individuals. The Commission believes that most antitrust defendants have the resources and earning capacity to pay these fines, at least over time. The statutory maximum fine is \$250,000 for individuals and \$1,000,000 for organizations, but is increased when there are convictions on multiple counts.",

and inserting in lieu thereof:

" Substantial fines are an essential part of the sentence. For an individual, the guideline fine range is from one to five percent of the volume of commerce, but not less than \$20,000. For an organization, the guideline fine range is determined under Chapter Eight (Sentencing of Organizations), but pursuant to subsection (d)(2), the minimum multiplier is at least 0.75. This multiplier, which requires a minimum fine of 15 percent of the volume of commerce for the least serious case, was selected to provide an effective deterrent to antitrust offenses. At the same time, this minimum multiplier maintains incentives for desired organizational behavior. Because the Department of Justice has a well-established amnesty program for organizations that self-report antitrust offenses, no lower minimum multiplier is needed as an incentive for self-reporting. A minimum multiplier of at least 0.75 ensures that fines imposed in antitrust cases will exceed the average monopoly overcharge.

The Commission believes that most antitrust defendants have the resources and earning capacity to pay the fines called for by this guideline, at least over time on an installment basis. The statutory maximum fine is \$350,000 for individuals and \$10,000,000 for organizations, but is increased when there are convictions on multiple counts."

Section 2S1.1 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:
 - (A) the greater of \$250,000 or 100 percent of the value of the funds if subsections (a)(1) and (b)(1) are used to determine the offense level; or
 - (B) the greater of \$200,000 or 70 percent of the value of the funds if subsections (a)(2) and (b)(1) are used to determine the offense level; or
 - (C) the greater of \$200,000 or 70 percent of the value of the funds if subsection (a)(1) but not (b)(1) is used to determine the offense level; or
 - (D) the greater of \$150,000 or 50 percent of the value of the funds if subsection (a)(2) but not (b)(1) is used to determine the offense level."

Section 2S1.2 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:
 - (A) the greater of \$175,000 or 60 percent of the value of the funds if subsection (b)(1)(A) is used to determine the offense level; or
 - (B) the greater of \$150,000 or 50 percent of the value of the funds if subsection (b)(1)(B) is used to determine the offense level."

Section 2S1.3 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:
 - (A) the greater of \$125,000 or 30 percent of the value of the funds if subsections (a)(1) and (b)(1) are used to determine the offense level; or
 - (B) the greater of \$50,000 or 20 percent of the value of the funds if subsection (a)(1) but not (b)(1) are used to determine the offense level."

Section 2S1.4 is amended by inserting the following additional subsection:

"(c) Special Instruction for Fines - Organizations

- (1) In lieu of the applicable amount from the table in subsection (d) of §8C2.4 (Base Fine), use:
 - (A) the greater of \$50,000 or 20 percent of the value of the funds if subsection (b)(1) or (b)(2) is used to determine the offense level; or
 - (B) the greater of \$15,000 or 10 percent of the value of the funds, otherwise."

Reason for Amendment: This amendment adds guidelines and policy statements to address the sentencing of organizational defendants.

Effective Date: The effective date of this amendment is November 1, 1991.

423. Amendment: Section 1B1.10(c) is amended by deleting:

"(c) *Provided*, however, that a reduction in a defendant's term of imprisonment --

- (1) is not authorized unless the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered by at least six months; and
- (2) may, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered."

and inserting in lieu thereof:

"(c) *Provided*, that a reduction in a defendant's term of imprisonment may, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered."

Section 1B1.10(d) is amended by deleting "and 341" and inserting in lieu thereof "341, 379, and 380".

The Commentary to §1B1.10 captioned "Background" is amended in the fourth paragraph by deleting:

"The requirement in subsection (c)(1) that the maximum of the guideline range be lowered by at least six months for a reduction to be considered",

and inserting in lieu thereof:

"The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion".

Reason for Amendment: This amendment expands the listing in subsection (d) to implement the directive in 28 U.S.C. § 994(u) in respect to the guideline amendments effective November 1, 1991. In addition, the amendment modifies subsection (c) to simplify the operation of this policy statement, expand eligibility under the policy statement to a few additional cases, and remove the potential for an anomalous result.

Effective Date: The effective date of this amendment is November 1, 1991.

424. Amendment: Chapter Five, Part F, is amended by inserting an additional policy statement as §5F1.7 (Shock Incarceration Program (Policy Statement)).

Reason for Amendment: This amendment adds a policy statement at §5F1.7 to reflect the provisions and implementation of 18 U.S.C. § 4046.

Effective Date: The effective date of this amendment is November 1, 1991.

425. Amendment: The Commentary to §6A1.2 is amended by inserting, immediately after "Commentary", the following:

"Application Note:

1. Under Rule 32, Fed.R.Crim. P., if the court intends to consider a sentence outside the applicable guideline range on a ground not identified as a ground for departure either in the presentence report or a pre-hearing submission, it shall provide reasonable notice that it is contemplating such ruling, specifically identifying the ground for the departure. Burns v. United States, __ U.S. __, 111 S.Ct. 2182 (1991).";

and by inserting "Background:" immediately before "In order".

Reason for Amendment: This amendment adds an application note to reflect the recent Supreme Court decision in Burns v. United States, __ U.S. __, 111 S.Ct. 2182 (1991).

Effective Date: The effective date of this amendment is November 1, 1991.

426. Amendment: The Commentary to §2T1.3 captioned "Application Notes" is amended by inserting the following additional note:

- "4. The amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax is calculated as follows: (1) determine the amount, if any, by which the gross income was understated; (2) determine the amount, if any, by which the taxable income was understated; and (3) determine the amount of any false credit(s) claimed (a tax 'credit' is an item that reduces the amount of tax directly; in contrast, a 'deduction' is an item that reduces the amount of taxable income).

Use the amount determined under step (1) or (2), whichever is greater, plus any amount determined under step (3).".

Reason for Amendment: This amendment clarifies the operation of the guideline.

Effective Date: The effective date of this amendment is November 1, 1991.

- 427. Amendment:** Section 7B1.3 is amended by redesignating subsection (c)(1)(1) as (c)(1)(A), (c)(1)(2) as (c)(1)(B), (c)(2)(1) as (c)(2)(A), and (c)(2)(2) as (c)(2)(B).

The Commentary to §7B1.3 captioned "Application Notes" is amended in Note 2 by deleting "§7B1.3(f)(2)" and inserting in lieu thereof "§7B1.3(g)(2)".

The Commentary to §7B1.3 captioned "Application Notes" is amended in Note 3 by deleting "No. 89-10529 (9th Cir. July 3, 1990)" and inserting in lieu thereof "907 F.2d 896 (9th Cir. 1990)".

The Commentary to §7B1.3 captioned "Application Notes" is amended by inserting the following additional note:

- "7. 'Maximum term of imprisonment imposable upon revocation,' as used in subsection (g)(2), refers to the maximum term of imprisonment authorized by statute for the violation of supervised release, not to the maximum of the guideline range."

Reason for Amendment: This amendment clarifies the operation of this policy statement, makes editorial improvements, and corrects a clerical error.

Effective Date: The effective date of this amendment is November 1, 1991.

- 428. Amendment:** The Commentary to §5F1.5 captioned "Background" is amended by deleting the last paragraph as follows:

" The Comprehensive Crime Control Act expressly authorizes promulgation of policy statements regarding the appropriate use of conditions of probation and supervised release. 28 U.S.C. § 994(a)(2)(B). The Act does not expressly grant the authority to issue guidelines on the subject. The appellate review provisions of the Act, however, authorize appeals of occupational restrictions that deviate from the minimum and maximum limitations 'established in the guideline' (emphasis added)."

Reason for Amendment: This amendment deletes an outdated paragraph. Section 7103(b)(3) of Public Law 100-690 amended 28 U.S.C. § 994 by adding subsection (a)(1)(E), which expressly authorizes the Commission to promulgate guidelines addressing occupational restrictions as a condition of probation or supervised release.

Effective Date: The effective date of this amendment is November 1, 1991.

- 429. Amendment:** The Commentary to §1B1.5 captioned "Application Note" is amended in Note 1 by deleting "2D1.2(a)(1), 2H1.2(a)(2)" and inserting in lieu thereof "2D1.2(a)(1), (2), and

2H1.1(a)(2)"; by deleting "§§2A4.1(b)(5)(B), 2Q1.2(b)(5)" and inserting in lieu thereof "§2A4.1(b)(7)"; and by inserting the following additional paragraph:

"A reference may also be to a specific subsection of another guideline; e.g., the reference in §2D1.10(a)(1) to '3 plus the offense level from the Drug Quantity Table in §2D1.1'. In such case, only the specific subsection of that other guideline is used."

The Commentary to §1B1.5 captioned "Application Note" is amended by inserting the following additional notes:

- "2. A reference may require that the offense level be determined under another offense guideline. In such case, the adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and E (Acceptance of Responsibility) are also to be determined in respect to that other offense guideline. For example, a defendant convicted of possession of a firearm by a felon, to which §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) applies, is found to have used that firearm in the commission of a robbery. The cross reference at §2K2.1(c) directs that the robbery offense guideline be used. The adjustments in Chapter Three, Parts A, B and E are to be applied as if the offense of conviction had directly referenced the robbery guideline.
3. A reference to another guideline may direct that such reference is to be used only if it results in a greater offense level. In such cases, the greater offense level means the greater final offense level (i.e., the greater offense level taking into account both the Chapter Two offense level and any applicable Chapter Three adjustments). Although the offense guideline that results in the greater offense level under Chapter Two will most frequently result in the greater final offense level, this will not always be the case. If, for example, a role or abuse of trust adjustment applies to the cross-referenced offense guideline, but not to the guideline initially applied, the greater Chapter Two offense level may not necessarily result in a greater final offense level.
4. A reference may direct that, if the conduct involved another offense, the offense guideline for such other offense is to be applied. Where there is more than one such other offense, the most serious such offense (or group of closely-related offenses in the case of offenses that would be grouped together under §3D1.2(d)) is to be used. For example, if a defendant convicted of possession of a firearm by a felon, to which §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) applies, is found to have possessed that firearm during commission of a series of offenses, the cross reference at §2K2.1(c) is applied to the offense resulting in the greatest offense level.";

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

Reason for Amendment: This amendment clarifies the operation of this guideline.

Effective Date: The effective date of this amendment is November 1, 1991.

430. Amendment: The Commentary to §2H1.1 captioned "Application Notes" is amended by inserting the following additional paragraph as the first paragraph of Note 1:

"'Underlying offense,' as used in this guideline, includes any offense under federal, state, or local law other than an offense that is itself covered under Chapter Two, Part H, Subpart 1, 2, or 4. For example, in the case of a conspiracy to interfere with a person's civil rights (a violation of 18 U.S.C. § 241) that involved an aggravated assault (the use of force) to deny certain rights or benefits in furtherance of discrimination (a violation of 18 U.S.C. § 245), the underlying offense in respect to both the violation of 18 U.S.C. § 241 (to which §2H1.1 applies) and the violation of 18 U.S.C. § 245 (to which §2H1.3 applies) would be the aggravated assault."

The Commentary to §2H1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional paragraph at the end:

"In certain cases, the count of which the defendant is convicted may set forth conduct that constitutes more than one underlying offense (e.g., two instances of assault, or one instance of assault and one instance of arson). In such cases, determine the offense level for the underlying offense by treating each underlying offense as if contained in a separate count of conviction. To determine which of the alternative base offense levels (e.g., §2H1.1(a)(1) or (a)(2)) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to each alternative base offense level. Use whichever results in the greater offense level. Example: The defendant is convicted of one count of conspiracy to violate civil rights that included two level 12 underlying offenses (of a type not grouped together under Chapter Three, Part D). No adjustment from Chapter Three, Parts A, B, or C applies. The base offense level from §2H1.1(a)(1) is 15. The offense level for each underlying offense from §2H1.1(a)(2) is 14 (2 + 12). Under Chapter Three, Part D (Multiple Counts), the two level 14 underlying offenses result in a combined offense level of 16. This offense level is greater than the alternative base offense level of 15 under §2H1.1(a)(1). Therefore, the case is treated as if there were two counts, one for each underlying offense, with a base offense level under §2H1.1(a)(2) of 14 for each underlying offense."

The Commentary to §2H1.1 captioned "Application Notes" is amended in the first sentence of the second paragraph of Note 1 (formerly the first paragraph) by deleting "contained in the particular guideline in Chapter Two) for any underlying criminal conduct" and inserting in lieu thereof "and cross references) from the offense guideline in Chapter Two that most closely corresponds to the underlying offense"; in the last sentence of the second paragraph of Note 1 (formerly the first paragraph) by deleting "an offense" and "that offense" and inserting in lieu thereof "arson" in each instance.

Reason for Amendment: This amendment clarifies the operation of this guideline.

Effective Date: The effective date of this amendment is November 1, 1991.

- 431. Amendment:** The Commentary to §2J1.7 captioned "Background" is amended by deleting the first paragraph as follows:

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

and inserting in lieu thereof:

"An enhancement under 18 U.S.C. § 3147 may be imposed only after sufficient notice to the defendant by the government or the court, and applies only in the case of a conviction for a federal offense that is committed while on release on another federal charge."

Reason for Amendment: This amendment corrects the description in the Background Commentary of the operation of the statute to which this guideline applies.

Effective Date: The effective date of this amendment is November 1, 1991.

- 432. Amendment:** The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 1 by inserting "or reckless" immediately before "conduct".

The Commentary to §2N2.1 captioned "Application Notes" is amended in Note 4 by deleting "anabolic steroids" and inserting in lieu thereof "human growth hormones", and by inserting at the end:

"Offenses involving anabolic steroids are covered by Chapter Two, Part D (Offenses Involving Drugs). In the case of an offense involving a substance purported to be an anabolic steroid, but not containing any active ingredient, apply §2F1.1 (Fraud and Deceit) with 'loss' measured by the amount paid, or to be paid, by the victim for such substance."

Reason for Amendment: This amendment clarifies Application Note 1 with respect to reckless conduct, conforms Application Note 4 to reflect that offenses involving anabolic steroids will be covered under §2D1.1 (Amendment 369), and clarifies the treatment of an offense involving a substance purported to be an anabolic steroid, but containing no active ingredient.

Effective Date: The effective date of this amendment is November 1, 1991.

- 433. Amendment:** Section 4B1.2(2) is amended by deleting "or distribution" and inserting in lieu thereof "distribution, or dispensing"; and by deleting "or distribute" and inserting in lieu thereof "distribute, or dispense".

Section 4B1.2(3) is amended by deleting "Part A of this Chapter" and inserting in lieu thereof "§4A1.1(a), (b), or (c)".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 2 by inserting "(i.e., expressly charged)" immediately following "set forth"; by inserting the following at the end:

"Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristics of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply."

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 2 by inserting "(including any explosive material or destructive device)" immediately following "explosives".

The Commentary to §4B1.2 captioned "Application Notes" is amended in Note 3 by inserting the following additional sentences at the end:

"A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult)."

Reason for Amendment: This amendment clarifies that the application of §4B1.2 is determined by the offense of conviction (i.e., the conduct charged in the count of which the defendant was convicted); clarifies that the offense of unlawful possession of a weapon is not a crime of violence for the purposes of this section; clarifies the definition of a prior adult conviction; makes the definitions in §4B1.2(2) more comprehensive; and clarifies the application of §4B1.2(3) by specifying the particular provisions of Chapter Four, Part A to which this subsection refers.

Effective Date: The effective date of this amendment is November 1, 1991.

- 434. Amendment:** The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 1 in the second sentence of the second paragraph by deleting "as part of a plea of guilty or nolo contendere" and inserting in lieu thereof "that is set forth in a written plea agreement or made between the parties on the record during a plea proceeding"; in the second sentence of the third paragraph by deleting "the plea" and inserting in lieu thereof "a plea agreement"; and in the third sentence of the third paragraph by inserting "agreement" immediately following "plea".

Reason for Amendment: This amendment clarifies the meaning of the term "stipulation" used in §1B1.2(a) and (c).

Effective Date: The effective date of this amendment is November 1, 1991.

- 435. Amendment:** Section 2G2.2 is amended in the title by deleting "Advertising, or" and inserting in lieu thereof "Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor;"

Section 2G2.2(a) is amended by deleting "13" and inserting in lieu thereof "15".

Section 2G2.2(b) is amended by inserting the following additional subdivision:

"(4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels."

Section 2G2.2(b)(2) is amended by inserting "by" immediately following "event".

The Commentary to §2G2.2 captioned "Statutory Provisions" is amended by deleting "2252" and inserting in lieu thereof "2252(a)(1)-(3)".

The Commentary to §2G2.2 captioned "Application Notes" is amended by redesignating Note 4 as Note 5; by inserting the following as Note 4:

"'Pattern of activity involving the sexual abuse or exploitation of a minor,' for the purposes of subsection (b)(4), means any combination of two or more separate instances of the sexual abuse or the sexual exploitation of a minor, whether involving the same or different victims.";

and in Note 5 (formerly Note 4) by inserting "exploited or" immediately before "abused"; by deleting "is warranted" and inserting in lieu thereof "may be warranted"; and by inserting ", as well as whether the defendant has received an enhancement under subsection (b)(4) on account of such conduct" immediately after "conduct".

Reason for Amendment: This amendment implements the instructions to the Commission in Section 632 of Public Law 102-141, the Treasury, Postal Service and General Government Appropriations Act of 1992.

Effective Date: The effective date of this amendment is November 27, 1991.

- 436. Amendment:** Section 2G2.4 is amended in the title by deleting "Receipt or" immediately before "Possession".

Section 2G2.4(a) is amended by deleting "10" and inserting in lieu thereof "13".

Section 2G2.4(b) is amended by inserting the following additional subdivision:

- "(2) If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor, increase by 2 levels.";

and in the caption by deleting "Characteristic" and inserting in lieu thereof "Characteristics".

Section 2G2.4(c)(2) is amended by inserting "shipping," immediately before "advertising, or"; and by deleting "Advertising, or" and inserting in lieu thereof "Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor;".

The Commentary to §2G2.4 captioned "Statutory Provision" is amended by deleting "2252" and inserting in lieu thereof "2252(a)(4)".

The Commentary to §2G2.4 captioned "Application Note" is deleted in its entirety as follows:

"Application Note:

1. This guideline assumes that the offense involved a small number of prohibited items. If the defendant possessed 50 or more books, magazines, periodicals, films, video tapes, or other items containing a visual depiction involving the sexual exploitation of a minor, and subsection (c)(1) or (c)(2) does not apply, an upward departure may be warranted."

Reason for Amendment: This amendment implements the instructions to the Commission in Section 632 of Public Law 102-141, the Treasury, Postal Service and General Government Appropriations Act of 1992.

Effective Date: The effective date of this amendment is November 27, 1991.

- 437. Amendment:** Section 2G3.1(a) is amended by deleting "6" and inserting in lieu thereof "10".

Section 2G3.1(c) is amended by deleting "Advertising, or" and inserting in lieu thereof "Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor;"; and by deleting "Receipt or" immediately before "Possession".

The Commentary to §2G3.1 captioned "Background" is amended by deleting "11" and inserting in lieu thereof "15".

Reason for Amendment: This amendment implements the instructions to the Commission in Section 632 of Public Law 102-141, the Treasury, Postal Service and General Government Appropriations Act of 1992.

Effective Date: The effective date of this amendment is November 27, 1991.

- 438. Amendment:** Section 1B1.2(a) is amended by deleting "conviction by a plea of guilty or nolo contendere" and inserting in lieu thereof "a plea agreement (written or made orally on the record)".

Section 1B1.2(c) is amended by deleting "conviction by a plea of guilty or nolo contendere" and inserting in lieu thereof "plea agreement (written or made orally on the record)".

The Commentary to §1B1.2 captioned "Application Notes" is amended in Note 5 by deleting "jury's verdict" and inserting in lieu thereof "verdict or plea".

Reason for Amendment: This amendment revises the language of this guideline to clarify the meaning of the term "stipulation," complementing an amendment to the commentary of this guideline effective November 1, 1991 (amendment 434). Both this amendment and amendment 434 were made in response to Braxton v. United States, 111 S.Ct. 1854 (1991). In addition, the term "jury's verdict" in the commentary of this section is deleted and replaced with the more appropriate term "verdict or plea".

Effective Date: The effective date of this amendment is November 1, 1992.

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

- "(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
- (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;
- (3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and"

and inserting in lieu thereof:

- "(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

- (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

- (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and".

The Commentary to §1B1.3 captioned "Application Notes" is amended by renumbering Notes 2-7 as Notes 3-8, respectively; and by deleting Note 1 as follows:

- "1. Conduct 'for which the defendant would be otherwise accountable,' as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. 18 U.S.C. § 2.) In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant 'would be otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.

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

Illustrations of Conduct for Which the Defendant is Accountable

- a. Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a boat containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actually unloaded, and notwithstanding any claim on his part that he was neither aware of, nor could reasonably foresee, that the boat contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the boat because he aided and abetted the unloading, and hence the importation, of the entire shipment.
- b. Defendant C, the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is injured, is convicted of the substantive count of bank robbery. Defendant C is accountable for the money taken because he aided and abetted the taking of the money. He is accountable for the injury inflicted because he participated in concerted criminal conduct that he could reasonably foresee might result in the infliction of injury.

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

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

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

and inserting in lieu thereof:

- "1. The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.
2. A 'jointly undertaken criminal activity' is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

- (i) in furtherance of the jointly undertaken criminal activity; and
- (ii) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly

undertaken by the defendant (the ‘jointly undertaken criminal activity’) is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant’s accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant’s agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant’s agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (*i.e.*, acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

Illustrations of Conduct for Which the Defendant is Accountable

- (a) Acts and omissions aided or abetted by the defendant
 - (1) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is

accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (*i.e.*, the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B)(applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity (the scope of which was the importation of the shipment of marihuana). A finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.

(b) Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable

- (1) Defendant C is the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was in

furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

- (c) Requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable; scope of the criminal activity
- (1) Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant D (*i.e.*, the forgery of the \$800 check).
 - (2) Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.
 - (3) Defendants H and I engaged in an ongoing marijuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marijuana. Defendant J is accountable for the entire single shipment of marijuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (*see* the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marijuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marijuana).
 - (4) Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is

Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.

- (5) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (i.e., the one delivery).
- (6) Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.
- (7) Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.
- (8) Defendants T, U, V, and W are hired by a supplier to backpack

a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities."

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 3 (formerly Note 2) by deleting the first sentence as follows:

"Such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction,' as used in subsection (a)(2), refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that were part of the same course of conduct or common scheme or plan as the offense of conviction."

The Commentary to §1B1.3 captioned "Application Notes" is amended in Note 6 (formerly Note 5) in the first paragraph by deleting:

"For example, in §2K1.5, subsection (b)(1) applies 'If the defendant is convicted under 49 U.S.C. § 1472(1)(2).'",

and inserting in lieu thereof:

"For example, in §2S1.1, subsection (a)(1) applies if the defendant 'is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).'";

and in the second paragraph by deleting:

"For example, §2K1.5(b)(1) (which is applicable only if the defendant is convicted under 49 U.S.C. § 1472(1)(2)) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 49 U.S.C. § 1472(1)(2).",

and inserting in lieu thereof:

"For example, §2S1.1(a)(1) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)."

The Commentary to §1B1.3 captioned "Application Notes" is amended by inserting the following additional notes:

"9. 'Common scheme or plan' and 'same course of conduct' are two closely-related concepts.

(A) Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme).

(B) Same course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses and the time interval between the offenses. The nature of the offenses may also be a relevant consideration (e.g., a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).

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

Reason for Amendment: This amendment clarifies and more fully illustrates the operation of this guideline. Material is moved from the commentary to the guideline itself and rephrased for greater clarity, the discussion of the application of this provision in the commentary is expanded, and additional examples are inserted. In addition, this amendment provides definitions of the terms "same course of conduct" and "common scheme or plan." Finally, this amendment conforms an example in Application Note 6 of the Commentary to a revision of a Chapter Two offense guideline.

Effective Date: The effective date of this amendment is November 1, 1992.

440. Amendment: Section 1B1.5 is amended by deleting:

"Unless otherwise expressly indicated, a reference to another guideline, or an instruction to apply another guideline, refers to the entire guideline, i.e., the base offense level plus all applicable specific offense characteristics and cross references."

and inserting in lieu thereof:

- "(a) A cross reference (an instruction to apply another offense guideline) refers to the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions).
- (b)
 - (1) An instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions), except as provided in subdivision (2) below.
 - (2) An instruction to use a particular subsection or table from another offense guideline refers only to the particular subsection or table referenced, and not to the entire offense guideline.
- (c) If the offense level is determined by a reference to another guideline under subsection (a) or (b)(1) above, the adjustments in Chapter Three (Adjustments) also are determined in respect to the referenced offense guideline, except as otherwise expressly provided.
- (d) A reference to another guideline under subsection (a) or (b)(1) above may direct that it be applied only if it results in the greater offense level. In such case, the greater offense level means the greater final offense level (i.e., the greater offense level taking into account both the Chapter Two offense level and any applicable Chapter Three adjustments)."

The Commentary to §1B1.5 captioned "Application Notes" is amended in Note 1 by deleting:

"are to be construed to incorporate the specific offense characteristics and cross references",

and inserting in lieu thereof:

"incorporate the specific offense characteristics, cross references, and special instructions".

The Commentary to §1B1.5 captioned "Application Notes" is amended by deleting Note 2 as follows:

- "2. A reference may require that the offense level be determined under another offense guideline. In such case, the adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and E (Acceptance of Responsibility) are also to be determined in respect to that other offense guideline. For example, a defendant convicted of possession of a firearm by a felon, to which §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) applies, is found to have used that firearm in the commission of a robbery. The cross reference at §2K2.1(c) directs that the robbery offense guideline be used. The adjustments in Chapter Three, Parts A, B and E are to be applied as if the offense of conviction had directly referenced the robbery

guideline.";

and by renumbering Notes 3 and 4 as Notes 2 and 3, respectively.

Reason for Amendment: This amendment clarifies the operation of this guideline and moves an instruction currently contained in the commentary into the guideline itself.

Effective Date: The effective date of this amendment is November 1, 1992.

441. Amendment: Section 1B1.8(b) is amended in subdivision (3) by deleting "or" immediately following the semicolon; in subdivision (4) by deleting the period at the end and inserting in lieu thereof "; or"; and by inserting the following additional subdivision:

"(5) in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities)."

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 1 by deleting the third sentence as follows:

"Although this guideline, consistent with the general structure of these guidelines, affects only the determination of the guideline range, the policy of the Commission is that where a defendant as a result of a cooperation agreement with the government to assist in the investigation or prosecution of other offenders reveals information that implicates him in unlawful conduct not already known to the government, such defendant should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose.",

and inserting in lieu thereof:

"Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to increase the defendant's sentence above the applicable guideline range by upward departure. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities); e.g., a court may refuse to depart below the applicable guideline range on the basis of such information."

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 3 in the second sentence by deleting:

"is governed by the provisions of Rule 11 of the Federal Rules of Criminal Procedure and Rule 410",

and inserting in lieu thereof:

"in a sentencing proceeding is restricted by Rule 11(e)(6) (Inadmissibility of Pleas, Plea Discussions, and Related Statements) of the Federal Rules of Criminal Procedure and Rule 410 (Inadmissibility of Pleas, Plea Discussions, and Related Statements)".

The Commentary to §1B1.8 captioned "Application Notes" is amended in Note 5 in the second sentence by deleting "repeats" and inserting in lieu thereof "provides".

Reason for Amendment: This amendment clarifies the operation of this guideline. Information protected by this guideline may not be used to determine the applicable guideline range. An upward departure on the basis of such information would be contrary to the Commission's policy (and, consequently, would be appealable under 18 U.S.C. § 3742(a)(2) and (3). See Williams v. United States, 112 S.Ct. 1112 (1992)). In contrast, the use of information covered by this guideline is appropriate in considering whether, and to what extent, a downward departure under §5K1.1 (Substantial Assistance to Authorities) is appropriate. In addition, this amendment makes minor editorial improvements.

Effective Date: The effective date of this amendment is November 1, 1992.

- 442. Amendment:** Chapter One, Part B, is amended by inserting an additional policy statement with accompanying commentary as §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)).

Reason for Amendment: This amendment inserts a policy statement addressing the use of the Guidelines Manual when the Guidelines Manual has been amended between the date the offense was committed and the date of sentencing.

Effective Date: The effective date of this amendment is November 1, 1992.

- 443. Amendment:** Section 2A2.4(c)(1) is amended by deleting "defendant is convicted under 18 U.S.C. § 111 and the" immediately before "conduct".

Section 2K1.5(b)(1) is amended by deleting:

"defendant is convicted under 49 U.S.C. § 1472(1)(2) (*i.e.*, the defendant acted willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life)",

and inserting in lieu thereof:

"offense was committed willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life".

Reason for Amendment: This amendment deletes the requirement of a conviction under a specific statute for these specific offense characteristics to apply and, consistent with the overall structure of the guidelines, provides for their application on the basis of the underlying conduct.

Effective Date: The effective date of this amendment is November 1, 1992.

- 444. Amendment:** Section 2A3.1 is amended in the title by deleting "or Assault with the Intent" immediately following "Attempt".

Section 2A3.1(b)(3) is amended by deleting:

"in the custody, care, or supervisory control of the defendant, was a corrections employee, or",

and by inserting in lieu thereof:

"(A) in the custody, care, or supervisory control of the defendant; or (B)".

Section 2A3.1 is amended by inserting the following additional subsection:

"(c) Special Instruction

- (1) If the offense occurred in a correctional facility and the victim was a corrections employee, the offense shall be deemed to have an official victim for purposes of subsection (a) of §3A1.2 (Official Victim)."

The Commentary to §2A3.1 captioned "Application Notes" is amended by renumbering Note 3 as Note 4; and by inserting the following additional note:

- "3. Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship."

Section 2A3.2 is amended by inserting the following additional subsection:

"(c) Cross Reference

- (1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse)."

The Commentary to §2A3.2 captioned "Application Notes" is amended by renumbering Note 2 as Note 3; and by inserting the following as Note 2:

- "2. Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship."

Section 2A3.4 is amended by inserting the following additional subsection:

"(c) Cross References

- (1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).
- (2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above."

The Commentary to §2A3.4 captioned "Application Notes" is amended by renumbering Note

3 as Note 4; and by inserting the following as Note 3:

- "3. Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship."

Section 2G1.2(c)(2) is amended by deleting "or Assault with the Intent" immediately before "to Commit Criminal Sexual Abuse".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 in the second paragraph by deleting "or Assault with the Intent" immediately before "to Commit Criminal Sexual Abuse".

Reason for Amendment: This amendment cross references §2A3.2 to §2A3.1, and §2A3.4 to §§2A3.1 and 2A3.2. A review of cases sentenced under these guidelines indicated that a significant proportion of cases sentenced under §2A3.2 and §2A3.4 clearly involved conduct that would more appropriately be covered under an offense guideline applicable to more serious sexual abuse cases. The addition of these cross references is designed to address this issue. In addition, this amendment removes an anomaly between §2A3.1(b)(3) and §3A1.2(a), and adds application notes to clarify the scope of §§2A3.1(b)(3), 2A3.2(b)(1), and 2A3.4(b)(3), using language derived from application notes pertaining to similar specific offense characteristics in Chapter Two, Part G.

Effective Date: The effective date of this amendment is November 1, 1992.

- 445. Amendment:** The Commentary to §2A4.1 captioned "Application Notes" is amended by inserting the following additional note:

- "5. In the case of a conspiracy, attempt, or solicitation to kidnap, §2X1.1 (Attempt, Solicitation, or Conspiracy) requires that the court apply any adjustment that can be determined with reasonable certainty. Therefore, for example, if an offense involved conspiracy to kidnap for the purpose of committing murder, subsection (b)(7) would reference first degree murder (resulting in an offense level of 43, subject to a possible 3-level reduction under §2X1.1(b)). Similarly, for example, if an offense involved a kidnapping during which a participant attempted to murder the victim under circumstances that would have constituted first degree murder had death occurred, the offense referenced under subsection (b)(7) would be the offense of first degree murder."

Reason for Amendment: This amendment clarifies the operation of this guideline.

Effective Date: The effective date of this amendment is November 1, 1992.

- 446. Amendment:** Section 2D1.1(b)(2) is amended by deleting "is convicted of violating 21 U.S.C. § 960(a)" and inserting in lieu thereof "unlawfully imported or exported a controlled substance"; and by inserting "or export" immediately following "to import".

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

"1 gm of Aminorex =	100 gm of marihuana
1 gm of Methcathinone =	380 gm of marihuana
1 gm of N-N-Dimethylamphetamine =	40 gm of marihuana";

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

"1 gm of Phenylcyclohexamine (PCE) = 5.79 kg of marihuana".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" by inserting an asterisk immediately following each of the following subdivision captions: "Schedule I or II Opiates", "Cocaine and Other Schedule I or II Stimulants (and their immediate precursors)", and "LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)"; and by inserting the following additional sentence at the end of each of the above noted subdivisions:

"**Provided*, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12."

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

"15. Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13-15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13-15 is the appropriate classification."

The Commentary to §2D1.1 captioned "Background" is amended in the fifth paragraph by deleting "mandated by" and inserting in lieu thereof "derived from".

Reason for Amendment: This amendment deletes the requirement of a conviction under a specific statute for the specific offense characteristic in subsection (b)(2) to apply and, consistent with the overall structure of the guidelines, provides for the application of this specific offense characteristic on the basis of the underlying conduct. In addition, this amendment adds equivalencies for four controlled substances to make the Drug Equivalency Tables more comprehensive, adds notes to the Drug Equivalency Tables to make clear the interaction between the minimum offense level for certain types of controlled substances in the Drug Quantity Table and the instructions for determining a combined offense level in a case with multiple controlled substances, and clarifies the treatment of certain pharmaceutical preparations that are classified as Schedule III, IV, or V substances under 21 C.F.R. § 1308.13-15.

Effective Date: The effective date of this amendment is November 1, 1992.

447. Amendment: Sections 2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2, 2D3.3, 2D3.4, and 2D3.5 are amended in their titles by inserting at the end thereof in each instance "; Attempt or Conspiracy".

Section 2D1.4, including accompanying commentary, is deleted as follows:

"§2D1.4. Attempts and Conspiracies

- (a) Base Offense Level: If a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.

Commentary

Statutory Provisions: 21 U.S.C. §§ 846, 963. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. If the defendant is convicted of a conspiracy that includes transactions in controlled substances in addition to those that are the subject of substantive counts of conviction, each conspiracy transaction shall be included with those of the substantive counts of conviction to determine scale. If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing. If the defendant is convicted of conspiracy, see Application Note 1 to §1B1.3 (Relevant Conduct).
2. Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.
3. See Commentary to §2D1.1 regarding weapon possession."

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 3 by deleting "reference §2D1.1, i.e., §§2D1.2, 2D1.4, 2D1.5, 2D1.6, 2D1.7(b)(1)" and inserting in lieu thereof "are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(b)(1), and 2D2.1(b)(1)".

The Commentary to §2D1.1 captioned "Application Notes" is amended in Note 12 by deleting:

"If the amount seized does not reflect the scale of the offense, see Application Note 2 of the Commentary to §2D1.4. If the offense involved negotiation to traffic in a controlled substance, see Application Note 1 of the Commentary to §2D1.4.",

and inserting in lieu thereof:

"Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making

this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing."

The Commentary to §2D1.1 captioned "Background" is amended in the fifth sentence of the fourth paragraph by deleting "(see §2D1.4)" immediately following "object of the attempt".

The Commentary to §2D1.6 captioned "Application Note" is amended in the first sentence of Note 1 by deleting "Commentary to §2D1.1, and Application Notes 1 and 2 of the Commentary to §2D1.4," and inserting in lieu thereof "Commentary to §2D1.1".

Section 2D1.11(c) is amended by deleting ", or §2D1.4 (Attempts and Conspiracies), as appropriate," immediately before "if the resulting".

Section 2D1.12(b) is amended by deleting ", or §2D1.4 (Attempts and Conspiracies), as appropriate," immediately before "if the resulting".

The Commentary to §2X1.1 captioned "Application Notes" is amended in Note 1 by deleting "§2D1.4 (Attempts and Conspiracies)" wherever it appears and inserting in lieu thereof in each instance:

"§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking, Including Possession with Intent to Commit These Offenses; Attempt or Conspiracy); §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy); §2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy); §2D1.6 (Use of Communication Facility in Committing Drug Offense; Attempt or Conspiracy); §2D1.7 (Unlawful Sale or Transportation of Drug Paraphernalia; Attempt or Conspiracy); §2D1.8 (Renting or Managing a Drug Establishment; Attempt or Conspiracy); §2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy); §2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy); §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy); §2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy); §2D1.13 (Structuring Chemical Transactions or Creating a Chemical Mixture to Evade Reporting or Recordkeeping Requirements; Presenting False or Fraudulent Identification to Obtain a Listed Chemical; Attempt or Conspiracy); §2D2.1 (Unlawful Possession; Attempt or Conspiracy); §2D2.2 (Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge; Attempt or Conspiracy); §2D3.1 (Illegal Use of Registration Number to Manufacture, Distribute, Acquire, or Dispense a Controlled Substance; Attempt or Conspiracy); §2D3.2 (Manufacture of Controlled Substance in Excess of or Unauthorized by Registration Quota; Attempt or Conspiracy); §2D3.3 (Illegal Use of Registration

Number to Distribute or Dispense a Controlled Substance to Another Registrant or Authorized Person; Attempt or Conspiracy); §2D3.4 (Illegal Transfer or Transshipment of a Controlled Substance; Attempt or Conspiracy); and §2D3.5 (Violation of Recordkeeping or Reporting Requirements for Listed Chemicals and Certain Machines; Attempt or Conspiracy)".

Reason for Amendment: This amendment clarifies and simplifies the guideline provisions dealing with attempts and conspiracies in drug cases and conforms the structure of these provisions to that of other offense guidelines that specifically address attempts and conspiracies (i.e., offense guidelines referenced by §2X1.1(c)).

Effective Date: The effective date of this amendment is November 1, 1992.

448. Amendment: Section 2D1.8 is amended by deleting subsections (a) and (b) as follows:

- "(a) Base Offense Level: 16
- (b) Specific Offense Characteristic
 - (1) If a firearm or other dangerous weapon was possessed, increase by 2 levels."

and inserting in lieu thereof:

- "(a) Base Offense Level:
 - (1) The offense level from §2D1.1 applicable to the underlying controlled substance offense, except as provided below.
 - (2) If the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises, the offense level shall be 4 levels less than the offense level from §2D1.1 applicable to the underlying controlled substance offense, but not greater than level 16.
- (b) Special Instruction
 - (1) If the offense level is determined under subsection (a)(2), do not apply an adjustment under §3B1.2 (Mitigating Role)."

The Commentary to §2D1.8 captioned "Application Note" is amended by deleting Note 1 as follows:

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

and inserting in lieu thereof:

- "1. Subsection (a)(2) does not apply unless the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises. For example, subsection (a)(2) would not apply to a defendant who possessed a dangerous weapon in connection with the offense, a defendant who guarded the cache of controlled substances, a defendant who arranged for the use of the premises for the purpose of facilitating a drug transaction, a defendant who

allowed the use of more than one premises, a defendant who made telephone calls to facilitate the underlying controlled substance offense, or a defendant who otherwise assisted in the commission of the underlying controlled substance offense. Furthermore, subsection (a)(2) does not apply unless the defendant initially leased, rented, purchased, or otherwise acquired a possessory interest in the premises for a legitimate purpose. Finally, subsection (a)(2) does not apply if the defendant had previously allowed any premises to be used as a drug establishment without regard to whether such prior misconduct resulted in a conviction."

Reason for Amendment: This amendment is designed to reduce unwarranted disparity by requiring consideration in the guideline of the scale of the underlying controlled substance offense. The amendment parallels an amendment to §2D1.6 made in 1990 (amendment 320).

Effective Date: The effective date of this amendment is November 1, 1992.

449. Amendment: The Commentary to §2E1.4 captioned "Background" is amended by deleting:

"The statute does not require that a murder covered by this section has been committed. The maximum term of imprisonment authorized by statute ranges from five years to life imprisonment.",

and inserting in lieu thereof:

"This guideline and the statute to which it applies do not require that a murder actually have been committed."

Reason for Amendment: This amendment makes editorial improvements, and deletes a reference to the length of the maximum term of imprisonment authorized by statute for the offense covered by this section that is no longer accurate.

Effective Date: The effective date of this amendment is November 1, 1992.

450. Amendment: Section 2L1.1(b)(2) is amended by deleting:

"If the defendant previously has been convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense, increase by 2 levels.",

and inserting in lieu thereof:

"If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

	<u>Number of Unlawful Aliens Smuggled, Transported, or Harbored</u>	<u>Increase in Level</u>
(A)	6-24	add 2
(B)	25-99	add 4
(C)	100 or more	add 6."

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional sentence at the end:

"The 'number of unlawful aliens smuggled, transported, or harbored' does not include the defendant."

The Commentary to §2L1.1 captioned "Application Notes" is amended by deleting Notes 2, 3, and 4 as follows:

- "2. 'Convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense' includes any conviction for smuggling, transporting, or harboring an unlawful alien, and any conviction for aiding and abetting, conspiring or attempting to commit such offense.
3. If the defendant was convicted under 8 U.S.C. § 1328, apply the applicable guideline from Part G (see Statutory Index) rather than this guideline.
4. The adjustment under §2L1.1(b)(2) for a previous conviction is in addition to any points added to the criminal history score for such conviction in Chapter Four, Part A (Criminal History). This adjustment is to be applied only if the previous conviction occurred prior to the last overt act of the instant offense.";

and by renumbering Notes 5, 6, 7, 8 and 9, as Notes 2, 3, 4, 5, and 6, respectively.

The Commentary to §2L1.1 captioned "Application Notes" is amended in Note 4 (formerly Note 7) by inserting "drug trafficking, or other serious criminal behavior," immediately following "subversive activity,".

The Commentary to §2L1.1 captioned "Application Notes" is amended by deleting the text of Note 5 (formerly Note 8) as follows:

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

and inserting in lieu thereof:

"If the offense involved dangerous or inhumane treatment, death or bodily injury, possession of a dangerous weapon, or substantially more than 100 aliens, an upward departure may be warranted."

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

"A second specific offense characteristic provides an enhancement if the defendant was previously convicted of a similar offense."

and inserting in lieu thereof:

"The offense level increases with the number of unlawful aliens smuggled, transported, or harbored. In large scale cases, an additional adjustment from §3B1.1 (Aggravating Role) typically will apply to the most culpable defendants."

The title of §2L2.1 is amended by deleting "Evidence of Citizenship or Documents Authorizing Entry" and inserting in lieu thereof "Documents Relating to Naturalization, Citizenship, or Legal Resident Status; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law".

Section 2L2.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics"; and by inserting the following additional specific offense characteristic:

"(2) If the offense involved six or more sets of documents, increase as follows:

	<u>Number of Sets of Documents</u>	<u>Increase in Level</u>
(A)	6-24	add 2
(B)	25-99	add 4
(C)	100 or more	add 6."

The Commentary to §2L2.1 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. §§ 1425-1427, 1546. For additional statutory provision(s), see Appendix A (Statutory Index)" and inserting in lieu thereof "8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), 1325(b), (c); 18 U.S.C. §§ 1015, 1028, 1425-1427, 1546".

The Commentary to §2L2.1 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes"; and by inserting the following additional note:

"2. Where it is established that multiple documents are part of a set intended for use by a single person, treat the set as one document."

The title of §2L2.2 is amended by deleting "Evidence of Citizenship or Documents Authorizing Entry for Own Use" and inserting in lieu thereof "Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law".

The Commentary to §2L2.2 captioned "Statutory Provisions" is amended by deleting "18 U.S.C. §§ 1423, 1425, 1546. For additional statutory provision(s), see Appendix A (Statutory Index)" and inserting in lieu thereof "8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (5), 1325(b), (c); 18 U.S.C. §§ 911, 1015, 1028, 1423-1426, 1546".

Section 2L2.3(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics"; and by inserting the following additional specific offense characteristic:

"(2) If the offense involved six or more passports, increase as follows:

	<u>Number of Passports</u>	<u>Increase in Level</u>
(A)	6-24	add 2
(B)	25-99	add 4
(C)	100 or more	add 6."

Reason for Amendment: Prior to this amendment, §2L1.1 provided the same offense level for a defendant who smuggles, transports, or harbors 1, 5, 25, 50, or any number of unlawful aliens. The inclusion of specific offense characteristic (b)(2) in §2L1.1 in the guidelines as initially promulgated in April 1987 was intended to conform the guidelines to the offense level indicated by past practices data for "ongoing criminal conduct." However, further study has convinced the Commission that the specific offense characteristic "prior conviction for the same or similar offense" is not a good proxy for such conduct. Moreover, the inclusion of a prior criminal record variable in the offense guideline is inconsistent with the general treatment of prior record as a separate dimension in the guidelines.

This amendment addresses these issues by providing an enhancement in the guideline for the number of aliens smuggled, transported, or harbored as a more direct measure of the scope of the offense. Consistent with the Commission's general approach throughout the guidelines, the offense level increases gradually with the number of aliens. It should be noted that §3B1.1 (Aggravating Role) generally provides an additional increase of 2, 3, or 4 levels for organizers, managers, and supervisors in large-scale cases. The enhancement in this amendment pertaining to the number of aliens is designed to work in conjunction with the operation of the role enhancements from §3B1.1. Sections 2L2.1 and 2L2.3 are amended to follow the same structure.

In addition, this amendment expands the titles of §§2L2.1 and 2L2.2, and the statutory provisions to these sections, to include additional statutes appropriately covered by these guidelines.

Effective Date: The effective date of this amendment is November 1, 1992.

451. Amendment: Section 2N2.1 is amended by inserting the following additional subsection:

"(b) Cross References

- (1) If the offense involved fraud, apply §2F1.1 (Fraud and Deceit).
- (2) If the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline, apply that other offense guideline if the resulting offense level is greater than that determined above."

The Commentary to §2N2.1 captioned "Application Notes" is amended by deleting Note 2 as follows:

- "2. If the offense involved theft, fraud, bribery, revealing trade secrets, or destruction of property, apply the guideline applicable to the underlying conduct, rather than this guideline."

and inserting in lieu thereof:

- "2. The cross reference at subsection (b)(1) addresses cases in which the offense involved fraud. The cross reference at subsection (b)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (e.g., theft, bribery, revealing trade secrets, or destruction of property)."

Reason for Amendment: This amendment inserts cross references to cover cases more appropriately addressed by other offense guidelines. Previously, a similar instruction addressing such cases was contained in the commentary to this section.

Effective Date: The effective date of this amendment is November 1, 1992.

452. Amendment: Section 2Q2.1(b)(1) is amended by deleting "involved a commercial purpose" and inserting in lieu thereof "(A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations".

Section 2Q2.1(b)(2) is amended by deleting:

"involved fish, wildlife, or plants that were not quarantined as required by law",

and inserting in lieu thereof:

"(A) involved fish, wildlife, or plants that were not quarantined as required by law; or (B) otherwise created a significant risk of infestation or disease transmission potentially harmful to humans, fish, wildlife, or plants".

Section 2Q2.1(b)(3)(B) is amended by deleting:

"a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation",

and inserting in lieu thereof:

"(i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 C.F.R. § 216.15); (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23)".

The Commentary to §2Q2.1 is amended by inserting, immediately before "Background", the following:

"Application Notes:

1. 'For pecuniary gain' means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Thus, offenses committed for pecuniary gain include both monetary and barter transactions. Similarly, activities designed to increase gross revenue are considered to be committed for pecuniary gain.
2. The acquisition of fish, wildlife, or plants for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private non-profit organization, or a private for-profit organization, shall be considered to involve a 'commercial purpose.'
3. For purposes of subsection (b)(2), the quarantine requirements include those set forth in 9 C.F.R. Part 92, and 7 C.F.R. Chapter III. State quarantine laws are included as well.
4. When information is reasonably available, 'market value' under subsection (b)(3)(A) shall be based on the fair-market retail price. Where the fair-market retail price is difficult to ascertain, the court may make a reasonable estimate using any reliable information, such as the reasonable replacement or restitution cost or the acquisition and preservation (e.g., taxidermy) cost. Market value, however, shall not be based on measurement of aesthetic loss (so called 'contingent valuation' methods).
5. If the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value, an upward departure may be warranted."

The Commentary to §2Q2.1 captioned "Background" is amended by deleting the last two sentences as follows:

"Enhancements are provided where the offense involved a commercial purpose, and where the fish, wildlife, or plants were not quarantined as required by law. An additional enhancement is provided where the market value of the species exceeded \$2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species."

Reason for Amendment: This amendment is designed to strengthen the deterrent effect of the sanctions for violations covered by this guideline. The amendment expands the specific offense characteristic in subsection (b)(1) to cover categories of offenses that appear to be equally serious to those committed for a commercial purpose. In addition, the amendment expands the specific offense characteristic in subsection (b)(2) to cover other comparable types of risk of harm. Furthermore, the amendment modifies the specific offense characteristic in subsection (b)(3) to better encompass the types of cases that the Commission intended to cover.

Effective Date: The effective date of this amendment is November 1, 1992.

453. Amendment: The Introductory Commentary to Chapter Two, Part T, Subpart 3, is amended by deleting "This part" and inserting in lieu thereof "This Subpart"; by deleting:

". These guidelines are primarily aimed at revenue collection or trade regulation. They are",

and inserting in lieu thereof:

", and is designed to address violations involving revenue collection or trade regulation. It is";

by deleting "legislation generally applies" and inserting in lieu thereof "criminal statutes apply"; and by deleting:

"or for imposing a sentence above that specified in these guidelines",

and inserting in lieu thereof:

"if applicable, or for imposing a sentence above that specified in the guideline in this Subpart".

Section 2T3.1 is amended in the title by inserting at the end "; Receiving or Trafficking in Smuggled Property".

Section 2T3.1 is amended by inserting the following additional subsection:

"(c) Cross Reference

- (1) If the offense involves a contraband item covered by another offense guideline, apply that offense guideline if the resulting offense level is greater than that determined above."

The Commentary to §2T3.1 captioned "Application Notes" is amended in the third sentence of Note 2 by deleting "the court should impose a sentence above the guideline" and inserting in lieu thereof "an upward departure may be warranted".

Section 2T3.2, including accompanying commentary, is deleted as follows:

"§2T3.2. Receiving or Trafficking in Smuggled Property

(a) Base Offense Level:

- (1) The level from §2T4.1 (Tax Table) corresponding to the tax loss, if the tax loss exceeded \$1,000; or
- (2) 5, if the tax loss exceeded \$100 but did not exceed \$1,000; or
- (3) 4, if the tax loss did not exceed \$100.

For purposes of this guideline, the 'tax loss' is the amount of the duty.

(b) Specific Offense Characteristic

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

Commentary

Statutory Provision: 18 U.S.C. § 545. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, the court should impose a sentence above the guideline. A sentence based upon an alternative measure of the 'duty' evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States if the increase in market value due to importation is not readily ascertainable, might be considered."

Section 8C2.1(a) is amended by deleting ", 2T3.2" immediately following "2T3.1".

Reason for Amendment: This amendment inserts a cross reference in §2T3.1 to cover cases more appropriately addressed by other offense guidelines. Previously, a similar instruction was set forth in the Introductory Commentary to this part. In addition, this amendment consolidates §§2T3.1 and 2T3.2 into one guideline as each contains the same offense levels and adjustments.

Effective Date: **The effective date of this amendment is November 1, 1992.**

454. Amendment: The Commentary to §3A1.1 captioned "Application Notes" is amended in Note 1 by inserting the following additional sentence at the end:

"Similarly, for example, a bank teller is not an unusually vulnerable victim solely by

virtue of the teller's position in a bank."

Reason for Amendment: This amendment clarifies the circumstances in which the vulnerable victim adjustment is intended to be applied.

Effective Date: The effective date of this amendment is November 1, 1992.

455. Amendment: Section 3A1.2(a) is amended by deleting:

"a law enforcement or corrections officer; a former law enforcement or corrections officer; an officer or employee included in 18 U.S.C. § 1114; a former officer or employee included in 18 U.S.C. § 1114",

and inserting in lieu thereof:

"a government officer or employee; a former government officer or employee".

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

"are not expressly covered by this section. The court should make an upward departure of at least three levels in those unusual cases in which such persons are victims",

and inserting in lieu thereof:

"although covered by this section, do not represent the heartland of the conduct covered. An upward departure to reflect the potential disruption of the governmental function in such cases typically would be warranted".

The Commentary to §3A1.2 captioned "Application Notes" is amended in Note 4 by deleting "law enforcement or corrections officer or other person covered under 18 U.S.C. § 1114" and inserting in lieu thereof "government officer or employee"; and by inserting the following additional sentence at the end:

"This adjustment also would not apply in the case of a robbery of a postal employee because the offense guideline for robbery contains an enhancement (§2B3.1(a)) that takes such conduct into account."

Reason for Amendment: This amendment expands the coverage of this guideline to apply in the case of any government officer or employee, former government officer or employee, or a member of the immediate family of any of the above, who is targeted because of the official conduct or position of that officer or employee.

Effective Date: The effective date of this amendment is November 1, 1992.

456. Amendment: The Introductory Commentary to Chapter Three, Part B is amended by deleting the third sentence of the first paragraph as follows:

"However, where the defendant has received mitigation by virtue of being convicted of an offense significantly less serious than his actual criminal conduct, e.g., the defendant is convicted of unlawful possession of a controlled substance but his actual conduct involved drug trafficking, a further reduction in the offense level under §3B1.2 (Mitigating Role) ordinarily is not warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense."

The Commentary to §3B1.2 captioned "Application Notes" is amended by inserting the following additional note:

- "4. If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine."

Reason for Amendment: This amendment clarifies a situation in which a defendant is not ordinarily eligible for a reduction under §3B1.2 (Mitigating Role) and moves the discussion of this issue from the Introductory Commentary of Chapter Three, Part B, to the Commentary of §3B1.2, where it more appropriately belongs.

Effective Date: The effective date of this amendment is November 1, 1992.

457. Amendment: The Commentary to §3C1.1 captioned "Application Notes" is amended by inserting the following additional note:

- "7. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused."

The Commentary to §3C1.2 captioned "Application Notes" is amended by inserting the following additional notes:

- "5. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.
6. If death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person, an upward departure may be warranted. See Chapter Five, Part K (Departures)."

Reason for Amendment: This amendment clarifies the scope of the conduct for which the defendant is accountable under §§3C1.1 and 3C1.2. In addition, this amendment adds an

application note to the Commentary of §3C1.2 that describes circumstances in which an upward departure may be warranted.

Effective Date: The effective date of this amendment is November 1, 1992.

458. Amendment: Section 3D1.2(d) is amended in the second paragraph by inserting "§2L1.1, 2L2.1, 2L2.3;" in the appropriate place by section; by inserting "§2Q2.1" in the appropriate place by section; and by deleting ", 2T3.2" immediately following "2T3.1".

Section 3D1.2(d) is amended in the third paragraph by deleting "§2L1.1, 2L2.1, 2L2.2, 2L2.3"

and inserting in lieu thereof "2L2.2".

The Commentary to §3D1.2 captioned "Application Notes" is amended in Note 3 by deleting example 7 as follows:

"(7) The defendant is convicted of two counts, each for unlawfully bringing one alien into the United States, but on different occasions. The counts are not to be grouped together."

Reason for Amendment: This amendment revises §3D1.2(d) to reflect amendments to §§2L1.1, 2L2.1, and 2L2.3 (amendment 450); to clarify that offenses under §2Q2.1 are to be grouped under this subsection; and to delete the reference to §2T3.2 made obsolete by the deletion of that guideline (amendment 453).

Effective Date: The effective date of this amendment is November 1, 1992.

459. Amendment: Section 3E1.1 is amended by deleting:

- "(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.
- (b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.
- (c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right."

and inserting in lieu thereof:

- "(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
 - (1) timely providing complete information to the government concerning his own involvement in the offense; or
 - (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,

decrease the offense level by 1 additional level."

The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 1 by deleting "for this provision" and inserting in lieu thereof "under subsection (a)"; by deleting subdivision (c) as follows:

- "(c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;"

by redesignating subdivisions (a) and (b) as subdivisions (b) and (c), respectively; by inserting the following as subdivision (a):

- "(a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;"

in subdivision (f) by deleting "and" immediately following "offense;"

by redesignating subdivision (g) as subdivision (h); and by inserting the following as subdivision (g):

- "(g) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and".

The Commentary to §3E1.1 captioned "Application Notes" is amended by deleting Note 3 as follows:

- "3. Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct will constitute significant evidence of acceptance of responsibility for the purposes of this section. However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility."

and by inserting in lieu thereof:

- "3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(a)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right."

The Commentary to §3E1.1 captioned "Application Notes" is amended by inserting the following additional note:

- "6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking one or both of the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b)(1) or (2) will occur particularly early in the case. For example, to qualify

under subsection (b)(2), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently."

The Commentary to §3E1.1 captioned "Background" is amended by deleting "a recognition and affirmative acceptance of personal responsibility for the offense and related conduct" and inserting in lieu thereof "acceptance of responsibility for his offense"; and by inserting the following additional paragraph at the end:

" Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range."

Section 4B1.1 is amended in the last sentence by deleting "2-levels" and inserting in lieu thereof "the number of levels corresponding to that adjustment".

Section 4B1.4(b) is amended by deleting the last sentence as follows:

"*If §3E1.1 (Acceptance of Responsibility) applies, reduce by 2 levels.",

and inserting in lieu thereof:

"*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment."

Reason for Amendment: This amendment provides an additional reduction of one level for certain defendants whose acceptance of responsibility includes assistance to the government in the investigation or prosecution of their own misconduct. In addition, it replaces the term "offense and related conduct" with the term "offense" and provides guidance as to the meaning of this term in the context of this guideline.

Effective Date: The effective date of this amendment is November 1, 1992.

- 460. Amendment:** Section 4A1.3 is amended in the fourth paragraph by deleting "a Category IV criminal history" wherever it appears and inserting in lieu thereof in each instance "Criminal History Category IV"; and by deleting:

"The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a decision above the guideline range for a defendant with a Category VI criminal history may be warranted. However, this provision is not symmetrical. The lower limit of the range for a Category I criminal history is set for a first offender with

the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a Category I criminal history on the basis of the adequacy of criminal history cannot be appropriate."

and inserting in lieu thereof:

"The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses. On the other hand, a defendant with nine prior 60-day jail sentences for offenses such as petty larceny, prostitution, or possession of gambling slips has a higher number of criminal history points (18 points) than the typical Criminal History Category VI defendant, but not necessarily a more serious criminal history overall. Where the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

However, this provision is not symmetrical. The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate."

Reason for Amendment: This amendment provides additional guidance concerning upward departure from Criminal History Category VI on the basis of adequacy of criminal history category, and makes minor editorial changes.

Effective Date: The effective date of this amendment is November 1, 1992.

461. Amendment: Section 4B1.2(3) is amended by deleting the last sentence as follows:

"The date that a defendant sustained a conviction shall be the date the judgment of conviction was entered.",

and inserting in lieu thereof:

"The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere."

The Commentary to §4B1.2 captioned "Application Notes" is amended by deleting the text of Note 2 as follows:

"'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an

element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristics of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.",

and inserting in lieu thereof:

"'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.".

Reason for Amendment: This amendment conforms the definition of "sustaining a conviction" in §4B1.2 to the definition of "convicted of an offense" in §4A1.2. In addition, this amendment ratifies a previous amendment to the commentary to §4B1.2 (amendment 433, effective November 1, 1991) and corrects a clerical error in a reference in that commentary to §2K2.1. The previous amendment to the text of Application Note 2 clarified that application of §4B1.2 is governed by the offense of conviction, and that the offense of being a felon in possession of a firearm is not a crime of violence within the meaning of this guideline. As a clarifying and conforming change, the previous commentary amendment reflected Commission intent that the term "crime of violence," as that term is used in §§4B1.1 and 4B1.2, be interpreted consistently with that term as used in other provisions of the Guidelines Manual. For example, §4B1.4, as promulgated by amendment 355, effective November 1, 1990, provides an increased offense level for a "felon-in-possession" defendant who is subject to an enhanced sentence under 18 U.S.C. § 924(e) and who used or possessed the firearm in connection with a crime of violence (§4B1.4(b)(3)(A)). This action to ratify a previous commentary amendment was taken because of concerns raised by United States v. Stinson, 957

F.2d 813 (11th Cir. 1992), in which the court stated it would not follow amendment 433 because the commentary amendment was not submitted to Congress.

Effective Date: The effective date of this amendment is November 1, 1992.

- 462. Amendment:** Chapter Five, Part A, is amended in the Sentencing Table at Offense Level 7, Criminal History Category I, by deleting "1-7" and inserting in lieu thereof "0-6"; and at Offense Level 8, Criminal History Category I, by deleting "2-8" and inserting in lieu thereof "0-6".

Chapter Five, Part A is amended in the Sentencing Table by designating four zones as follows: Zone A (containing all guideline ranges having a minimum of zero months); Zone B (containing all guideline ranges having a minimum of at least one but not more than six months); Zone C (containing all guideline ranges having a minimum of eight, nine, or ten months); and Zone D (containing all guideline ranges having a minimum of twelve months or more).

Section 5B1.1 is amended by deleting:

- "(a) Subject to the statutory restrictions in subsection (b) below, sentence of probation is authorized:
- (1) if the minimum term of imprisonment in the range specified by the Sentencing Table in Part A, is zero months;
 - (2) if the minimum term of imprisonment specified by the Sentencing Table is at least one but not more than six months, provided that the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in §5C1.1(c)(2) (Imposition of a Term of Imprisonment).",

and inserting in lieu thereof:

- "(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)."

The Commentary to §5B1.1 captioned "Application Notes" is amended in Note 1 by deleting:

- "(a) Where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is zero months. In such case, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.
- (b) Where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is at least one but not more than six months.",

and inserting in lieu thereof:

- "(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).";

and by deleting "Offense Level is 8 and the Criminal History Category is I" and inserting in lieu thereof "offense level is 7 and the criminal history category is II".

The Commentary to §5B1.1 captioned "Application Notes" is amended in Note 2 by deleting:

"Where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is more than six months",

and inserting in lieu thereof:

"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 Commentary to §5B1.1 captioned "Background" is amended by deleting "1st Sess. 89). Subsection" and inserting in lieu thereof "1st Sess. 89 (1983)). Section".

Section 5C1.1(a) is amended by inserting "applicable" immediately before "guideline range".

Section 5C1.1(b) is amended by deleting "minimum term of imprisonment in the applicable guideline range in the Sentencing Table is zero months" and inserting in lieu thereof "applicable guideline range is in Zone A of the Sentencing Table".

Sections 5C1.1 is amended by deleting:

- "(c) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is at least one but not more than six months, the minimum term may be satisfied by (1) a sentence of imprisonment; (2) 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 §5C1.1(e); or (3) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term, but in no event less than one month, is satisfied by imprisonment.
- (d) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in §5C1.1(e), provided that at least one-half of the minimum term

is satisfied by imprisonment.",

and inserting in lieu thereof:

- "(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."

Section 5C1.1 is amended by deleting:

- "(f) If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than ten months, the guidelines require that the minimum term be satisfied by a sentence of imprisonment."

and inserting in lieu thereof:

- "(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."

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 1 by deleting the first sentence as follows:

"Subsection 5C1.1(a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the guideline range specified in the Sentencing Table.",

and inserting in lieu thereof:

"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."

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 2 by deleting:

"Subsection 5C1.1(b) provides that where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is zero months",

and inserting in lieu thereof:

"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)";

and by deleting "may, for example," and inserting in lieu thereof ", for example, may".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 3 by deleting:

"Subsection 5C1.1(c) provides that where the minimum term of imprisonment specified in the guideline range from the Sentencing Table is at least one but not more than six months",

and inserting in lieu thereof:

"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)";

by deleting:

"For example, where the guideline range is 3-9 months, a sentence of probation with a condition requiring at least three",

and inserting in lieu thereof:

"For example, where the guideline range is 4-10 months, a sentence of probation with a condition requiring at least four";

by deleting "one-half of the minimum term specified in the guideline range from the Sentencing Table, but in no event less than one month," and inserting in lieu thereof "one month"; by deleting "two months followed by a term of supervised release with a condition requiring two" and inserting in lieu thereof "one month followed by a term of supervised release with a condition requiring three"; and by deleting:

"For example, where the guideline range is 3-9 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under §5C1.1(c)(2)) 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 §5C1.1(c)(3))",

and inserting in lieu thereof:

"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))".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 4 by deleting:

"Subsection 5C1.1(d) provides that where the minimum term specified in the guideline range from the Sentencing Table is more than six but not more than ten months",

and inserting in lieu thereof:

"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)";

and by deleting "under §5C1.1(d)" wherever it appears and inserting in lieu thereof in each instance "under subsection (d)".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 5 by deleting "Subsection 5C1.1(e)" and inserting in lieu thereof "Subsection (e)".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 7 by deleting "§5C1.1(c)" and inserting in lieu thereof "subsections (c)".

The Commentary to §5C1.1 captioned "Application Notes" is amended by deleting Note 8 as follows:

"8. Subsection 5C1.1(f) provides that, if the minimum term of imprisonment set forth in the Sentencing Table is more than ten months, the minimum term must be satisfied by a sentence of imprisonment without the use of any of the incarceration alternatives in §5C1.1(e).",

and inserting in lieu thereof:

"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).".

Reason for Amendment: This amendment expands the number of categories in the Sentencing Table in Criminal History Category I in which the court has discretion to impose a sentence without imprisonment or confinement conditions. In addition, it removes the requirement that a "split sentence" include a term of imprisonment of at least one-half of the minimum of the guideline range for less serious categories of offenses and offenders and substitutes a requirement that such term of imprisonment be at least one month. Finally, this amendment reformats these sections to make their operation clearer.

Effective Date: The effective date of this amendment is November 1, 1992.

463. Amendment: Chapter Five, Part E, is amended by inserting an additional policy statement as §5E1.5 (Costs of Prosecution (Policy Statement)).

Reason for Amendment: This amendment makes the Guidelines Manual more comprehensive by adding a section to provide notice of certain statutory requirements pertaining to the imposition of the costs of prosecution.

Effective Date: The effective date of this amendment is November 1, 1992.

- 464. Amendment:** Section 5F1.6 is amended by deleting "21 U.S.C. § 853a" and inserting in lieu thereof "21 U.S.C. § 862".

The Commentary to §5F1.6 captioned "Application Notes" is amended in Note 1 by deleting "21 U.S.C. § 853a(d)" and inserting in lieu thereof "21 U.S.C. § 862(d)".

The Commentary to §5F1.6 captioned "Background" is amended by deleting "21 U.S.C. § 853a" wherever it appears and inserting in lieu thereof in each instance "21 U.S.C. § 862"; by deleting "21 U.S.C. § 853a(a)(1)" and inserting in lieu thereof "21 U.S.C. § 862(a)(1)"; by deleting "(a)(2)" and inserting in lieu thereof "(b)(1)"; by deleting "21 U.S.C. § 853a(a)(1)(C)" and inserting in lieu thereof "21 U.S.C. § 862(a)(1)(C)"; and by deleting "21 U.S.C. § 853a(c)" and inserting in lieu thereof "21 U.S.C. § 862(c)".

Reason for Amendment: This amendment conforms the references to the statutory provisions underlying this guideline as such provisions were renumbered by the Comprehensive Crime Control Act of 1990.

Effective Date: The effective date of this amendment is November 1, 1992.

- 465. Amendment:** Section 5G1.3 is amended by deleting subsection (b) as follows:

"(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that constituted part of the same course of conduct as the instant offense and have been fully taken into account in the determination of the offense level for the instant offense, or if the prior undischarged term of imprisonment resulted from a federal offense and was imposed pursuant to the Sentencing Reform Act, the sentence for the instant offense shall be imposed to result in a combined sentence equal to the total punishment that would have been imposed under §5G1.2 (Sentencing on Multiple Counts of Conviction) had all the sentences been imposed at the same time."

and inserting in lieu thereof:

"(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."

Section 5G1.3(c) is amended by inserting "(Policy Statement)" immediately before "In"; and by deleting "unexpired" and inserting in lieu thereof "undischarged".

The Commentary to §5G1.3 captioned "Application Notes" is amended by deleting Notes 2-4 as follows:

"2. Subsection (b) (which applies only if subsection (a) does not apply), applies in two situations. First, it applies if the sentence resulting in the undischarged term of imprisonment was a federal sentence imposed pursuant to the Sentencing Reform Act. In such cases, the court shall fashion a sentence equal to the total punishment that would have been imposed had both sentences been imposed at the same time. Second, it applies if the conduct resulting in the undischarged term of imprisonment was part of the same course of conduct as the instant offense and has been fully taken into account in determining the offense level for the instant offense (e.g., where a defendant is prosecuted in both federal and state

court for the same criminal conduct; or where a defendant is prosecuted in federal and state court for different criminal transactions that are part of the same course of conduct, such as two drug sales, but the conduct underlying both transactions is fully taken into account under §1B1.3 (Relevant Conduct) in determining the offense level for the instant offense).

3. 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 instant sentence (e.g., if the appropriate total punishment determined under this subsection for all offenses is 30 months and the defendant has already served 10 months of the prior undischarged term of imprisonment, the court should impose a sentence of 20 months concurrent with the prior undischarged term).
4. Where the defendant is serving an unexpired term of imprisonment in circumstances other than those set forth in subsections (a) or (b), the court shall impose a consecutive sentence to the extent necessary to fashion a sentence resulting in incremental punishment for the multiple offenses. To the extent practicable, the court shall impose a sentence for the instant offense that results in a combined sentence that approximates the total punishment that would have been imposed under §5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time. Where the defendant is serving a term of imprisonment for a state offense, the information available may permit only a rough estimate of the total punishment that would have been imposed under the guidelines. It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process. In fashioning an appropriate incremental punishment, the court should consider whether the offense was committed while the defendant was on bail or other release status from another offense. In such cases, a reasonable incremental penalty appropriately would include an additional enhancement equivalent to that provided in §2J1.7 (Commission of Offense While on Release).",

and inserting in lieu thereof:

- "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."

Reason for Amendment: This amendment deletes the prong of §5G1.3(b) pertaining to the sentencing of a defendant subject to an undischarged term of imprisonment previously imposed pursuant to the Sentencing Reform Act because the Commission found a number of problems in implementation. Cases previously addressed by this prong henceforth will be addressed by subsection (c), which is designed to produce a similar result but requires less precise calculations. Consistent with the structure of the Guidelines Manual, subsection (c) is expressly designated a policy statement. In addition, this amendment provides additional commentary explaining, and providing examples of, the operation of this section.

Effective Date: The effective date of this amendment is November 1, 1992.

466. Amendment: Chapter 5, Part H is amended by inserting an additional policy statement as §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)).

Chapter 1, Part A, Subpart 4(b) is amended in the first paragraph by inserting "§5H1.12 (Lack of Guidance as a Youth and Similar Circumstances)," immediately following "§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status),".

Reason for Amendment: This amendment provides that the factors specified are not appropriate grounds for departure.

Effective Date: The effective date of this amendment is November 1, 1992.

467. Amendment: Section 6B1.2(a) is amended by inserting "or the sentencing guidelines" immediately following "statutory purposes of sentencing".

Section 6B1.2(a) is amended by inserting the following additional paragraph at the end:

"Provided, that a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of §1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted."

The Commentary to §6B1.2 is amended in the first paragraph by deleting:

"This section makes clear that a court may accept a plea agreement provided that the judge complies with the obligations imposed by Rule 11(e), Fed. R. Crim. P. A judge",

and inserting in lieu thereof "The court".

The Commentary to §6B1.2 is amended in the second paragraph by deleting:

"will accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that the contemplated sentence is within the guidelines or, if not, that the recommended sentence or agreement",

and inserting in lieu thereof:

"should accept a recommended sentence or a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence".

The Commentary to §6B1.2 is amended by inserting the following additional paragraphs at the end:

" A defendant who enters a plea of guilty in a timely manner will enhance the likelihood of his receiving a reduction in offense level under §3E1.1 (Acceptance of Responsibility). Further reduction in offense level (or sentence) due to a plea agreement will tend to undermine the sentencing guidelines.

The second paragraph of subsection (a) provides that a plea agreement that includes the dismissal of a charge, or a plea agreement not to pursue a potential charge, shall not prevent the conduct underlying that charge from being considered under the provisions of §1B1.3 (Relevant Conduct) in connection with the count(s) of which the defendant is convicted. This paragraph prevents a plea agreement from restricting consideration of conduct that is within the scope of §1B1.3 (Relevant Conduct) in respect to the count(s) of which the defendant is convicted; it does not in any way expand or modify the scope of §1B1.3 (Relevant Conduct)."

Reason for Amendment: This amendment clarifies that a plea agreement to dismiss a charge or not to pursue a potential charge does not insulate the conduct underlying such charge from the operation of §1B1.3 (Relevant Conduct) in respect to the count(s) of which the defendant is convicted. In addition, this amendment makes clearer the Commission's policy that plea agreements should not undermine the sentencing guidelines.

Effective Date: The effective date of this amendment is November 1, 1992.

468. Amendment: Appendix A (Statutory Index) is amended by deleting:

"8 U.S.C. § 1325 2L1.2",

and inserting in lieu thereof:

"8 U.S.C. § 1325(a) 2L1.2
8 U.S.C. § 1325(b) 2L2.1, 2L2.2
8 U.S.C. § 1325(c) 2L2.1, 2L2.2";

in the line beginning "18 U.S.C. § 245(b)" by inserting ", 2J1.2" immediately following "2H2.1";

in the line beginning "18 U.S.C. § 371" by deleting "2D1.4," immediately following "2C1.7,";

in the line beginning "18 U.S.C. § 545" by deleting ", 2T3.2";

in the line beginning "18 U.S.C. § 547" by deleting ", 2T3.2";

in the line beginning "18 U.S.C. § 549" by deleting ", 2T3.2";

in the line beginning "18 U.S.C. § 656" by inserting ", 2F1.1" immediately following "2B1.1";

in the line beginning "18 U.S.C. § 657" by inserting ", 2F1.1" immediately following "2B1.1";

in the line beginning "18 U.S.C. § 1028" by deleting "2L1.2, 2L2.1" and inserting in lieu thereof "2L2.1, 2L2.2";

by deleting:

"18 U.S.C. § 1346 2C1.7";

in the line beginning "18 U.S.C. § 2331(a)" by deleting "18 U.S.C. § 2331(a)" and inserting in lieu thereof "18 U.S.C. § 2332(a)";

by deleting:

"18 U.S.C. § 2331(b) 2A2.1",

and inserting in lieu thereof:

"18 U.S.C. § 2332(b)(1) 2A2.1
18 U.S.C. § 2332(b)(2) 2A1.5";

in the line beginning "18 U.S.C. § 2331(c)" by deleting "18 U.S.C. § 2331(c)" and inserting in lieu thereof "18 U.S.C. § 2332(c)";

in the line beginning "19 U.S.C. § 1464" by deleting ", 2T3.2";

in the line beginning "21 U.S.C. § 846" by deleting "2D1.4" and inserting in lieu thereof "2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2, 2D3.3, 2D3.4, 2D3.5";

in the line beginning "21 U.S.C. § 963" by deleting "2D1.4" and inserting in lieu thereof "2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.7, 2D1.8, 2D1.9, 2D1.10, 2D1.11, 2D1.12, 2D1.13, 2D2.1, 2D2.2, 2D3.1, 2D3.2, 2D3.3, 2D3.4, 2D3.5";

in the line beginning "31 U.S.C. § 5322" by inserting ", 2S1.4" immediately following "2S1.3";

and in the line beginning "46 U.S.C. App. § 1903(j)" by deleting "2D1.4" and inserting in lieu thereof "2D1.1".

The Commentary to §2B4.1 captioned "Background" is amended in the sixth paragraph by deleting "§§77d-1 and 77d-2" and inserting in lieu thereof "78dd-1 and 78dd-2".

The Commentary to §2C1.7 captioned "Statutory Provisions" is amended by deleting ", 1346".

The Commentary to §2C1.7 captioned "Application Notes" is amended in Note 1 by inserting "(A)" immediately following "involve"; and by deleting ", 1346), or" and inserting in lieu thereof "), or (B)".

The Commentary to §2C1.7 captioned "Background" is amended by deleting ", 1341-1343, and 1346" and inserting in lieu thereof "and 1341-1343".

The Commentary to §2T1.1 captioned "Background" is amended in the fifth paragraph by deleting "28 U.S.C. § 994(n)" and inserting in lieu thereof "28 U.S.C. § 994(i)(2)".

Reason for Amendment: This amendment makes the statutory index more comprehensive, and conforms it to the amendments of the Chapter Two offense guidelines. In addition, it corrects clerical errors and makes an editorial improvement.

Effective Date: The effective date of this amendment is November 1, 1992.

- 469. Amendment:** Section 1B1.10(d) is amended by deleting "and 380" and inserting in lieu thereof "380, 433, and 461".

Reason for Amendment: This amendment expands the listing in subsection (d) to implement the directive in 28 U.S.C. § 994(u) in respect to guideline amendments that may be considered for retroactive application.

Effective Date: The effective date of this amendment is November 1, 1992.

- 470. Amendment:** The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 7 in the first paragraph by inserting the following additional sentence as the second sentence:

"As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred."

The Commentary to §2F1.1 captioned "Application Notes" is amended in Note 7(b) by deleting:

"In fraudulent loan application cases and contract procurement cases where the defendant's capabilities are fraudulently represented, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan.",

and inserting in lieu thereof:

"In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used."

Reason for Amendment: This amendment clarifies that interest is not included in the determination of loss. In, addition, it clarifies that in fraudulent loan application cases, as in other types of fraud, if the intended loss is greater than the actual loss, the intended loss is used. Finally, it makes an editorial improvement in this commentary by deleting an unnecessary phrase.

Effective Date: The effective date of this amendment is November 1, 1992.

471. Amendment: The Commentary to §2K1.3 captioned "Application Notes" is amended by inserting the following additional note:

"11. As used in subsections (b)(3) and (c)(1), 'another felony offense' and 'another offense' refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted."

The Commentary to §2K2.1 captioned "Application Notes" is amended in Note 15 by deleting "or (a)(5)" and inserting in lieu thereof "(a)(4)(B), or (a)(6)".

The Commentary to §2K2.1 captioned "Application Notes" is amended by inserting the following additional note:

"18. As used in subsections (b)(5) and (c)(1), 'another felony offense' and 'another offense' refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted."

Reason for Amendment: This amendment clarifies the meaning of the terms "another felony offense" and "another offense," and corrects a clerical error.

Effective Date: The effective date of this amendment is November 1, 1992.

- 472. Amendment:** The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 8 by deleting the last sentence as follows:

"If the government is able to show that a sentence imposed outside this time period is evidence of similar misconduct or the defendant's receipt of a substantial portion of income from criminal livelihood, the court may consider this information in determining whether to depart and sentence above the applicable guideline range.",

and by inserting in lieu thereof:

"If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category).".

Reason for Amendment: This amendment clarifies that dissimilar, serious prior offenses outside the applicable time period may be considered in determining whether an upward departure is warranted under §4A1.3. The amendment provides additional Commission guidance on an issue that has produced conflicting decisions among the courts of appeals. Compare, e.g., United States v. Leake, 908 F.2d 550, 554 (9th Cir. 1990) (upward departure impermissible for remote prior convictions dissimilar to instant offense) and United States v. Samuels, 938 F.2d 210, 215 (D.C. Cir. 1991) (suggesting the same) with United States v. Williams, 910 F.2d 1574, 1579 (7th Cir. 1990) (although older prior crimes dissimilar to instant offense, upward departure permissible if convictions are reliable information of increased recidivism risk), rev'd on other grounds, 112 S. Ct. 1112 (1992) and United States v. Russell, 905 F.2d 1439, 1444 (10th Cir. 1990) (same).

Effective Date: The effective date of this amendment is November 1, 1992.

- 473. Amendment:** The Commentary to §7B1.1 captioned "Application Notes" is amended by deleting Notes 2 and 3 as follows:

- "2. 'Crime of violence' has the same meaning as set forth in §4B1.2(1), and includes any offense under federal or state law punishable by imprisonment for a term exceeding one year that --
- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
 - (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.